THE HIGH COURT

[2026] IEHC 465

[Record No. 2020/2502P]

BETWEEN

NATIONAL PAEDIATRIC HOPSITAL DEVELOPMENT BOARD

PLAINTIFF

AND

BAM BUILIDNG LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Michael Quinn delivered on the 14th day of July 2026

(Further and Better Discovery)

Introduction

1. The judgment relates to an application by the defendant for an order directing the plaintiff to make further and better discovery in compliance with an order of Mr. Justice Mulcahy made on 29 October 2025, referred to as the "Second Discovery Order", and for consequential orders. The Second Discovery Order was made following amendments to the defence and to the reply to defence, which in turn arose from matters which came to light on production of documents pursuant to a first 'round' of discovery.
2. The proceedings relate to a dispute concerning a contract made between the parties on 14 August 2017 for the construction by the defendant of a children's hospital at the St. James's Hospital campus in Dublin 8.
3. The contract divided the works into two phases. Phase A was the basement, substructure, underground and enabling works. Phase B comprised the superstructure and all other works.
4. There are now pending a number of different proceedings between the same parties relating to the contract and its operation. The other cases have been stayed. In this case the plaintiff seeks a declaration of validity of an instruction given by it to the defendant on 8 January 2019 ("The Instruction Date") to commence the Phase B works. The validity or otherwise of the Phase B Instruction is of central importance for both the timing and the final cost of the entire project.
5. The contract provided that Phase A works would commence on 2 October 2017. Phase B works would commence when the plaintiff issued to the defendant the Phase B Instruction.
6. Clause 9.1.3 of the contract provides, *inter alia*,

"The Contractor shall start the Phase B works under the contract when so instructed by the Employer's Representative. [Provided that the Adjusted Contract Sum has first been ascertained by the parties or determined by the expert], the Employer's Representative may issue such an instruction at any time after the starting date".

7. The Phase B Instruction is a letter to the defendant dated 8 January 2019 from Clare White, a director of O'Connell Mahon Architects. It confirms that the plaintiff, the defendant and certain named sub-contractors "have now completed the pre–Phase B engagement process." It recites that the parties each have acknowledged and accepted the Adjusted Contract sum under the contract, at €887,722,697.10 and the Guaranteed Maximum Price at €909,915,764.53.

8. Arising from engagement between the parties immediately following the issue of the Phase B Instruction, a dispute arose as to the validity of the Phase B Instruction. The defendant claimed that not all of the pre-conditions to the valid issue of a Phase B Instruction had been met when the Instruction was given. The dispute was referred to conciliation pursuant to a dispute resolution clause in the contract.

9. The conciliator issued a recommendation on 13 November 2019. On 29 November 2019 the defendant notified the plaintiff that it was dissatisfied with the recommendation, stating the following:

"*We say that, when the Employer's Representative purported to instruct us to proceed with the Phase B works on 8 January 2019, the conditions prescribed by the contract for issue with such an instruction were not satisfied. You say that they were*."

<u>These Proceedings</u>

10. On 1 April 2020 these proceedings issued.

11. The relief claimed by the plaintiff is a declaration that the instruction dated 8 January 2019 is a valid and legally binding instruction to the defendant to commence the Phase B works.

12. In its amended statement of claim delivered 6 April 2020 the plaintiff recites the events leading up to the issue of the Phase B Instruction and pleads (para. 41) that the condition required to be satisfied prior to the issue of the Phase B Instruction was the ascertainment or determination of the Adjusted Contract Sum. It pleads that that had occurred prior to the issue of the instruction and that the instruction was therefore valid.

13. The plaintiff pleads also that the defendant is estopped by certain representations and conduct of the defendant on which the plaintiff has relied from denying that the Adjusted Contract Sum was ascertained and/or agreed and/or that the defendant has waived its right to dispute same and/or has acquiesced in same.

14. In its amended Defence and counterclaim delivered 30 June 2020, the defendant disputes the plaintiff's description of the events which occurred prior to the Instruction Date. It denies that the Adjusted Contract Sum had been ascertained or determined prior to the issue of the Phase B Instruction or that the Phase B Instruction was valid.

15. The defendant denies also that the only condition required to be satisfied prior to the issue of the Phase B Instruction was the ascertainment or determination of the Adjusted Contract Sum. It pleads that the contract required the completion and final coordination of the design for Phase B works prior to any instruction to commence same. It relies on the terms of Appendices 2 and 3 to the contract and a document referred to as the "Works Requirements".

16. The defendant denies that it is estopped by any representations or conduct from denying that the Adjusted Contract Sum was ascertained and/or agreed or that it has waived its right to dispute the validity of the Phase B Instruction.

17. The defendant counter claims for a declaration that the plaintiff was not entitled to issue the Phase B Instruction on 8 January 2019.

18. The defendant also counterclaims for declarations that the plaintiff had failed as of 8 January 2019 and/or continues to fail to provide the level of design in respect of the Phase B works to which the defendant is contractually entitled. It claims a declaration that the plaintiff has failed to provide a design whereby Phase B could be comprehensively measured and priced as a lump sum.

19. The defendant seeks other declarations relevant to its claims arising from Change Orders, design changes or additions.

20. On 4 December 2020 an order was made by this Court (McDonald J.) that the trial of the proceedings be conducted in modules. The court ordered that the first module consist of the following issues only: –

    (1) The matters pleaded in the statement of claim and the defence (not the counterclaim);

    (2) The following question: "do the mechanisms for which clauses 10 and/or 13 of the contract provide apply to claims arising from alleged design changes or additions that the defendant contends in these proceedings ought, pursuant to the contract, to have been covered by the design in respect of the Phase B works provided by the plaintiff as at 8 January 2019 and which the defendant contends was not provided as of that date or subsequently".

First Discovery

21. Following the making of the order for a modular trial the parties exchanged requests for discovery of documents, limited to issues to be determined in the first module. Arising from this correspondence applications were made for orders for discovery. Before the applications for discovery were heard, on the application of the parties the proceedings were adjourned on 12 October 2021 to facilitate certain discussions with liberty to re-enter. On 17 July 2023 the proceedings and the discovery motions were re-entered. Certain

agreements were made between the parties as to the categories of documents in which discovery should be made. The parties failed to reach agreement in relation to the date ranges applicable to a number of categories. On 21 March 2024 an order was made by this Court on foot of the defendants notice of motion for orders for discovery, stipulating all of the categories of documents in which the plaintiffs were required to make discovery. (See judgment of this Court delivered 27 February 2024 [2024] IEHC 114). That order is referred to as the First Discovery Order.

22. The Commercial Director of the defendant Mr. Thomas Morris has sworn five affidavits of discovery.

23. On 3 October 2024 Mr. Morris swore his First affidavit of discovery. On 31 January 2025 Mr. Morris swore a supplemental affidavit of discovery. On 12 June 2025 Mr. Morris swore a second supplemental affidavit of discovery. On 13 November 2025 Mr. Morris swore a third supplemental affidavit of discovery.

24. On 11 March 2026 Mr. Morris swore his Fifth affidavit of discovery, the content of which is the subject of this application.

25. Arising from the first exchanges of discovery affidavits a number of applications were brought before the court by each of the parties for inspection of documents and for further and better discovery. Some of these were resolved by consent and further orders made and affidavits sworn.

Appointment of the Employer's Representative

26. The defendant says that arising from its inspection of documents produced pursuant to the plaintiff's first and second discovery affidavits, it learned that the person who signed the Phase B Instruction letter, being Ms. Clare White, a director of O'Connell Mahon Architects, had not before signing that letter been appointed by the plaintiff as the Employer's Representative for the contract.

27. The defendant says that on 12 December 2014 the firm of Building Design Partnership (Architects, Designers, Engineers) Limited (BDP) was first appointed lead design consultant to the plaintiff. Its services included design, architecture and "Employer's Representative" services. The defendant claims that it learned from inspection of documents that it was not until 8 August 2023 that BDP appointed as a sub consultant, the firm O'Connell Mahon Architects (OCMA) whose functions included the provision of Employer's Representative services. This, it says, was four years and seven months after the signing of the Phase B Instruction and means that when Ms. White signed that Instruction she had no authority to do so.

28. The defendant says that documents produced to it show that it is now being asserted that when OCMA were appointed sub-consultants, including for the services of Employer's Representative, by the signing of a sub-consultancy agreement on 8 August 2023 that appointment was retrospective to a date at least before 8 January 2019 and it rejects that proposition.

29. The plaintiff says that Ms. White was at all times authorised to act as the Employer Representative and held that authority when she gave the Phase B Instruction on 8 January 2019.

30. Arising from this issue the defendant applied for liberty to amend its defence. The application was contested and on 2 July 2025 an order was made by this Court (Roberts J.) granting to the defendant liberty to amend the defence. An amended defence was delivered on 2 July 2025 containing the following new plea:

"*34 A Without prejudice to the foregoing, and to the other matters pleaded herein, it is denied that the purported issue of the Phase B Instruction by Clare White on 8 January 2019 was a valid instruction to start the Phase B works as provided for in Subclause 9.1.3 of the conditions of contract in circumstances where Clare White of O'Connell*

Mahon Architects was not appointed by the plaintiff as the Employer's Representative for the contract."

31. On 31 July 2025 the plaintiff delivered an amended reply and defence to the counterclaim including the following:

"*13. A By way of special reply to paragraph 34.A of the re-amended defence, the contents of which are denied, the issue of the Phase B Instruction by Clare White on 8 January 2019 was a valid instruction issued by the Employer's Representative to commence the Phase B works pursuant to Subclause 9.1.3 of the contract. Further, Clare White of O'Connell Mahon Architects is the Employer's Representative for the contract, as defined within Subclause 1.1 and Schedule Part 1A of the Contract, and the plaintiff will rely on the contract in full at the trial of the action in this regard. Further and or alternatively the defendant is estopped by its conduct from denying that Clare White of O'Connell Mahon Architects is the Employer's Representative under the contract as alleged and/or has acquiesced in her acting as such so that it is precluded from contesting the validity of her appointment and/or has waived the entitlement to dispute the validity of her appointment*."

<u>Second Discovery</u>

32. Arising from the amended pleadings each of the parties sought additional discovery from the other. Applications were issued before the court and an order for additional discovery, referred to by the parties as the Second Discovery Order, was made by this Court (Mulcahy J.) on 29 October 2025.

33. By this order the defendant was obliged to and made discovery of a new category 13, being documents evidencing, recording or referring to the defendant's allegation that Clare White was not appointed as the Employer's Representative under the contract.

34. The plaintiff was ordered to make discovery of the following four new categories:

“Category 1

(a) All documents that record and/or refer to the Plaintiff as the ‘Client’ (or otherwise), changing Clare White's position as Clinical Design Lead within the context of being a “Key Team Member” to the position as Employer’s Representative under the Contract;

(b) All documents that record and/or refer to the substitution and appointment of Clare White to the position of Employer's Representative, under the Contract, instead of Sean Mahon

Date range: 21 December 2014 to 1 April 2020

Category 2

(a) All documents that refer to and/or record that Sean Mahon was to be appointed as Employer’s Representative under the Contract prior to being substituted for Clare White.

Date range: 21 December 2014 to 1 April 2020.

Category 3

(a) All documents that record and/or refer to the making of a sub consultancy agreement between Building Design Partnership (Architects, Designers, Engineers) Limited (BDP) and O'Connell Mahon Architects (OCMA) for the ER services (the OCMA Sub-Consultant Appointment), including but not limited to:

   (i) Documents created in or around the date of the Lead Design Appointment in December 2014:

(ii) *Documents recording and/or referring to any negotiations between BDP and OCMA in relation to the making of the OCMA Sub Consultant Appointment in the period between December 2014 and 8 August 2013.*[1]

(iii) *Documents recording and/or referring to the signing of the OCMA Sub Consultant Appointment on 8 August 2023;*

(iv) *Documents recording or referring to when it "came to light" that the OCMA Sub Consultant had not been signed.*

(b) *All documents recording, any instructions issued by BDP to OCMA regarding the performance of the ER services by OCMA and/or Clare White to issue the Phase B Instruction on 8 January 2019*

(c) *All documents recording, any instructions issued by the plaintiff to the ER under the Contract, whether to BDP or OCMA or Clare White to issue the Phase B Instruction on 8 January 2019.*

Category 4

(a) *All documents recording the delegation by Clare White of the ER's powers under the contract to other persons to issue the Phase B Instruction on 8 January 2019".*

35. In the course of this application it emerged as significant that while Categories 1 and 2 above identify a date range, no date range was stipulated for categories 3 and 4.

36. For completeness it is appropriate to recall that in the First Discovery Order dated 21 March 2024, the only category which was suggested by the parties to be potentially directly

[1] BDP were appointed Lead Consultant in December 2014. The Sub Consultancy Agreement between BDP and OCMA was signed on 8 August 2023.

relevant to the issues now in dispute and the amended pleadings was Category B, which was as follows:

> *"All documents which record and/or evidence and refer to the authority of various members of the Design Team (including the Employer's Representative) to (a) discuss with and/or represent to the defendant, during the course of the Pre-Phase B Engagement Process the condition and/or completeness of the design for the Phase B Works."*
>
> *Date range: 1 September 2017 to 30 July 2019."*[2]

<u>Fifth Affidavit of Discovery</u>

37. On 11 March 2006 Mr. Morris swore his fifth affidavit of discovery. This is described as the Affidavit as to Documents in respect of the Second Discovery Order, being the order of Mulcahy J. made on 29 October 2025.

38. Under the heading "scoping, identification and collection of potentially relevant documents" Mr. Morris states the following:

> *"5. In order to comply with its discovery obligations, the Plaintiff conducted a thorough search for all documentation falling within the ambit of the Second Discovery Order which the Plaintiff has been ordered to make in these proceedings <u>and which had not been collected previously for the purpose of complying with the First Discovery Order (the "Previously Collected Data Set").</u> This search was conducted with the assistance of its legal advisers, McCann FitzGerald LLP (the "Plaintiff's Solicitors") and arranged for this material to be reviewed by the Plaintiff's Solicitors.* (emphasis added)

[2] It was stated during the course of this hearing that in making the First Discovery the plaintiff in fact collected documents relevant to Category B up to 1 April 2020, and not the stated end date of 30 July 2019

39. This paragraph means that the plaintiff searched for all documents falling within the ambit of the Second Discovery Order, excluding material included in the First Discovery. It does not mean, as the defendant submits, that the searches were in some way limited by reference to categories or date ranges applicable to the First Discovery. That is clear also from the next paragraph quoted below:

6. As part of this exercise, documents were obtained from custodians and former custodians in the Plaintiff who were identified by the Plaintiff as holding potentially relevant data pursuant to the Second Discovery Order which did not form part of the Previously Collected Data set. These custodians are Tom Costello, John Pollock, Phelim Devine, Richard Fitzpatrick, Norman Craig and Elaine O'Rourke (the "Custodians").

7. Documents were obtained and collected from the following sources:

(a) emails of the Custodians;

(b) a mobile phone of one of the Custodians; and

(c) hardcopy documents held by the Custodians where applicable.

8. The Plaintiff's solicitors wrote on behalf of the Plaintiff, to all current and past agents and advisers of the Plaintiff who it was determined might potentially have relevant documents and received potentially relevant documents for review. These include Building Design Partnership (Architects, Designers, Engineers) Limited ("BDP"), O'Connell Mahon Architects ("OCMA") and William Fry LLP.

9. Given the nature of the Second Discovery Categories, there are documents which BDP and OCMA hold which are relevant to the Second Discovery Categories but were not within the plaintiffs possession power or procurement…. <u>BDP and OCMA however provided documents on a confidential basis which are potentially relevant to the Second Discovery Categories, but which do not form part of the 'client file' on the basis that</u>

they are not documents created for and on behalf of the Plaintiff or within the Plaintiff's possession or power, including documents over which privilege arises. These documents were provided to the Plaintiff solely for the purpose of these proceedings.

10. Potentially relevant documents were also collected from the Plaintiff's Solicitors, as legal advisers to the Plaintiff.

11. All of the documentation referred to at paragraph 7 to 10 above are referred to collectively as the 'Data Sources'. All of the Data Sources were provided to the Plaintiff's Solicitors for the purpose of determining their relevance to the Second Discovery Categories." (emphasis added)

40. The first of the underlined sentences in paragraph 8 above states that documents provided by BDP and OCMA were provided 'on a confidential basis, but which do not form part of the 'client file' on the basis that they are not documents created for and on behalf of the plaintiff or within the Plaintiff's possession or powers, including documents over which privilege arises.' That statement suggests that such documents were provided under some character of a restriction. But the next sentence, and paragraph 11, clearly state that all of these documents were 'Data Sources' and were provided to the Plaintiff's Solicitors for the purpose of determining their relevance to the Second Discovery Categories. This is critical. It means that the Plaintiff's Solicitors received them all. They were under a duty to include in the Second Discovery all of such documents as were relevant to the four new categories, subject of course to listing in the First Schedule Second Part those in respect of which privilege was asserted and stating the nature of any privilege claim. There is no evidence that they did not discharge that duty.

41. In an affidavit sworn 15 April 2026 Mr. Stephen Proctor, a partner in McCann Fitzgerald describes how the process was followed. See paragraphs 44-46 below.

42. In the next section Mr. Morris describes the "Discovery Review". He continues as follows:

"12. All of the Data Sources were collected, processed, de-duplicated, and uploaded to an eDiscovery review platform called Relativity, maintained by the Plaintiff's Solicitors (the 'Platform') where email data was threaded. All hardcopy documents identified by the Custodians as potentially relevant were tabbed, scanned and then transferred to the Platform for review. Data from the Previously Collected Data Set which was not discovered in the original affidavits and which is held by Grant Thornton (a provider of eDiscovery services engaged by the Plaintiff) on a Nuix server was filtered with search terms. The search term responsive data was uploaded to the Platform and email threaded. Search terms were also applied across the Previously Collected Data Set uploaded to the platform for the purpose of complying with the First Discovery Order <u>but which was not previously discovered</u>. Non-text searchable documents and mobile phone messages in the Previously Collected Data Set were also identified for review. I say that following the above steps a total of 131,167 documents presented on the Platform for review (the 'Review Set').

13. In order to review the Review Set efficiently, continuous active learning technology ('CAL') was utilised on the Platform in respect of documents which the CAL system is suitable for (the 'CAL Review Data Set'). Excluded from the CAL Review Data Set was the documentation referred to at paragraphs 8 and 9 above [documents received from BPD and OCMA] *<u>which was reviewed in its entirety</u> but was included in the CAL system as a seed set for training purposes, and non-text searchable documents and mobile phone messages were also excluded from the CAL Review Data Set and reviewed in their entirety ('Linear Review Data Set').* (emphasis added)

43. Mr. Morris in the following paragraphs elaborated further in his description of the continuous active learning technology, the ranking and tagging of documents treated or identified by CAL as the most likely relevant documents for review, the system of testing

known as the "Elusion Test" and the reviews then undertaken by the team of discovery reviewers.

44. In his affidavit Mr. Proctor stated that in making the additional discovery affidavit documents were collected from custodians and former custodians of the plaintiff, the plaintiff's relevant agents and advisers, and were collected from document management systems, mailboxes, mobile phones and hardcopy documents. He continued, at paragraph 7 as follows:

"I say that over 393,000 documents were collected from the Plaintiff (including its agents and advisers) as part of this scoping and collections exercise in respect of the Second Discovery Categories. As averred to in the Additional Discovery Affidavit data which was previously collected for the purpose of complying with the First Discovery Order formed part of the search and review exercise for the Second Discovery Order which data set consisted of over 16 million documents."

45. Mr. Proctor continued in paragraph 8 as follows:

"Through the use of technology including de-duplication, email threading, application of keywords, and continuous active learning ("CAL") on the review platform, Relativity One, the total volume of documents included in the review in respect of the Second Discovery Categories was reduced to 131,167 documents."

46. Mr. Proctor described the document review carried out by a team of discovery reviewers under the supervision of the solicitor team. He refers also to the quality control checks and a validation test which were carried out. He states that 32,399 documents were reviewed, resulting in the discovery of 102 documents being discovered, 91 were produced and 11 were withheld on the grounds of the privilege.

This application

47. In this application, the defendant seeks the reliefs at (1), (2), (3), (7) and (8) mentioned below. Reliefs (4), (5), (6) and (9) were not pursued at the hearing, but it is informative to refer to the Notice of Motion in full:

(1) An order directing the plaintiff to make further and better discovery in compliance with the order of Mr. Justice Mulcahy perfected on 29 October 2025 (the "Second Discovery Order") including by swearing a further affidavit in accordance with the reliefs set out herein.

(2) An order directing the plaintiff to swear and file a further affidavit explaining, for the purposes of the Second Discovery Order:

(a) the complete list of custodians considered and/or included in the plaintiffs scoping and collection exercise;

(b) the role and involvement of each custodian from whom documents were collected in relation to the Second Discovery Categories; and

(c) the rationale for the exclusion (if any) of Clare White, David Gunning, Tim Bouchier Hayes, Fiona Ross, Tom Morris and Susan Bryson.

(3) An order directing the plaintiff to identify Clare White as a custodian and to collect review and discover all documents held by her personally and/or in her capacity as Employer's Representative, or in her capacity as a director of OCMA which fall within the scope of the Second Discovery Categories.

(4) (Not pursued at hearing) An order directing the plaintiff to swear and file a further affidavit clarifying:

(a) the basis upon which documents were obtained from BDP and OCMA for the purpose of the Second Discovery Order; and

(b) the searches conducted of the plaintiff's own records for documents falling within the scope of the Second Discovery Categories.

(5) (Not pursued at hearing) An order directing the plaintiff to swear and file a further affidavit providing further particulars of the Continuous Active Learning Review methodology applied for the purposes of the Second Discovery Order, including the de-duplication process, the validation/illusion testing carried out (including results relied upon) and the basis upon which only five documents from the custodian pool were identified as relevant from a Review Set of 131,167 documents;

(6) (Not pursued at hearing) An order directing the plaintiff to confirm what searches were conducted of 4 Projects and M Files and whether documents from those sources formed part of the plaintiff's Data Sources for the purpose of the Second Discovery Order and/or were otherwise reviewed for compliance with the Second Discovery Order.

(7) An order directing the plaintiff to review and discover all documents falling within the scope of the Second Discovery Categories irrespective of whether such documents were previously discovered pursuant to the order of Mr. Justice Quinn made on 21 March 2024 (the "First Discovery Order").

(8) In the alternative an order directing the plaintiff to identify any such previously discovered documents which fall within the Second Discovery Categories by reference to the earlier discovery already made (including by unique identifier and/or production/Dates range, where applicable) without requiring duplicate reproduction.

(9) (Not pursued at hearing) An order directing the plaintiff to provide, pursuant to the Confidentiality Ring and/or Confidentiality Protocol agreed in these proceedings, unredacted versions of the documents produced with redactions on the basis of alleged

commercial sensitivity and irrelevance (including the documents which the Plaintiff's solicitors have indicated were redacted in that manner).[3]

48. The application is grounded on an affidavit sworn on 2 April 2026 by Michael Kennedy, a solicitor in the firm of A&L Goodbody Solicitors acting for the defendant. A supplemental affidavit was sworn by Mr. Kennedy on 22 April 2026 in reply to Mr. Proctor's affidavit of 15 April 2026.

49. Insofar as they are relevant to the reliefs still sought by the defendants, Mr. Morris identified the following four issues: –

    1. Inadequacy of the custodian list
    2. Volume and adequacy of discovery
    3. Documents from BDP and OCMA
    4. Date ranges and the original discovery.

<u>Sterling Winthrop and other cases</u>

50. Before I turn to the four issues it is helpful to identify the principles which apply to applications of this nature.

51. The seminal judgment of Kenny J. in *Sterling Winthrop Group Limited v. Farbenfabriken Bayer* [1967] IR 97 describes the first five relevant principles.

52. Firstly, the court has always had power to order that either party should make a further affidavit of discovery.

53. Secondly, such an order will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession relevant to the action which have not been disclosed by the first affidavit.

54. Thirdly, the court will order a further affidavit of documents when it is satisfied

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[3] The court was informed that related motions issued by the parties concerning the operation of a previously agreed Confidentiality Protocol had been resolved by agreement between the parties.

(a) from the pleadings,

(b) from the affidavit of discovery already filed,

(c) from the documents referred to in the affidavit of discovery, or

(d) from an admission by the party who has made the affidavit of discovery,

that the party against whom the order is sought has other documents in his possession relating to the issues in the action which have not been disclosed by the first affidavit.

55. Fourthly, the court will order a further affidavit when there are grounds, derived from the documents discovered, for suspecting that there are other relevant documents in the possession of the party who has made the affidavit of where there are reasonable grounds for believing that the person making the affidavit of discovery has misunderstood the issues in the case and has, in consequence, omitted documents from it.

56. Fifthly, the court should not order a further affidavit of documents unless it has been shown that there are other relevant documents in the possession of the defendants (in that case) or that the person making the affidavits has misunderstood the issues in the action or that his view that the documents are not relevant is wrong.

57. The following further principles derive from more recent cases.

58. Sixthly, in *Daly v. Ardstone Capital Limited* [2020] IEHC 200, Murray J. expressed the view that the conditions identified by Kenny J. in *Sterling Winthrop* are not exhaustive. He put it thus:

> "*I do not read the decision as suggesting that that is the only material to which the court can have regard. In order to decide whether the person making the affidavit has misunderstood the issues in the action and/or that his view as to whether documents are outside his discovery obligation was wrong, it may be necessary to have regard to other evidence. Explanations of the issues in the case, of the reasons specific documents have been excluded from the discovery and of the context in which*

documentation that is alleged to exist is said to have come into being may be taken into account provided these explanations are tendered by persons who are in a position to properly avert to them." (citing *Victoria Hall Management Ltd & Ors. v. Cox & Ors.* [2019] IEHC 639).

59. Seventhly, in *Ardstone* Murray J. identified the jurisdiction of the court to direct, instead of further and better discovery, the swearing by the respondent of affidavits to address one or more of the specific concerns raised in the application with a view *inter alia* to ensuring that the party against whom such an order is made confirms that the process of making discovery has been correctly undertaken. He cited recent examples of such orders namely *Victoria Hall Management Ltd. & Ors v. Cox* (op cit) *and Kelland Homes Limited v Ballytherm Limited & Ors.* [2019] IEHC 46.

60. In paragraph 12 Murray J. had the following to say:

"The power of the court to direct further and better discovery was, until 2011, not provided for in the rules. The jurisdiction derived from the court's inherent power to ensure that its own orders were complied with. It follows from the nature and purpose of that jurisdiction that upon an application for further and better discovery, the court can stop short of directing further and better discovery per se and instead direct the swearing by the respondent of affidavits <u>to address one or more of the specific concerns raised in the application with a view inter alia to ensuring that the party against whom such an order is made confirms that the process of making discovery has been correctly undertaken</u>. This occurs frequently in practice. (citing Victoria Hall Management Ltd & Ors. v Cox op cit and Kelland Homes Limited v. Ballytherm Limited & Ors. [2019] IEHC 46)." (emphasis added)

61. The plaintiff submitted that the jurisdiction to make a more limited form of order requiring an affidavit directed to one or more of specific concerns, as distinct from making further

and better discovery "per se" is only engaged after the court has determined that the *Sterling Winthrop* test is met. I am not persuaded that this is a correct reading of the judgment of Murray J. It is clear from the text I have underlined that Murray J. was contemplating that such a specific order could be made in a case where valid concerns arose as to whether the deponent of the discovery affidavit had, for whatever reason, not correctly undertaken the necessary search processes. This more limited jurisdiction to require an affidavit addressing a "specific concern raised in the application" is directed towards a situation where the court may not have determined conclusively that there has been a failure on the part of the party making the discovery to comply with the original order, but where the court finds that a clear explanation or narrative description is required to demonstrate how it is said that the party making discovery has complied with the original order.

62. I now turn to the four issues identified by the defendant.

Inadequacy of the custodian list

63. Mr. Kennedy refers to the fact that Mr. Morris's affidavit names six custodians whose emails and devices were searched for the Second Discovery. In correspondence the defendant requested an explanation of the role and involvement of each of those custodians. This request was declined, and the plaintiff says that there is no basis upon which it should be required to explain the rationale for the selection of its custodians.

64. This matter is addressed in paragraph 6 of Mr. Morris's affidavit where he states that:

> *"Documents were obtained from custodians and former custodians and the plaintiff who were identified by the plaintiff as holding potentially relevant data pursuant to the second discovery order which did not form part of the previously collected data set."*

65. Mr. Morris names the six custodians and describes the process which was followed. He states that the search which was conducted through the devices of these custodians was a search for documents relevant to the Second Discovery Order which had not previously

been collected for the purpose of complying with the First Discovery Order. This does not mean that the plaintiff was relying on the Previously Collected Data Set, and it is a logical explanation for the choice of custodians. The evidence is that the six custodians were identified and chosen because it was considered that they held data potentially relevant to the Second Discovery Order.

66. Mr. Kennedy states that the defendant has identified five other individuals who were directly involved in the subject of the Second Discovery Categories but were not included as custodians. He names these as David Gunning, Fiona Ross, Tom Morris, Tim Bouchier Hayes and Susan Bryson. He does not say in what respect these persons were "directly involved". He observed that two of these, namely Mr. Gunning and Mr. Bouchier Hayes were custodians in the First Discovery but he does not state why they should necessarily be custodians for the Second Discovery.

67. As a general principle, a party making discovery is not under an obligation to provide an analysis of why any persons were not selected as custodians. There may be exceptional cases to depart from that principle. In this case I am not persuaded that Mr. Kennedy's general assertion that other named persons were 'directly involved' or his reference to the previous identification of two of these persons as custodians in the First Discovery is sufficient to reject the sworn evidence of Mr. Morris that the selection of custodians was made by reference to the Plaintiff's belief that these were the persons holding potentially relevant data.

Clare White

68. The position in relation to Ms. White is different.

69. Clare White is the person who issued the Phase B Instruction. She was a director of OCMA. She is named in each of the four categories in the Second Discovery Order.

70. The defendant says that the exclusion of Ms. White as a custodian was a significant deficiency in the plaintiff's discovery exercise and that she ought to have been identified as a separate custodian given her central role.

71. Mr. Morris's affidavit says that when making the Second Discovery the plaintiff wrote to all current and past agents and advisers of the plaintiff including OCMA. OCMA provided documents on a confidential basis and he states that these documents were provided to the plaintiff. (See paragraph 39-42 above).

72. Mr. Proctor states that data was collected from Ms. White. He cites Mr. Morris's affidavit in which it was explained that documents were collected from O'Connell Mahon Architects of which Mr. White is a director. He says that the fact that Clare White was not listed as a custodian in the additional discovery affidavit "does not mean that the approach to the collection process was in anyway sub-standard" and he repeats the assertion that there is no obligation on parties to provide a list of custodians in the affidavit of discovery.

73. Mr. Proctor continues:

> *"Ms. White has confirmed to me that the only email account she used in her role as Employer Representative is her OCMA email account. Ms. White has also confirmed to me that she uses only one phone. The data on this phone was collected for the purposes of complying with the First Discovery Order and was de-scoped in respect of the Second Discovery Order as Ms. White confirmed that she did not have any text messages relevant to the Second Discovery Categories."*

74. At the hearing of this application counsel for the plaintiff informed the court that he was instructed to confirm that if required Ms. White would swear an affidavit repeating the confirmations stated above by Mr. Proctor.

75. There is a difference between the manner in which documents are collected from agents and advisers and the manner in which searches are conducted on the email addresses and

devices of an individual custodian. For the former, there is no suggestion in this case that either the plaintiff or OCMA fell short in the exercise whereby the plaintiff's solicitors wrote to OCMA and others requesting documents and OCMA provided documents, as described in paragraph 8 of Mr. Morris's affidavit, and which were then included among Data Sources in the Data Review. For the latter, being the named individual custodians, there was applied, as described in paragraph. 7 of Mr. Morris's affidavit, the more rigorous process of interrogating emails, devices and hard copy documents. The collected documents then formed part of the Data Sources included in the Data Review.

76. The plaintiff's submission is that the 'agent and adviser' collection process was sufficient to capture any documents held by Ms. White having regard to her capacity as a director of OCMA. Ms. White was clearly a person with a very particular standing, as the author of the Phase B Instruction. She is central to the issue identified in the amended pleadings which gave rise to the Second Discovery Order. I am not persuaded that the 'firm wide' document collection process, which was applied to OCMA, however properly and diligently it was performed, carried with it the same rigour as was applied to custodians.

77. The court was not informed that there was any impediment to treating Ms. White as a custodian, despite the fact that she is not an employee of the plaintiff. Her exclusion from the 'custodian' process was not warranted in the particular circumstances of this case and I shall make the order sought in paragraph 3 of the Notice of Motion, directing that the Plaintiff identify Ms. White as a custodian and to collect, review and discover, on affidavit, all documents held by her personally and/or in her capacity as Employer's Representative, or in her capacity as a director of OCMA which fall within the scope of the Second Discovery Categories.

Volume and adequacy of discovery

78. Mr. Kennedy says that "the remarkably low volume of documents produced, even accepting the plaintiff's correction of the initial figure, raises serious concerns as to the adequacy of the discovery exercise."

79. Mr. Kennedy refers to the fact that only 91 documents were produced, 11 of which were fully withheld for reasons of privilege, across a period spanning approximately nine years. That is the period between the original appointment of BDP in 2014 as the lead consulting firm to the plaintiff and the signing on 8 August 2023 of the letter appointing OCMA to be sub consultants, that appointment including Employer Representative Services.

80. Mr. Kennedy says that "the defendant finds it difficult to reconcile the proposition that a continuous active learning process applied to 131,167 documents identified only five documents relevant from the custodian pool". He says that the outcome is implausible and raises questions regarding the adequacy of the review exercise conducted.

81. In his second affidavit Mr. Kennedy refers to what he describes as a series of matters which are unclear in relation to the CAL process. Those issues having been identified in that affidavit the defendant did not in this application pursue the relief in paragraph 5 of the Notice of Motion, namely an order directing the swearing of an affidavit providing further particulars of the continuous active learning review methodology including de-duplication, validation and illusion testing and so on.

82. Mr. Kennedy identified what he describes as examples of "gaps". He refers in particular to category 3(a)(ii) and 3(a)(iv) of the Second Discovery Order (see paragraph 34 above). These categories impose the requirement to make discovery of documents recording and/or referring to the "signing" of the OCMA sub consultant appointment, and secondly recording or referring to "when it came to light that the OCMA sub consultant appointment had not been signed."

83. The "gaps" identified by Mr. Kennedy are described by him in paragraph 32 of his affidavit in what he calls "non-exhaustive examples":

"32.1. The OCMA sub consultant appointment was executed on 8 August 2023, some nine years after the commencement of the project and the lead design appointment in December 2014.

32.2 The plaintiff only disclosed 13 documents (parents and children) for the year 2023.

32.3 The earliest of these documents (NPH20000090) was an email from Frank Fleming of BDP to Heather Wells (BDP) and Gareth Hewer (BDP) on 23 June 2023 flagging that he was carrying out some "housekeeping" and noted the OCMA sub consultant appointment had not been signed. I say that there are no documents explaining why Mr. Fleming was carrying out this "housekeeping", six years after BDP says the sub consultant appointment was agreed. There are also very limited internal BDP exchanges on the issue thereafter.

32.4 David Brennan of BDP then emails Sean Mahon in relation to the undersigned OCMA sub consultant appointment on 23 June 2023 and 27 June 2003. Mr. Mahon does not respond to these emails.

32.5 Mr. Brennan then emails Sean Mahon again on 25 July 2023 and 27 July 2023. Mr. Mahon does not respond to these emails. In fact there are no emails from Mr. Mahon in 2023.

32.6 The first email from OCMA to BDP on the issue is on 1 August 2023 – from Rachel Darling, responding to Mr. Brennan's email of 27 July 2023. This email is included in a chain of emails that appears to have been provided by BDP.

32.7 There are no internal emails from OCMA in 2023 and/or in relation to the sub consultant appointment at that time.

32.8 In fact it does not appear that OCMA may have provided any emails for 2023, despite BDP clearly providing emails which are sent to and received from OCMA during that period.

32.9 The 13 documents are inclusive of children. The latest of the children is 28 August 2017 with emails between BDP and OCMA stating that all that was left to agree were the fees. No further correspondence on the fees has been disclosed – this simply does not make sense."

84. Mr. Kennedy makes the following statement having identified the so-called "gaps" in his paragraph 33: "*The defendant, in light of the Plaintiff's additional discovery, is left asking the question of what prompted or triggered the belated execution of this agreement*."

85. This averment by Mr. Kennedy reveals a misunderstanding of the purpose of discovery. The 'gaps' identified by Mr. Kennedy in paragraph 32 and the 'question' identified in paragraph 33, may be of interest at the trial and may call for explanation, if it transpires at the trial that evidence on the particular question of what 'provoked or triggered the belated execution" of the Sub-Consultancy Agreement, is found to be necessary. Discovery is not the process by which such a question must be answered.

86. I have considered the 'gaps' identified by Mr. Kennedy against the Fifth Affidavit of Mr. Morris and the affidavit of Mr. Proctor. From paragraphs 5 to 22 of Mr. Morris's affidavit the entire review process is carefully described, including the manner in which continuous active learning technology has been applied, the 'Elusion' and other validation tests have been applied and the review undertaken by the team of discovery reviewers under the supervision of the plaintiff's solicitors. It is frequently possible to characterise apparent 'gaps' as suggesting a flawed process. But when the totality of the affidavit evidence is considered I am not persuaded that the *Sterling Winthrop* test is met and shall make no further order under this heading.

<u>Documents from BDP and OCMA</u>

87. Mr. Kennedy states that eighty-five of the ninety-one documents produced in the second discovery were provided by OCMA and BDP. He says that this raises questions concerning the completeness of plaintiff's own records and the adequacy of the searches conducted.

88. Again this question turns on paragraphs 6 to 11 of Mr. Morris's affidavit. In paragraphs 8 and 9 he describes the collection of documents from agents and advisers including BDP and OCMA. In paragraph 11 he confirms that all such documents were within the Data Sources which were reviewed.

89. Mr. Proctor confirms the process adopted in relation to agents and advisers. He adds that "it is to be expected that the vast majority of documents originated from BDP and OCMA given the nature of the Second Discovery Categories – and given that previously discovered documents were not re-discovered." That is correct, and I draw no contrary inference from the fact that the preponderance of documents produced emanated from BDP and OCMA.

90. In *Linfen Limited v. Rocca* [2009] IEHC 292 MacMenamin J. identified a distinction between documents which come into existence or which are generated by an agent and which therefore belong to the principal and documents prepared by professional advisers for their own assistance. At paragraph 9 in Mr. Morris's affidavit he refers to certain documents not forming part of the "client file". The defendant points, understandably, to an apparent contradiction between that averment, and the later confirmation in the next sentence, and in paragraph 11, that all such documents were part of the Data Sources provided to the Plaintiff's Solicitors for the purpose of determining their relevance. On a close reading, Mr. Morris does not state anywhere that any of the documents were withheld from the Plaintiff's Solicitors, whether on grounds of privilege or otherwise. The reference to 'privilege' in paragraph 9 does not mean that any such documents were excluded from the Data Set reviewed.

91. I do not accept that the fact that the preponderance of documents discovered were documents of BDP and OCMA means that the plaintiff's records were incomplete or that its searches were inadequate. This may, depending on the flow of evidence, require more explanation at the trial of the action, but it does not meet the *Sterling Winthrop* test for ordering a further affidavit on the subject.

Date ranges and the original discovery

92. The defendant complains that since the Second Discovery Order did not contain any carveout or exclusion for previously discovered documents, the plaintiff was obliged to conduct a fresh review of all documents falling within the scope of the Second Discovery Categories, irrespective of whether they had previously been discovered.

93. The four categories identified in the Second Discovery Order are different from the categories identified in the First Discovery Order, with the possible limited overlap of Category B in the First Discovery Order. They differ also in that there is no date range applying to Categories Three and Four in the Second Discovery Order.

94. In his second affidavit Mr. Kennedy states the following:

> "*It appears from paragraph 34 that Mr. Proctor is saying that the plaintiff took the data obtained pursuant to the First Discovery Order and then used this Data Set, and additional data to review for compliance with the Second Discovery Order. In circumstances where Category B from the First Discovery Order is the only category that can be considered potentially relevant for the purpose of the categories set out in the Second Discovery Order, the approach taken by the plaintiff is fundamentally flawed for two reasons*".

Mr. Proctor's paragraph 34 says no such thing.

95. Mr. Kennedy then refers to the difference in date ranges and the difference in the description of the categories. Mr. Kennedy continues: "the plaintiff merely sought documents from

additional custodians. It did not seek to re-collect, re-scope or expand the existing data sets to capture the earlier period mandated by the Second Discovery Order."

96. Finally on this subject Mr. Kennedy states (at para. 44) that "compliance with Category B of the First Discovery Order cannot on any interpretation, amount to compliance with the categories set out in the Second Discovery Order".

97. This statement by Mr. Kennedy would be correct were it a fair summary of the evidence, which it is not.

98. This question is determined by a proper understanding of the phrases "Previously Collected Data Set" and "Data Sources" used by Mr. Morris in his Fifth Affidavit. Mr. Morris states in para. 5 that the plaintiff conducted a thorough search for all documentation falling within the ambit of the Second Discovery Order which the plaintiff had been ordered to make in these proceedings "and which had not been collected previously for the purpose of complying with the First Discovery Order." Mr. Morris goes on in para. 12 to say that data from the Previously Collected Data Set, but which was not discovered in the original affidavits and was held by Grant Thornton was filtered with search terms. He says that "*search terms were also applied across the Previously Collected Data Set uploaded to the Platform for the purpose of complying with the First Discovery order but which was not previously discovered. Non-text searchable documents and mobile phone messages in the Previously Collected Data Set were also identified for review. I say that following the above steps a total of 131,167 documents presented on the platform for review (the "Review Set")*."

99. Nowhere is it stated that the searches undertaken for the Second Discovery Order were reliant upon or limited by the content of the "Previously Collected Data Set".

100. Related to this objection, the defendant seeks an order directing the plaintiff to review and discover all documents falling within the scope of the Second Discovery Categories

irrespective of whether such documents were previously discovered pursuant to the First Discovery Order. In the alternative, it seeks an order directing that the plaintiff identify any previously discovered documents which fall within the Second Discovery Categories by reference to the earlier discovery already made. If there is any such duplication that should be readily identifiable to both parties, but in light of my conclusion that the Second Discovery was not deficient for reliance on a cohort of documents limited by reference to searches made for the First Discovery, no such order will be made.

Documents after 8 August 2023

101. This leaves, under this heading, one aspect which even on Mr. Morris's description and Mr. Proctor's affidavits remains unexplained. It is said by Mr. Kennedy that the latest date of any document provided in the Fifth Affidavit of discovery is 8 August 2023 being the date on which it is said the Sub-Consultancy Agreement was executed.

102. It was not until 13 March 2025 that the defendant initiated its application for leave to amend the defence by the inclusion of the new paragraph 34 A, which culminated in the order of Roberts J. made on 2 July 2025 granting liberty to amend the defence. There was not opened to me any of the correspondence which passed before the issuing of that motion, or any of the affidavits sworn in the application to amend. It would be extraordinary if this application was made without any prior correspondence on the subject between the parties, or between the plaintiff and BPD or OCMA, or without any internal communications within the plaintiff. It may be that when this matter was brought to the plaintiff's attention by the defendant, it made no response whatsoever. As regards internal communications it is likely that some, but not all, would attract a privilege. If so they should have been discovered, either in Part One or Two of the First Schedule. No explanation was proffered by the plaintiff on this subject either on affidavit or in submissions.

103. I shall direct that the plaintiff review, collect and discover all documents postdating 8 August 2023 and matching the Four Categories in the Second Discovery Order.

<u>Conclusion and Orders</u>

104. By reference to paragraph 3 of the Notice of Motion, there will be an order directing the plaintiff to identify Clare White as a custodian and to collect, review and discover all documents held by her personally and/or in her capacity as Employer's Representative or in her capacity as a director of OCMA which fall within the scope of the Second Discovery Categories, and that the plaintiff swear and file an affidavit (the "Sixth Affidavit") verifying the result of such collection and review.

105. By reference to paragraph 1 of the Notice of Motion, there will be an order directing the plaintiff to review, collect and discover all documents falling within the scope of the Second Discovery Categories which came into existence on or after 8 August 2023.

106. All other reliefs sought in the Notice of Motion are refused.

107. The matter will be listed on 24 July 2026 at 10:30 am. for any necessary submissions as to the form of order and costs.