**THE HIGH COURT**

**Record No. 2016 No. 8842P**

**BETWEEN**

**PETER DOWNEY**

**Plaintiff**

**-and-**
**THE COUNCIL OF THE KING'S INNS,**
**HONORABLE SOCIETY OF KING'S INNS and**
**THE EDUCATION COMMITTEE OF KING'S INNS**

**Defendants**

**Judgment of Mr. Justice Denis McDonald delivered on 14 May, 2018**

1. The Plaintiff is a solicitor. While still a solicitor, he completed the degree course at the King's Inns. In these proceedings, he claims that the Defendants are in breach of contract with him as a consequence of their refusal to admit him to the Degree of Barrister-at-Law. He claims that there is nothing to prevent the Defendants awarding him the Degree of Barrister-of-Law notwithstanding that he is a solicitor. His counsel has said to the court that he does not intend to practice as a Barrister but, having been accepted for the two year part-time Barrister-at-Law Degree course, having paid the total fees for that course of €12,330, having passed the examinations and assessments, and having eaten the requisite number of dinners at the King's Inns, he is entitled to be conferred with the Degree of Barrister-at-Law.

2. It should be noted that although the proceedings relate to the 2008/2009 and 2009/2010 academic years at the King's Inns, the Plenary Summons was not issued until 4 October, 2016.

3. In the present application before the court, the Defendants seek the following relief:-

> (a) An Order pursuant to the inherent jurisdiction of the Court discharging the appearance entered on behalf of the Defendants by Crowley Millar, Solicitors, on 6 November, 2017; and
>
> (b) An Order pursuant to Order 12, Rule 26 of the Rules of the Superior Courts setting aside service of the Plenary Summons on the Defendants for failure to serve the Plenary Summons within 12 months from the date of issue.

4. As noted above, the Plenary Summons in this case was issued on 4 October, 2016. Accordingly, it was necessary to serve the Summons not later than 3 October, 2017. However, the Summons was not presented to An Post for the purposes of postal service on the Defendants until 4 October, 2017. According to Order 121, Rule 3, the service by post of any document which is authorised to be served by post is deemed to have been effected at the time at which the document would be delivered in the ordinary course of post. In the present case, it appears from Exhibit "SA3" to the Grounding Affidavit of Séan Alyward sworn on behalf of the Defendants that the Summons did not, in fact, reach the Defendants until 9 October, 2017. In circumstances where 4 October, 2017 was a Wednesday, and 9 October was a Monday, it is difficult to understand why the postal packet containing the copy Summons took so long to be delivered to the Defendants. For the purposes of Order 121, Rule 3, the date when service would be deemed to be effected must lie somewhere between 5 October, 2017 and 9 October, 2017. For present purposes, it is unnecessary to be more precise. Whether the Summons is deemed to have been served on 5 October, 2017 or 9 October, 2017, it is clear that more than 12 months had passed since the date of its issue, and, at the time of its service, the Summons could no longer be said to have been in force unless renewed by Order of the Court. This follows from the provisions of Order 8, Rule 1 as explained by the Supreme Court in *Baulk v. Irish National Insurance Co. Ltd* where Walsh J. said that a Summons "*shall not be in force for the purpose of service after [twelve months], unless renewed by leave of the Court*".

5. However, an unqualified appearance was entered to the Plenary Summons in this case on behalf of the Defendants by Crowley Millar, Solicitors, on 6 November, 2017. The form of appearance used in this case incorrectly refers to the "*Personal Injuries Summons served upon us on the 3rd day of November, 2017*". The Plenary Summons here was not a personal injuries summons. Nonetheless, although it is difficult to understand why the appearance refers to the incorrect form of summons and to an incorrect date of service, nothing ultimately turns on this error. The application now before the Court is to "discharge" the unqualified appearance so that the Defendants would then be entitled to pursue the second element of their application before the court, namely the application to set aside service of the Summons pursuant to Order 12, Rule 26. The Defendants acknowledge that it would not be open to them to make any application pursuant to Order 12, Rule 26 unless the unqualified appearance entered on their behalf by Crowley Millar is discharged or set aside. This follows from the language of Rule 26 which provides as follows:-

> *"A defendant before appearing shall be at liberty to serve notice of motion to set aside the service upon him of the summons …". (Emphasis added).*

6. This position is also confirmed in the case law. Thus, for example, in S*heldon v. Brown Bayley's Steelworks Ltd* , Singleton L.J. said at p 400:-

> *"The position under Order 8, Rule 1 is that the Writ is not in force for the purpose of service after the 12 months period has run; it is still a Writ. The unconditional appearance by Dawneys …is a step in the action; it amounts to a waiver with regard to service; it prevents Dawneys …from being able to contend successfully that the service on them is bad".*

7. More recently, Hedigan J. observed in *Transportstyrelson v. Ryanair Limited* [2012] IEHC 226 at p 21 that:-

> *"In cases which fall outside the scope of the Convention, the general principle is that the entry of an unconditional appearance by the defendant is one of the steps which should be regarded as a submission to the jurisdiction of the Court by that defendant".*

**The jurisdiction of the court to discharge or set aside an appearance**

8. The basis for the Defendants' application to discharge the appearance is that the appearance was entered as a consequence of what the Defendants contend was a mistake (which I describe in more detail below). The parties are agreed that where an appearance has been entered as a consequence of a mistake, there is an inherent jurisdiction in the Court to set aside the appearance notwithstanding that there is no express rule contained in the Rules of the Superior Courts making any provision for such

an application. This is in contradistinction to the Rules of Court in Northern Ireland and in England & Wales where express provision has been made for the making of such an application.

9. Both parties have drawn attention to the approach taken by Costello J. (as he then was) in an *ex tempore* judgment delivered in *Taher Meats (Ireland) Ltd v. State Company for Foodstuff Trading* where he said:-

> *"The first preliminary point that has been raised on this application relates to the fact that an appearance was entered by the second Defendant. The second Defendant has moved under O.12, r.26 which permits a defendant before appearing to serve a Notice of Motion to set aside an order authorising the service on it. I am quite satisfied that the appearance was entered by mistake. And whilst there is no specific rule on the matter, it seems to me that the court has an inherent jurisdiction to rectify such an error and I propose to discharge the appearance entered by the second Defendant. This means that the second Defendant is at liberty to apply under the rule to which I have referred to discharge the order in this matter".*

10. Although Costello J. cites no authority for this proposition, it is clear that even before the enactment of the express provisions now contained in the rules in both Northern Ireland and in England & Wales, the English courts had determined that there was a jurisdiction to set aside or discharge an appearance even where the appearance was unconditional in its terms. The case law acknowledges the existence of such a jurisdiction. For example, Carswell J. (as he then was) in *Bradford v. Department of the Environment* explained the position as follows:-

> *"The entry of an unconditional appearance by a defendant can have important consequences since it may constitute the waiver of an irregularity such as failure to serve the writ of summons within the prescribed time: see Sheldon v. Brown Bayley's Steelworks Ltd …..This step is not, however, an outright waiver, but at most a contingent one, since its finality is mitigated by the effect of Order 31, rule 1, under which a party who has entered an appearance may withdraw it with the leave of the court: see Rothman's of Pall Mall (Overseas) Ltd v. Saudi Arabian Airlines Corporation [1981] QB 368 … per Mustill J. Specific provision to this effect was first introduced in the Rules of the Supreme Court in Northern Ireland in the 1980 revision, and had first appeared in the English Rules in 1962. Before the Rules were so amended, however, there was an established practice, referred to in successive editions of the Supreme Court Practice and the Annual Practice, whereby the court would permit a party to withdrawn an appearance in certain circumstances. The court is given a discretion under Order 21, rule 1, but it has to be exercised judicially, and in practice this has meant that courts have at times adopted similar criteria for granting leave to those applied before Order 21, rule 1 was introduced; see Somportex Ltd v. Philadelphia Chewing Gum Corporation …per Salmon L.J. In Firth v. John Mowlen Ltd [1978] 3 All ER 331, however, the Court of Appeal was careful to stress that the Somportex case is not authority for limiting the application of Order 21, rule 1, to cases covered by the old practice. It said that each case has to be looked at on its own particular facts, and that the judge has a discretion". (underlining added).*

11. In the *Somportex case* (to which Carswell J. drew attention in the *Bradford case*), Salmon L.J. explained that the English Order 21, Rule 1 was, in fact, based on the "*old practice*" – i.e. based on the practice in existence prior to the enactment of the relevant English Rule. In *Somportex Ltd v. Philadelphia Chewing Gum Corporation* [1968] 3 All ER 26, Salmon L.J. said (at p 31):-

> *"…It is quite plain under RSC, Ord. 21 that if an appearance, whether it be conditional or unconditional, is entered by mistake, the judge may order it to be set aside. It is true that Ord. 21 says nothing expressly about mistake, but that order is based on the old practice. For example, if a solicitor has no instructions and no authority, by mistake enters an appearance on behalf of his client, then under Ord. 21 that appearance will be set aside. …".*

12. The English cases therefore illustrate that even prior to the adoption of the English Rule, it was part of the practice of the English courts to entertain applications to discharge appearances. This has also been recognised in Northern Ireland in the judgment of Carswell J. in the *Bradford case*. Accordingly, notwithstanding that there is no reference to any of the case law in his *ex tempore* judgment in the *Taher case*, there is clearly ample authority for the course taken by Costello J. in that case, and it is likely that Costello J. was referred to the line of authority cited above. The existence of an inherent jurisdiction in the court operating side by side with the Rules of the Superior Courts has long been acknowledged and is evident in a variety of circumstances as appears from a number of decisions of the Supreme Court in cases such as *Moylist Construction Limited v. Doheny* [2016] 2 IR 283 (dealing with the inherent jurisdiction of the court to dismiss a claim on the grounds that it is bound to fail) and *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459 (dealing with the inherent jurisdiction of the court to dismiss a claim on the grounds of inordinate and inexcusable delay where the interests of justice require it).

13. Having regard to the English practice prior to the enactment of the new Rules in England and Northern Ireland, and having regard to the Irish case law acknowledging the existence of an inherent jurisdiction in the court, it would therefore be very surprising if the inherent jurisdiction did not extend to a power to set aside or discharge an appearance notwithstanding the absence of any rule expressly providing for such an application.

**The "*mistake*" on which the Defendants rely**

14. There are a number of affidavits before the Court. The principal affidavit is sworn by Séan Alyward on behalf of each of the Defendants. Mr. Alyward (who is the Under Treasurer of the King's Inns) explains that on receipt of the Plenary Summons on 9 October, 2017 by post, he e-mailed the Defendants' insurance brokers, JLT Ireland, attaching a copy of the Plenary Summons and requesting that he alert the Defendants' insurers, Allianz plc, to the existence of the proceedings. On the same day, he received a response by e-mail from Mr. McGuinness of JLT Ireland informing him that Allianz plc had been notified, and that a copy of the Plenary Summons had been provided to Allianz. In that e-mail, Mr. McGuinness stated that he "*would press for* [Allianz's] *urgent advices*" and that he would be in "*further contact*" with Mr. Alyward.

15. On the same day, Mr. Alyward also instructed O'Connor, Solicitors, and he says that his understanding is that O'Connor, Solicitors, in turn instructed junior and senior counsel on 13 October, 2017. Advice was given that an application should be brought to set aside service of the Plenary Summons and, pending the making of such an application, no appearance should be entered. Mr. Alyward says that on this basis, O'Connor, Solicitors, did not enter an appearance on behalf of the Defendants.

16. Mr. McGuinness of DLT Ireland was aware of the involvement of O'Connor, Solicitors. This is clear from Exhibit "SA5" to Mr. Alyward's affidavit which comprises an exchange of e-mails between Mr. Alyward and Mr. McGuinness on 27 October, 2017 and 31 October, 2017. In his e-mail of 27 October, 2017 (copied to Ann Benson of O'Connor, Solicitors), Mr. Alyward stated:-

> *"Dear John,*

*We will bring this encouraging advice to the attention of our Chairman & insurance brokers.*

*The original of the envelope with post office date stamp will be forwarded to you by hand on Tuesday after the Bank Holiday".*

17. While the attachments to that e-mail are not exhibited, it appears from Mr. McGuinness' response of 31 October, 2017 that legal advice from O'Connor solicitors or from counsel was attached. Mr. McGuinness in his e-mail of 31 October, 2017 says:-

*"I have forwarded the latest legal correspondence on the matter to our insurers".*

18. It is clear from the exchange of e-mails that by the end of October 2017, the issue about the validity of the service of the Summons was already the subject of active consideration by O'Connor solicitors and this is confirmed by the reference in Mr. Alyward's e-mail of 27 October, 2017 to the original envelope "*with post office date stamp*" which he said would be forwarded to JLT Ireland after the Bank Holiday weekend. This was obviously relevant to the issue as to when service was deemed to have been effected pursuant to Order 121, Rule 3 (discussed in paragraph 4 above).

19. While this correspondence was being exchanged between JLT Ireland and the Defendants, instructions were given by DWF Claims on behalf of insurers to a different firm of solicitors – namely Messrs. Crowley Millar. This is clear from the affidavit of Hugh Millar sworn on 28 November, 2017 in support of the Defendants' motion. Mr. Millar says in very plain terms in paragraph 3 of his affidavit:-

*"On 26th October, I received instructions in this matter from DWF Claims who had been instructed by the insurers of the Defendant, Allianz plc to investigate this matter on behalf of the insurer. My instructions were to enter an appearance to proceedings to protect the interest of the insured pending the completion of enquiries. I therefore entered an appearance to the proceedings on 3rd November, 2017 and same was filed in the Central Office of the High Court on 6th November, 2017".*

20. While Mr. Millar says in his affidavit that he entered the appearance on 3 November, 2017, the correct legal position is that the date of entry of an appearance is the date when the relevant appearance form is filed in the Central Office, and therefore, the date of the appearance in this case is 6 November, 2017 rather than 3 November, 2017.

21. The affidavits sworn on behalf of the Defendants have been criticised by the Plaintiff. In a replying affidavit sworn by the Plaintiff on 18 January, 2018, the Plaintiff draws attention to the fact that the letter of instructions from DWF Claims is not exhibited to Mr. Millar's affidavit and the Plaintiff says:-

*"….it is therefore not possible to determine what specific instructions were given to Mr. Millar. Mr. Millar's affidavit does not contend that he was told to enter a Conditional appearance. I say that a review of the letter of instructions sent to Mr. Millar by DWF Claims appears to be necessary to determine (a) what Mr. Millar's precise instructions were and (b) to properly assess the impact of the appearance entered".*

22. The Plaintiff also makes the point in paragraph 8 of the same affidavit that:-

*"Mr. Alyward's affidavit contends that Crowley Millar, solicitors entered an appearance in error but this contention flies in the face of the averment in Mr. Millar's affidavit that he was instructed to enter an appearance to protect the interests of the insured whilst investigations were being carried out. There can be no doubt that Mr. Millar was told to enter an appearance and the question appears to be whether he correctly followed his instructions or whether he misinterpreted them. The court cannot properly assess this issue without sight of the letter of instruction sent to Mr. Millar by DWF Claims".*

23. Mr. Millar swore a further affidavit on 23 January, 2018 in response to the Plaintiff's affidavit in which he said that he only became aware on 8 November, 2017 of the fact that John O'Connor of O'Connor, solicitors had been instructed on behalf of the Defendants. This arose following a telephone call from Mr. O'Connor to him. Mr. Millar continues in paragraph 8 of his affidavit:-

*"As is set out clearly in the affidavit of Seán Alyward, the Defendants instructed O'Connor solicitors in this matter on 9 October, 2017 and had no knowledge of Crowley Millar solicitors' involvement until 8 November, 2017. The Plaintiff's focus on the relationship between DWF Claims, being the handlers appointed by Allianz plc to investigate the claim, and Crowley Millar solicitors is misplaced. The Plaintiff asserts that it is necessary for the court to have sight of the instructions from DWF Claims to Crowley Millar solicitors …to determine the application to discharge the appearance. Far from being necessary, the said instructions are irrelevant to the issue to be determined herein. I say and believe the issue is who was instructed by the Defendants to represent them in the matter. It is clear from Mr. Alyward's affidavit that at all times O'Connor solicitors had been instructed to represent them, and therefore I say and believe the letter between the insurer's claims handler and Crowley Millar solicitors is irrelevant. In any event, I state at paragraph 3 of my first affidavit that the instructions I did receive from DWF Claims (albeit, unbeknownst to me, contrary to how the Defendants had already elected to defend the matter) were to enter an appearance. This acknowledgment being made, and given that the relevant relationship is not that between DWF Claims and Crowley Millar solicitors, it is difficult to see how sight of the said letter could assist the Plaintiff".*

24. At the hearing before me, counsel for the Plaintiff submitted that both the instructions from DWF Claims to Crowley Millar and the relevant policy of insurance ought have been exhibited by Mr. Millar to his affidavits. During the course of the hearing, the Defendants agreed to make available a copy of the terms and conditions of the policy (but not the schedule containing the amount of the premium and the extent of the cover). Clause 4.5 of the policy deals with the defence of proceedings against the insured in the following terms:-

*"Defence*

*The Insurer does not assume any duty to defend, and an Insured shall defend and contest any Claim made against them unless the Insurer, in its sole and absolute discretion, elects in writing to take over and conduct the defence and settlement of any Claim. If the Insurer does not so elect, it shall be entitled, but not required, to participate fully in such defence and the negotiation of any settlement that involves or appears reasonably likely to involve the Insurer. In the event that the Insurer decides that representation by a solicitor is necessary (such decision to be at the sole discretion of the Insurer) then an Insured shall select one of the Legal Panel to provide such legal representation". (bold in original).*

25. Clause 4.5 appears to me to involve the following elements:-

> (a) It is for the Insured (in this case the Defendants) to defend and contest any claim made against them unless Allianz, in its discretion, elects in writing to take over the conduct of defence of the claim;
>
> (b) If Allianz elects in writing to take over the conduct of the defence of the claim, it will be entitled (albeit not required to do so) to participate fully in such defence;
>
> (c) In the event that Allianz decides that representation by a solicitor is necessary, the Defendants will be entitled to select one of the firms of solicitors on the Allianz Legal Panel.

26. Although the court has not been provided with a copy of the instructions given by DWF Claims to Crowley Millar, it is clear from the evidence before the court that, following service of the proceedings, the Defendants appointed O'Connor solicitors to advise them and to act on their behalf. Having regard to the opening words of Clause 4.5 of the General Conditions of the policy, it would appear that the Defendants were entitled to proceed in this way. It was then up to Allianz to elect in writing to conduct the defence on behalf of the Defendants. There is no evidence before the court as to whether such election was ever made. However, what is quite clear is that there was never any selection by the Defendants of a solicitor from the Allianz Legal Panel. Instead, the Defendants went directly to their own solicitor, namely O'Connor solicitors.

27. The affidavit evidence before the court demonstrates that the Defendants were unaware of Crowley Millar's involvement until 8 November, 2017 when Mr. John O'Connor of O'Connor solicitors informed the Defendants that it had come to the attention of his firm, when attending at the Central Office of the High Court to issue the motion to set aside the appearance, that an appearance had already been entered by Crowley Millar solicitors on the Defendants' behalf. This is clear from paragraph 13 of Mr. Alyward's affidavit.

28. Likewise, it is clear that Crowley Millar were unaware of the involvement of O'Connor solicitors until the same date (namely 8 November, 2017). In paragraph 4 of his second affidavit, Mr. Millar confirms that he became aware of the involvement of O'Connor solicitors when John O'Connor telephoned him on 8 November, 2017. While not expressly stated in the affidavits, this appears to have arisen following the discovery by O'Connor solicitors that an appearance had been entered on behalf of the Defendants when they sought to file the notice of motion to set aside service of the summons.

**Relevant case law**

29. In the hearing before me, the Defendants placed significant reliance on the decision of Carswell J. in *Bradford v. Department of the Environment* [1986] NI 41. In that case, a writ was issued by the plaintiff in April 1979 but was not served on the third named defendant until December 1983. In circumstances where the writ had never been renewed against that defendant, the service was not valid. Accordingly, in May 1984, the third named defendant successfully applied to have the summons set aside. However, in September 1985, the third named defendant's insurers gave instructions to a different firm of solicitors to act on the third named defendant's behalf. Both the insurers and the new firm of solicitors were unaware that service had been invalid and had been set aside. The new solicitors ascertained that no appearance had ever been entered and, concerned about the position, they entered an appearance on the third named defendant's behalf. Subsequently, they learned that service had been set aside and they should not have entered the appearance. An application was then brought under the Northern Irish Rules of Court seeking leave to withdraw the appearance. Carswell J. granted leave. While making clear that the discretion of the court to give leave pursuant to the relevant rule was not limited to cases of mistake, Carswell J.'s judgment deals with the question of mistake in the following terms (at p 43):-

> *"Where an application is based on mistake, ….the effect of the authorities …is that where a party or his solicitor enters an appearance under a misapprehension of fact, he may be allowed to withdraw it, at least where no prejudice has occurred as a result; but where he has taken that step ill-advisedly or through an incorrect appreciation of the law or his rights under it, he will not generally be permitted to withdraw the appearance".*

30. It was argued in that case that the entry of the appearance by the new firm of solicitors was the deliberate entry of an appearance and that on the basis of the *Somportex* line of authority (discussed below), the application should be refused. However, Carswell J. rejected that argument and said (again at p 43):-

> *"[Counsel's] argument might have more substance if the third defendant's solicitors had known when they entered an appearance that the writ of summons had expired when it was served on their client. In such case, it might have been said that they took the step of entering an appearance with knowledge of the essential facts, but without appreciating the consequences which flowed from them ….On the facts, however, the third defendant's solicitors did not know that the writ had been served out of time, and assumed that it had been duly served but no appearance had been entered.*
>
> *In these circumstances, it seems to me that the entry of an appearance was brought about by genuine misapprehension of fact on the part of the third defendant's solicitors and their instructing insurers. That, in my opinion, brings the case within the bounds of the court's discretion under Order 21, rule 1. ….".*

31. Counsel for the Defendants has strongly relied on this judgment contending that there is a clear parallel between the facts (as set out by Carswell J. in that case) and the facts here. In particular, counsel argued that there was a clear misapprehension of fact on the part of Crowley Millar and DWF Claims – in that they were unaware of the fact that O'Connor solicitors had already been appointed and had advised that an unconditional appearance should not be entered.

32. On the other hand, counsel for the Plaintiff placed equally strong reliance on the decision of the English Court of Appeal in *Somportex Ltd v. Philadelphia Chewing Gum Corporation* [1968] 3 All ER 26. In that case, the defendant was a corporation incorporated in the State of Pennsylvania. It was sued by the English plaintiff in the English courts. Its U.S. lawyers sought advice from a leading firm of solicitors in the City of London. According to Lord Denning M.R. (at p 28) and Salmon L.J. (at p 30), there were a number of alternatives open to the U.S. company following service of the English proceedings on it:-

> (a) In the first place, a decision could have been made to ignore the proceedings and not to enter an appearance at all, in which case judgment could be given against them in default of appearance but that would not be enforceable in the United States. It would only be of concern to the U.S. company if it had assets in England;
>
> (b) An application could have been brought by notice of motion to have the service set aside on the grounds that the English courts had no jurisdiction;
>
> (c) A conditional appearance could have been entered on the American corporation's behalf, in which case an application

could have been brought to have the writs set aside on the same grounds. However, if that application was unsuccessful, the unconditional appearance would (in accordance with the then English practice) be deemed to become unconditional; or

(d) An unconditional appearance could have been entered.

33. Having taken advice from London lawyers, the U.S. company decided to enter a conditional appearance. However, the U.S. company subsequently changed its mind and sought to withdraw the conditional appearance such that there could never be a submission to the English courts. This application was refused by the English Court of Appeal which held that no mistake had been made. Instead, the court held that a deliberate decision had been made by the U.S. company on the basis of the advice given by London lawyers to enter a conditional appearance. Lord Denning M.R. said (at p 29):-

> *"… It seems to me that they were very wise to enter a conditional appearance. It was a step which would be advised by any competent lawyer if there was a likelihood that assets would then or afterwards come into England.*
>
> *We have, therefore, a wise course of action deliberately decided on by eminent firms in England and the United States after consultation, and I do not think that they should be allowed now to go back on it. It must be remembered that, on the faith of this entry of an appearance, the English company have altered their position. They have not gone to the United States as they might have done, and taken steps there against the American company. They have remained in this country and pursued the action here – on the faith that there was a conditional appearance entered which would become unconditional unless it was duly set aside. In the circumstances, I do not think that we should give leave to withdraw the appearance".*

34. In the same case, Salmon L.J. (at pp 31-32) said:-

> "I am afraid that I am quite unable to find any sort of mistake here on which the American company can rely. …
>
> I think that if a party, who has had the best professional advice, elects to take a course of this kind, acts on it and that action has the effect of postponing the proceedings for three months, it should not subsequently be able to say that he resiles from what he has done and would now rather elect one of the other courses which had been open to him".

35. It is clear from the approach taken by Lord Denning M.R. and Salmon L.J. that they considered that a deliberate decision had been made in that case (after appropriate advice had been taken) to enter a conditional appearance, and in those circumstances, the court was not prepared to accept that any mistake had been made.

36. As noted above, significant reliance was placed on the decision in *Somportex* by counsel for the Plaintiff here. Counsel submitted that the affidavit evidence of Mr. Millar (discussed above) showed very clearly that the appearance was entered intentionally, and therefore, leave to withdraw the appearance should be refused.

37. The Plaintiff makes the case that the parallels between the present case and *Somportex* are stark. In particular, it is submitted that it is clear from Mr. Millar's first affidavit that he received instructions in the matter from DWF Claims on behalf of insurers to enter an appearance. The Plaintiff therefore makes the case that the entry of appearance was a deliberate act and not an error. The Plaintiff urges that I should take the same approach as that taken by the Court of Appeal in *Somportex*.

38. In response, counsel for the Defendants argues that the correct comparator here is not *Somportex* but the *Bradford case*. In *Bradford*, the appearance was entered quite deliberately, but yet the court held that this was done as a consequence of a misapprehension on the part of the firm of solicitors who entered it because that firm was unaware of the fact that a challenge had already been made to the validity of the service of the summons in that case. The Defendants argue that the same position applies here. While, of course, Mr. Millar entered the appearance quite deliberately on the instructions of DWF Claims, Mr. Millar was under a misapprehension. He was unaware of the fact that the King's Inns had already instructed O'Connor solicitors and had decided not to enter an unqualified appearance pending the making of an application under Order 12, Rule 26 to set aside service of the summons. In this context, the insurance policy appears to envisage that the King's Inns could proceed in this way. This follows from the first part of Clause 4.5 (quoted above).

39. Counsel for the Defendants seeks to distinguish the *Somportex* case on the basis that, in that case, there was a decision taken after legal advice to enter a conditional appearance. There was, in fact, no evidence in that case of any misapprehension of fact. The conditional appearance was entered into quite deliberately but, on further reflection, the U.S. company subsequently thought it would have been better off not entering any appearance at all and sought to withdraw the conditional appearance previously entered (after taking specific advice from London lawyers). Counsel for the Defendants drew attention to the observations of Campbell J. in Northern Ireland in *Vokes v. Eastern Health & Social Services Board* [1990] NI 388 who characterised the *Somportex case* in the following terms (at p 108):-

> *"In the exercise of [the court's] discretion, some distinction may be drawn between cases where a party has taken a deliberate step and then seeks to resile from it, see for example Somportex …., and those cases where a mistake has been made ….".*

40. Counsel for the Defendants contend that what happened in *Somportex* was precisely that – a deliberate step had been taken which the U.S. company sought to resile from subsequently. In contrast, the position here is that while a deliberate step was taken to enter an appearance, that deliberate step was taken under a complete misapprehension of fact – namely that a decision had already been taken not to enter an unconditional appearance.

41. However, the Plaintiff relies on the exchange of e-mails contained in Exhibit "SA5" to Mr. Alyward's affidavit to suggest that there can have been no misapprehension here. In particular, it is submitted on behalf of the Plaintiff that the exchange of e-mails in Exhibit "SA5" (discussed in paragraphs 16 to 18 above) show that insurers were informed that there was an issue with the service of the summons. The suggestion therefore is that the appearance was entered into deliberately in the knowledge that an issue arose in relation to the service of the summons.

42. In response, counsel for the Defendants draws attention to the date of the exchange of e-mails in Exhibit "SA5". In particular, he draws attention to the fact that the exchange of e-mails post-dates 26 October, 2017 when Mr. Millar confirms he received instructions to enter an appearance. The exchange of e-mails was completed on Tuesday, 31 October, 2017. It appears from Mr. Millar's affidavit that he sent the appearance for filing in the Central Office on Friday, 3 November, 2017, and it was subsequently

entered on Monday, 6 November, 2017. Moreover, Mr. Millar has sworn in very clear terms that he was unaware of the involvement of O'Connor solicitors until 8 November, 2017. Thus, he could not have been aware of the exchange of e-mails concluding on 31 October, 2017 (since those e-mails referred to legal correspondence from O'Connor solicitors). In the circumstances, I have come to the conclusion that there is sufficient evidence before me to conclude that there was a mistake made by Crowley Millar in entering an unconditional appearance on 8 November, 2017 on behalf of the Defendants. That appearance was entered into on the basis of a misapprehension of fact – in particular, it was entered into in ignorance of the fact that advice had already been given and a decision had already been made not to enter such an appearance, but instead, to bring an application under Order 12, Rule 26 to set aside service of the plenary summon.

**Prejudice**

43. However, the case law shows that the court will not be prepared to allow an appearance to be set aside or discharged if there is prejudice to the Plaintiff. The case law makes clear that prejudice to the Plaintiff is a relevant consideration in any consideration by the court of an application to set aside an appearance on the grounds of mistake. Thus, for example, in the *Bradford case*, Carswell J. (at p 43) said:-

> *"….The effect of the authorities to which I have referred is that where a party or his solicitor enters an appearance under a misapprehension of fact, he may be allowed to withdraw it, at least where no prejudice has occurred as a result; but where he has taken that step ill-advisedly or through an incorrect appreciation of the law or his rights under it, he will not generally be permitted to withdraw the appearance". (Emphasis added).*

44. In the present case, it is submitted on behalf of the Plaintiff that the Plaintiff has been prejudiced. It is contended that an application to renew the summons now (brought more than six months after the expiry of the 12 month period provided for in Order 8, Rule 1) is much less likely to be granted than if an application had been brought immediately after the expiry of the 12 month period in October 2017.

45. In considering the question of prejudice, the following events seem to me to be relevant:-

(a) It appears from Exhibit "HJM2" to Mr. Millar's first affidavit that the unconditional appearance was served by e-mail sent to the Plaintiff's solicitors on 3 November, 2017;

(b) As noted above, the appearance was entered on 6 November, 2017;

(c) On 8 November, 2017, Crowley Millar e-mailed the Plaintiff's solicitors to say:-

> *"We would be obliged if you could confirm if you will consent to an amendment in our Memorandum of Appearance. We wish to amend this to a Conditional Appearance";*

(d) On the same day (8 November, 2017), the Plaintiff's solicitors e-mailed asking for clarification as to the basis on which Crowley Millar wished to amend the appearance;

(e) On 13 November, 2017, Crowley Millar responded by e-mail in the following terms:-

*"We apologise for the confusion in this matter; we received incorrect instructions.*

*It has been agreed that John O'Connor solicitors will come on record for this case and they will serve a notice of change of solicitor shortly.*

*They will address the issue in relation to the appearance";*

(f) On 15 November, 2017, Crowley Millar e-mailed the Plaintiff's solicitors in the following terms:-

> *"The parties with for the Appearance to be changed to a Conditional Appearance before O'Connor solicitors come on record. We were not aware of the background of the matter nor were we aware that O'Connor solicitors were already dealing with this when we were mistakenly instructed to come on record. O'Connor solicitors always intended on filing a Conditional Appearance.*
>
> *We'd be grateful if you could consent to the filing of the Conditional Appearance. O'Connor solicitors will come on record thereafter";*

(g) On 16 November, 2017, the Plaintiff's solicitors responded saying:-

> *"Once again we request the grounds on which you are seeking our consent to amend your client's Appearance to a Conditional Appearance. We previously sought the reason for such an amendment in our e-mail dated 8 November, 2017 but received no reply to our query";*

(h) On 20 November, 2017, Crowley Millar e-mailed to say:-

> *"Thank you for your letter of the 16th November. I phoned your office on the 17th and left a voicemail.*
>
> *The position is relatively straightforward. An error was made in this office being instructed in this matter in the first instance. We were unaware that in fact John O'Connor & Company solicitor had been instructed in the matter and it was their intention to file a Conditional Appearance. We did not receive any information about that and did not receive the instruction until after we had filed the Appearance. Consequently, we should not have been instructed at all. This is the error.*
>
> *You might kindly confirm whether or not you are prepared to consent to a change in the nature of the Appearance";*

(i) On 22 November, 2017, a further e-mail was sent by Crowley Millar to the Plaintiff's solicitors saying:-

> *"We write to advise that we are instructed to bring an application to set aside the Appearance and you should therefore disregard the request to consent to converting the Appearance into a Conditional Appearance";*

(j) On 29 November, 2017, the notice of motion seeking the relief now claimed was filed.

46. Regrettably, the e-mails sent on behalf of the Defendants in the period between 8 November, 2017 and 23 November, 2017 were not a model of clarity. No explanation was proffered to the Plaintiff as to why the Defendants proposed to change the nature of the appearance from an unconditional appearance to a conditional appearance. In particular, nothing was said that the Defendants wished to bring an application to set aside service of the summons. In my view, this should have been explained to the Plaintiff. Nonetheless, the Plaintiff's solicitors could have been in no doubt about the matter following receipt of the notice of motion filed on 29 November, 2017. That occurred within a period of less than four weeks from the date of entry of the appearance. I do not believe that this relatively short period could be said to have prejudiced the ability of the Plaintiff to renew the summons. I do not believe that a court, on an application to renew the summons under Order 8, Rule 1, would consider that the Plaintiff's position was significantly less favourable on 29 November, 2017 than it had been on 6 November, 2017.

47. It is true that a number of months have passed since the present notice of motion was filed but, in my view, the key point is that from at least 29 November, 2017, the Plaintiff and the Plaintiff's legal team were aware that the Defendants were proposing to seek to discharge the appearance and to contest the service of the summons on the basis that it had not been served within the requisite 12 month period from the date of its issue. From that point onwards, the Plaintiff and his legal advisors were therefore in a position to form a view as to what approach should be adopted.

48. In terms of prejudice, it seems to me that the key fact for present purposes is that the Plaintiff was aware within four weeks of the date of entry of the appearance that the Defendants were seeking to set aside the appearance so that they could contest the validity of service of the summons. In my view, that period of four weeks is not sufficient to give rise to any prejudice on the part of the Defendants in the context of the necessary application to be made under Order 8, Rule 1.

**Costs**

49. In the context of prejudice, one thing is clear – namely that the Plaintiff has been put to the expense of dealing with the present application arising as a consequence of a mistake to which the Plaintiff did not contribute in any way. The case law suggests that a defendant who has made a mistake in similar circumstances to the mistake which occurred here must bear the costs of the application to set aside or discharge the appearance. This was the approach that was taken by Carswell J. in the *Bradford case* (at pp 43-44) and while I will hear the parties in relation to costs, it seems to me that, subject to any submissions that may be made by the parties as to the costs, the *prima facie* position must be that the Plaintiff should be entitled to all his costs arising from the mistake which has been made which include costs of dealing with the correspondence from Crowley Millar in November 2017 and the costs of the present application.

50. Subject to any argument that may arise in relation to costs, I am therefore of opinion that this is a proper case in which to discharge the appearance entered on behalf of the Defendants by Crowley Millar on 6 November, 2017.

**Setting aside the service of the summons**

51. While I have not heard any significant argument from the parties in relation to the second relief sought, it was clear from the position adopted by the parties in the course of the hearing before me that it was acknowledged on both sides that if the appearance is discharged, it would follow that service of the summons should also be set aside pursuant to Order 12, Rule 26. This is in circumstances where, on the evidence before me, it is quite clear that the summons was served outside the 12 month period prescribed by Order 8, Rule 1, and where no application has been made to date to renew the summons. I therefore propose to make an order pursuant to Order 12, Rule 26 setting aside service of the summons in this case upon the Defendants.

52. For completeness I should mention that an argument was made during the course of the hearing on behalf of the Defendants that the jurisdiction of the court to set aside an appearance is not confined to cases of mistake. I express no view on that argument. In light of the conclusion which I have reached, I do not believe it is necessary for me to address that issue.