

THE HIGH COURT

[2024] IEHC 494

Record No. 2021 3794P

Between

START MORTGAGES DESIGNATED ACTIVITY COMPANY

Plaintiff

and

VINCENT KAVANAGH AND MADELEINE (OTHERWISE MADELINE) KAVANAGH

Defendants

Judgment of Mr. Justice Conor Dignam delivered on the 2nd day of August 2024

INTRODUCTION

1. This is the first-named defendant's application for discovery of eight broad categories of documents (each of which contains sub-categories amounting to thirty-four categories).
2. It is part of an extensive history of litigation between the parties. Indeed a central part of the plaintiff's opposition to making discovery of some of the categories is that they relate to matters which have already been determined by the courts.
3. Roberts J has previously given a judgment in these proceedings in respect of an application for interrogatories by the first-named defendant (*[2023] IEHC 131*). Noonan J has also given judgment in related proceedings (*Start Mortgages Limited v Kavanagh [2017] IEHC 433*). Both of these judgments very helpfully set out the background to these proceedings. Some background is also set out in the replying affidavit filed on behalf of the plaintiff. Neither party took issue with the summary of the background given in the affidavit or those judgments and I therefore gratefully adopt them. For ease of reference, I set out in full the background given by Roberts J. It should also be noted, because I will refer to them below, that Allen J gave judgment in respect of an injunction application by the plaintiff in these proceedings (*[2022] IEHC 114*) and Egan J gave

judgment ([2022] IEHC 348) in an application for the first-named defendant's attachment and committal for breach of Allen J's Order. Roberts J said:

"The background to this dispute and the litigation between the parties to date

5. The defendants are a married couple. By loan offer dated 13 June 2007, Bank of Scotland (Ireland) Limited, then trading as Halifax, ('BOSI') agreed to provide the defendants with a loan facility for €110,000 to purchase the property the subject of these proceedings being the property comprised in Folio 9004F of the register of freeholders Co Carlow (the 'Property'), which was to be their home. The defendants entered into a deed of mortgage with BOSI on 6 July 2007.

6. The defendants executed a first legal charge over the Property in favour of BOSI which secured the loan on the Property in compliance with the deed of mortgage. This charge was registered as a burden on the Property by BOSI on 21 September 2007.

7. BOSI transferred all its assets and liabilities (including the charge on the Property) to its parent company, Bank of Scotland plc ('BOS') by operation of law with effect from 23:59 hours on 31 December 2010. This transfer was effected by cross-border merger pursuant to European Communities (Cross Border Mergers) Regulations 2008 of Ireland and the Companies (Cross Border Mergers) Regulation 2007 of the United Kingdom approved by the High Court of Ireland on 22 October 2010 and by the Scottish Court of Session on 10 December 2010.

8. On 11 October 2014, BOS sold its loan portfolio and related securities, including the security on the Property, to LSF IX Paris Investments Limited ('LSF') by way of purchase deed.

9. On 14 January 2015 LSF exercised its entitlement under the purchase deed to nominate the plaintiff to purchase what are described as the purchased assets.

10. On 3 February 2015 an accession deed was entered into between BOS and the plaintiff pursuant to which the plaintiff assumed certain of LSF's obligations under the purchase deed and became entitled to acquire the purchased assets. Accordingly, the plaintiff became the legal assignee of the defendants' mortgage and security on the Property in February 2015.

11. The plaintiff became the registered owner of the former BOSI charge on the Property on 10 April 2015.

12. On 28 May 2015 the plaintiff was substituted for BOS in Circuit Court proceedings which BOS had issued against the defendants on 21 October 2013 seeking possession of the Property arising from the defendants' default under their loan secured on the Property.

13. On 14 June 2016 the Circuit Court granted an Order for possession of the Property to the plaintiff.

14. The defendants did not appeal the Circuit Court Order within the time limited by the RSC and, in December 2016, they issued a motion seeking an extension of time to appeal. That extension of time was granted by the Master of the High Court.

15. The appeal to the High Court was heard by Noonan J (under proceedings 2016/279 CA in the matter of *Start Mortgages Limited v Kavanagh* [2017] IEHC 433) who delivered judgment on 4 July 2017 dismissing the appeal. At para 26 of his judgment Noonan J stated: "I am satisfied therefore that the plaintiff's proofs are now, and were at the time the matter was before the Circuit Court, perfectly in order and the plaintiff is entitled to judgment for possession accordingly".

16. An Execution Order issued from the Circuit Court office on 14 March 2019 in respect of the Property.

17. The plaintiff's evidence is that its first attempt to execute the Order on 18 November 2019 was opposed and abandoned. The plaintiff successfully effected possession of the Property on 17 February 2020 but later that day the defendants and/or persons acting on their instructions forced entry into the Property and regained physical possession.

18. This situation gave rise to the current proceedings which commenced by plenary summons on 19 May 2021 in which an application was made by the plaintiff for an interlocutory injunction restraining the defendants, their servants or agents, from trespassing upon or otherwise entering the Property.

19. The application for injunctive relief was heard by Mr Justice Allen who delivered his judgment on 3 March 2022. At paragraphs 2 and 3 of his judgment Allen J stated: "Start is plainly entitled to the order which it seeks.... In truth it is a perfectly simple case. Mr and Mrs Kavanagh have defied the process of the law".

20. Allen J sets out in some detail the defence offered by the defendants and the arguments advanced (at paras 22-56 of his judgment). At paragraph 56 of his judgment Allen J states

"This is not a case of a mortgagee or receiver seeking to take the law into his own hands but of a mortgagee who was put into possession of the mortgaged property in accordance with law by an officer of the Circuit Court duly authorised by law. The force which was used – and which Mr. Kavanagh does not suggest was not entirely necessary – was lawfully used."

21. Allen J granted interlocutory relief to the plaintiff to which he stated (at para 57) the plaintiff was "entitled as a matter of right". The interlocutory Order made in terms restraining the defendants from trespassing upon or entering the Property remains in place pending the trial of these proceedings.

22. A further application was made by the plaintiff to the High Court on 31 May 2022 seeking an Order pursuant to Order 44, RSC for the attachment and committal of the first named

defendant and three other named individuals for their alleged failure to comply with the Order of the High Court (Allen J) made on 3 March 2022.

23. That application was heard by Ms Justice Egan who delivered her judgment on 2 June 2022 (*Start Mortgages DAC v Kavanagh [2022] IEHC 348*). In para 23 of her judgment she states:

"In this case I find that, in continuing to trespass upon the property, the first named defendant wilfully disobeyed the order of 3rd March 2022. Further, I am satisfied, beyond a reasonable doubt, that the first named defendant was fully aware of the order and of the consequences of breaching it. I am further satisfied that the first named defendant has been afforded abundant opportunity to comply with the order of 3rd March, 2022, up to and including immediately before I delivered judgment, but has repeatedly and steadfastly refused to do so. I am therefore satisfied beyond reasonable doubt that the first named defendant is in breach of paragraph 1 of the order of Allen J. of 3rd March, 2022 and in contempt of court by trespassing upon or otherwise entering the property."

24. There is no direct evidence before this court regarding what occurred after the Order of Ms Justice Egan was made although it appears that the first defendant was imprisoned for a period of time for contempt of court.

25. In his affidavit sworn 23 August 2022, the first named defendant confirms at para 9 that "over this past weekend it has come to my attention that an application is pending in the PRA against the family dwelling." This is the affidavit grounding the PRA Motion to which I will return.

26. At the hearing of this matter on 28 February 2023, counsel for the plaintiff confirmed to the court that the Property has been sold to a third-party purchaser, Mr Damien Cleary, and that the defendants are no longer in possession of the Property. In those circumstances it appears that the plaintiff's claim in these proceedings is now a claim for damages for a period of approximately 18 months during which the defendants are alleged to have trespassed on the Property.

27. The defendants have delivered a detailed defence and counterclaim. Given the relevance of this to all the motions before this court, I now propose to consider this pleading in some detail."

4. These proceedings were instituted by Plenary Summons on the 19th May 2021 seeking an injunction restraining the defendants and any persons acting in concert with them from trespassing upon the property, and damages for trespass and breach of contract. The plaintiff pleaded some of the background matters set out above and pleaded that after the plaintiff successfully effected possession on the 17th February 2020 on foot of the Order for Possession the defendants and/or persons acting on their instructions forced entry into the property and regained physical possession. An interlocutory injunction application was made which led to Allen J's judgment and ultimately Egan J's judgment.

5. It is stated at paragraph 16 of the plaintiff's replying affidavit that the property has now been sold and the proceeds of sale applied to the first-named defendant's indebtedness. This is not disputed by the first-named defendant. The effect of this is that the plaintiff's claim must now be limited to the claim for damages for trespass and breach of contract presumably from the date on which the first-named defendant went back into possession to when the plaintiff regained possession.
6. Roberts J also helpfully summarised the matters raised in the first-named defendant's Defence and Counterclaim. This is particularly helpful in light of the confusing nature of the Defence and Counterclaim. Again, neither party disagreed with this summary and I therefore adopt it. Roberts J said:

"28. The defence and counterclaim is dated 26 May 2022. It purports to be delivered only on behalf of the first named defendant and confirms that the second named defendant has left the Property. The document suffers from confusing and unusual drafting common to many cases in which parties are advised by persons who are not legally qualified. However, I have reviewed it in detail and the following is a summary of the general arguments and statements advanced by way of defence:

- (1) The plaintiffs have not lawfully sued the defendants. This argument appears to relate to a claim that there is no evidence as to the terms on which the plaintiff resolved on a corporate level to sue the defendants and no evidence of the basis on which the plaintiff instructed its own solicitors or authorised them to swear affidavits on behalf of the plaintiff.*
- (2) The property is a constitutionally protected family dwelling and is inviolable under the Constitution.*
- (3) The plaintiff has no direct knowledge of the loan offer, mortgage or registration which occurred in 2007 and possesses no originating paperwork. The plaintiff therefore cannot rely on or give evidence on these matters. Any evidence the plaintiff gives of matters prior to February 2015 is hearsay and inadmissible.*
- (4) The transfer/assignment of the defendants' loans and security to the plaintiff was unlawful. The BOSI burden on the folio was cancelled on 9 April 2015 and the plaintiff did not register any charge on 10 April 2015, as alleged.*
- (5) There were never Circuit Court possession proceedings issued on 21 October 2013 as BOS were not registered as owners of any burden on that date. The instrument being relied upon was not revenue stamped and does not legally exist and this defect can never be cured. The claim that the plaintiff was "substituted" in the proceedings "is the first admission of deception and dishonesty before the Courts".*

- (6) *There was no Order of the Circuit Court on 14 June 2016 as there was no civil bill for possession.*
- (7) *The fact that the High Court on 4 July 2017 failed to set aside the "instrument of 14 June 2016" is immaterial and moot as there was never a Circuit Court Order for possession.*
- (8) *The production of two different instruments in the High Court was fraudulent and neither one lawfully issued from the Carlow Circuit Court office. There was never a lawful Order of possession. The County Registrar for the County of Carlow never put the plaintiff in lawful possession of the Property.*
- (9) *The plaintiff unlawfully gained possession of the Property on 17 February 2020 and used force to do so. It was the plaintiff who was the trespasser on the Property when it sought to unlawfully enter it.*
- (10) *The defendants are entitled not to hand over possession of the Property "to false claimants relying on false claims to deceive them and the Courts in Ireland".*
- (11) *The defendants are not indebted to the plaintiff. The plaintiff is not a bona fide lender or mortgagee.*
- (12) *Even if the plaintiff was a lawful mortgagee in possession it would "be legally obliged to not sell the family dwelling for the currency of 12 years pursuant to the provisions of s. 54 Statute of Limitations 1957; such lawful provision for any mortgagor's right to redeem a mortgage.". The plaintiffs are wilfully ignoring a mortgage redemption demand of 22 October 2021 pursuant to s. 121 of the Consumer Credit Act 1995.*

29. *The counterclaim is lengthy. However, most paragraphs simply repeat or expand on what is proffered by way of defence, for example in relation to the appointment of the plaintiff's solicitors and the allegations that the plaintiff has ignored the statutory demand for redemption and that the burdens have not been registered or the documents stamped. The defendants allege that they are not in breach of the Order of Allen J dated 3 March 2022 because they have not received a "judicially signed and approved judgment" or a perfected High Court Order. It is alleged that the plaintiff "in a consistent pattern of acting dishonestly" purported to issue a notice of motion for attachment and committal. This is stated to be an instrument of no legal standing as the purported penal endorsement was not signed or dated. It is alleged that the plaintiff is attempting to "steal private property contrary to Criminal Justice Acts." Para 43 of the Counterclaim states that*

"If the Plaintiff ..proceeds to unlawfully sell the family dwelling, by any means, then any person(s) purporting to purchase same shall be satisfied to have been made a party to those claimed criminal actions, especially whereby a defaulted Demand to Redeem is in place from the Defendants prior to any such unlawful sale".

30. *Twenty-nine separate reliefs are sought by the first named defendant. These include:*

- (1) *Declarations that the pleaded registrations or court Orders did not or could not issue and, to the extent that they did, they are of no legal effect or force. A declaration is sought that the plaintiff is trespassing on the Property;*

- (2) *Various Orders including:*
 - (i) *an Order for An Garda Síochána to undertake certain investigations;*

 - (ii) *an Order to strike off the plaintiff's solicitors;*

 - (iii) *an Order compelling the plaintiff to produce receipts and loan documentation;*

 - (iv) *an Order cancelling the registered burdens;*

 - (v) *an Order declaring any sale of the defendants' lands unlawful and, if sold, an Order to declare such sale void and that it be reversed, including any registrations made in the PRA;*

 - (vi) *an Order compelling the plaintiff to "facilitate Statutory Mortgage Redemption", and, if they fail to do so, an Order that the first named defendant be at liberty to issue a motion for attachment and committal against the directors of the plaintiff;*

 - (vii) *an Order for damages under various headings including aggravated and exemplary damages, "summary compensation in lieu of costs", interest and consequential Orders.*

31. *The general approach of the defendants in this case is to argue that the Orders already made by the courts in these and related proceedings are invalid and that the defendants are not obliged to comply with them. This is, unfortunately, a common theme that arises where litigants, having exhausted the formal court appeals process without success, then argue that the Orders themselves are invalid and/or seek to re-litigate issues which are res judicata. Both of these approaches are taken by the first named defendant in his defence and counterclaim. He also seeks Orders which it would be simply impossible for him to obtain in these proceedings such as those sought against the Gardaí or the plaintiff's solicitors. All of these matters will be for the trial judge to ultimately determine. I intend however to deal with the motions before me on the basis that the court Orders made to date are valid and binding on the parties, and that the evidence of registrations and other matters relied on in those court hearings have already been properly determined as a matter of fact."*

7. That challenges to earlier proceedings and Orders form a central part of these proceedings is absolutely clear from the Defence and Counterclaim. For example, and I

stress that this is just one example, it is pleaded at paragraphs 6 and 7 of the Defence and Counterclaim that:

"6. As per SoC para. 6 there was no order of the Circuit Court on 14th June 2016 as there was no Civil Bill for possession and also no party with the required standing of a registered burden over lands to ground any instrument such as that of a Court Order for possession.

7. As per Soc para. 7 the First Named Defendant was not obliged to appeal that instrument of 14th June 2016 but for completeness only did so. That the High Court on 4th July 2017 failed to set same aside is immaterial and moot as there was never a Circuit Court Order for possession. The Plaintiff of course falsely deemed the dismissal made good that which does not legally exist. It did not and it cannot ever be made Good and all that stems from it is both void and a fraud while maintained."

8. The plaintiff joined issue by way of Reply and Defence to Counterclaim. I deal with some of the individual pleas later but for present purposes it can be noted that some general thrusts of the Reply and Defence to Counterclaim are that the first-named defendant fails in his Defence and Counterclaim to engage with a number of key facts in the Statement of Claim, that some claims are frivolous and vexatious, and that large sections of the Counterclaim are res judicata as having been decided by Noonan J and Allen J in the judgements referred to above.

REQUEST FOR VOLUNTARY DISCOVERY

9. The first-named defendant sought voluntary discovery on the 20th April 2023. As noted above, he sought eight categories of discovery. Within each of those categories he sought specified documents or sub-categories of documents. I return to those individual categories during the course of this judgment but one feature of them is that the first-named defendant sought "An attested to be true copy" of the document or category of documents. The eight categories which he sought were:

1. Capacity and Standing of Plaintiff to issue High Court Plenary Proceedings;
2. Documentation of Title, incorporating Loan contract and Mortgage Deed;
3. Purported sale by the Plaintiff of 36 Beechwood Park;
4. Chain of Title of claim from Bank of Scotland (Ireland) Limited through to Plaintiff;

5. Circuit Court Possession Claim and Appeal of same in High Court;
 6. Execution;
 7. Imprisonment of the First Named Defendant;
 8. Claimed Indebtedness of the Defendants to the Plaintiff.
10. Following service of the request for voluntary discovery (but before the plaintiff had replied substantively to the request) the first-named defendant also served a Notice to Admit Facts on the 12th May 2023.
11. By two letters of the 22nd May 2023, the plaintiff's solicitor replied to the Notice to Admit Facts and the request for voluntary discovery. In relation to the first of these, they simply stated *"We have reviewed the facts set out in your Notice and we confirm none of the facts are admitted. The matters remain contested between us but there is nothing to admit."* In relation to the request for voluntary discovery, the plaintiff agreed to provide discovery of:

"Category 2(4), "An attested to be true copy of Title Deeds to 36 Beechwood Park, Carlow, Co. Carlow, being the lands comprised in Folio 9004F County Carlow ("36 Beechwood Park");"

Category 3(5), "An attested to be true copy of a purported executed contract for sale of 36 Beechwood Park again from the timeframe mid June – end August 2022";"

Category 3(6), "An attested to be true copy of a purported Deed of Conveyance of 36 Beechwood Park entered into circa mid June – end August 2022";"

Category 7(28), "An Attested to be true copy of a lawfully subscribed penal indorsement by the Plaintiff on High Court Order perfected 3rd March 2022 with proof of service of said penal indorsed Court Order";"

Category 7(29), "An Attested to be true copy of a signed and dated filed Attachment and Committal motion";"

Category 7(30), "An Attested to be true copy of all documents used to engage An Garda Síochána to force entry to the dwelling of the Kavanagh family at 36 Beechwood Park on the morning of 31st May 2022";"

Category 7(31), "An Attested to be true copy of the licence relied upon by the security force used by the Plaintiff to occupy the family dwelling of the Kavanagh family at 36"

Beechwood Park once An Garda Síochána used Force to remove the First Named Defendant”; and

Category 7(33), “An Attested to be true copy of the arrest warrant/document(s) relied upon by the Plaintiff for the First Named Defendant to have been arrested prior to being committed to prison.”

They provided copies of those documents. Some of them were redacted.

12. They refused to make discovery of the other documents or categories of documents for the following reasons:

- (i) Category 1 is neither relevant or necessary;
- (ii) The balance of the documents in Category 2 and the documents in Category 4 are neither relevant nor necessary. They deal with matters which are res judicata because those matters were the subject of a Circuit Court decision which was approved by the High Court;
- (iii) Category 5 is neither relevant nor necessary, and the documents specified therein are directed towards trying to impugn the rulings of the Circuit Court and High Court;
- (iv) Category 6 is neither relevant nor necessary. The matters with which they are concerned which the defendants seek to impugn have been the subject of review by the High Court and have been found to be regular;
- (v) The documents in Category 7 are in the main unnecessary and vexatious on the basis that the first-named defendant is not entitled to seek to put in question the manner in which the attachment and committal process was carried out. Some documents from Category 7 were being discovered but this was being done “for ease”;
- (vi) Category 8 is neither relevant nor necessary.

The plaintiff’s solicitor also urged the first-named defendant to read the above judgment of Roberts J as “*yet another iteration of why some of the points you seek to make are neither relevant nor necessary to your defence and counterclaim.*”

13. By letter of the 9th June 2023 (and schedule attached thereto) the first-named defendant responded to the plaintiff’s position. Firstly, he made the point that by stating that all facts remain contested (in response to the Notice to Admit Facts) the plaintiff was

conceding that all documents sought by voluntary discovery exists but the plaintiff was refusing to make discovery of them. I should pause to say that this position is misconceived and is redolent of an approach which is sometimes seen in cases involving litigants-in-person where they write making a demand, fixing a deadline for compliance, and state that failure to comply with that demand shall be deemed to have certain legal consequences nominated by the author. Secondly, the first-named defendant addressed the discovery which had been agreed to (and the documents which had been furnished) and set out why he claimed proper discovery had not been made by the plaintiff. He pointed out that the only document that was provided under sub-category 2(4) was a purported copy mortgage deed and this was not the "Title Deeds" sought and agreed to be provided. In relation to sub-category 3(5) (the executed contract for sale of the property) he contended that the document was not an intact instrument as it displayed no terms and conditions of purported sale and it contained impermissible redactions. In relation to sub-category 7(31) (the licence relied upon by the security force used by the plaintiff) he noted that no such licence was produced and made the point that the plaintiff had therefore accepted "*that there was no licensed security firm on 31st May 2022 unless the same is now separately discovered.*" A locksmith licence was produced but, he pointed out, inter alia, it was only effective since 3rd February 2023. He raised no issue about the discovery of sub-categories 7(28), (29), (30) and (33). He then addressed the plaintiff's refusal to make discovery of the other categories or documents. He went through each category and set out the first-named plaintiff's position in great detail. Interestingly, despite addressing the categories in such detail, the first-named defendant in his reply did not really address the point that the matters with which many of the categories are concerned (and the reasons for which they are sought) are res judicata.

14. The plaintiff's solicitor replied on the 7th July 2023, stating "*The documents provided are those which are relevant and necessary and we will not be making discovery of any other categories. We urge you to carefully review the documents in light of the pleadings and to consider Start's position that the matters are not relevant and necessary. The provision of discovery is entirely predicted (sic) on the pleadings and the test of relevance and necessity are judged by reference to the pleadings. In seeking further documentation you are going beyond what is necessary and therefore we suggest it is vexatious.*"
15. That is where matters stood and the first-named defendant then issued this motion for discovery. As noted above, some sub-categories have been provided and the first-named defendant makes no complaint about them. He has rejected the purported discovery of sub-categories 2(4), 3(5) and 3(6) on the basis either that they are incomplete or are inappropriately redacted. I have, therefore, approached these on the basis that there is no agreement for discovery in respect of these categories and will first determine whether

those sub-categories are discoverable and, if they are, whether the discovery that has been made is adequate or not.

GENERAL POINTS

16. Before dealing with the individual categories it may be helpful to address four general points.
17. The principles in relation to discovery are well-established and there was no dispute in relation to those principles. They are helpfully set out at paragraph 29 of the judgment of the Court of Appeal in *BAM v National Treasury Management Agency [2015] IECA 246*. It is entirely unnecessary to set them out other than to recall that the documents sought must be relevant and necessary, relevance and necessity must be assessed by reference to the pleadings, and discovery must be proportionate. The burden of proving relevance, necessity and proportionality is on the party seeking discovery. That relevance and necessity must be assessed on the issues disclosed by the pleadings is clear from *BAM v NTMA*. At paragraph 35 of the judgment the Court said:

"35. The first task in a discovery application is to ascertain the issues that arise on the pleadings. The Court's function in the substantive case is to decide on the issues put before it by the parties; it does not possess a power to engage in a roving investigation of the relationship between the parties or of the circumstances that gave rise to the proceedings. It is a question of jurisdiction and function fundamentally. The Rules of the Superior Courts require that claims be stated and defended and that particulars be furnished to enable the parties to know the case they have to meet. In the case of the claimant that consists of the statement of claim or equivalent pleading document. For a defendant or respondent party meeting the case, clarity of pleading is also required. The point is that each side should know what the other's position is so that it can address the matters that are in dispute and can take for granted those that are undisputed."

This is also reflected in paragraphs 38 and 40 of the judgment in *BAM v NTMA*.

18. Secondly, the mere fact that an issue is raised in the pleadings is not sufficient to satisfy the test of relevance, necessity and proportionality. Otherwise, a litigant could deliver an extremely wide and far-reaching pleading and then assert a right to extremely broad discovery by pointing to the fact that an issue is raised in the pleadings. On a general level, rather than specific to this case, there is considerable force in the point made in the replying affidavit of the plaintiff that, for example, where a pleading seeks to agitate matters which are *res judicata*, or seeks to impugn the rulings of the Circuit Court and High Court, and seeks to make vexatious claims which attack an attachment and

committal process, this must be "*factored into the calculus of what is relevant and necessary.*" The general point is that while discovery can only be ordered if it is relevant to an issue raised in the pleadings, the mere fact that an issue is raised in the pleadings can not automatically lead to discovery.

19. Thirdly, as noted above, the plaintiff, in the case of each sub-category of documentation, seeks "*An attested to be true copy of*" the documents. He complains in his reply to the discovery that was made that the documents that were provided were not "*attested to be true copies.*" While he does not rely on this failure for continuing to seek discovery, he does appear in his motion to continue to seek copies which are attested to be true. It seems to me that this is sought on the basis of a misunderstanding of the discovery process. What is required where discovery is ordered or made on foot of an agreement to make voluntary discovery is for the party making discovery to swear an affidavit as to the documents which are in their possession, power or procurement or which were, but are no longer, in their possession, power or procurement. The party seeking discovery can then seek inspection of the documents or, as is more usually the case, can seek to obtain copies of the documents from the party making discovery. They can then seek inspection of the originals. The question of the validity of the documents or the copies of those documents is a matter for that later stage and not for when discovery is being made. Furthermore, an Order for the provision of "*Attested to be true copies*" of documents goes beyond what is encompassed by discovery. It requires the party to do something with the documents in their possession, power or procurement, whereas a discovery order is meant to be an Order directing the party to list the documents which are in their possession.
20. Fourthly, the overarching point made on behalf of the plaintiff in respect of very many of the documents sought is that they are not relevant or necessary and discovery would not be proportionate because they concern matters which are res judicata or are directed towards a collateral attack on earlier Court Orders. The same argument in relation to the motion for interrogatories was helpfully summarised by Roberts J where she said at paragraph 45 of her judgment "*First, the plaintiff says that the proposed interrogatories are vexatious because, using the counterclaim as their springboard, they seek to make enquiries about matters which are res judicata, as if they were as yet undecided.*"
21. This potentially gives rise to the question of whether discovery can be resisted on that basis without a motion being brought to strike out or dismiss the proceedings on the grounds that the proceedings are res judicata, frivolous and vexatious and an abuse of process. However, that argument was not made by the defendant notwithstanding that the point that discovery could not be obtained because it concerned matters which were res judicata was raised front and centre by the plaintiff from the time of their solicitor's response to the request for voluntary discovery.

22. Furthermore, Roberts J determined the first-named defendant's motion for interrogatories where the same issue arose and refused a large number of the interrogatories on the basis that they were directed towards matters which are res judicata. Order 31 Rule 2 of the Rules of the Superior Courts confirms that the Court should only grant leave for the issue of "*such interrogatories as shall be considered necessary either for disposing fairly of the cause or matter or for saving costs.*" Thus, it is a very similar test to the test for discovery. Roberts J was satisfied that she should not permit the issue of interrogatories in relation to matters which had already been determined by the Circuit Court and High Court. For example, in relation to the transfer of loans from BOSI to BOS, she said (at paragraph 49) that "*While this transfer is pleaded in the statement of claim to establish the plaintiff's title to the defendant's loan and locus standi to bring these proceedings, the Circuit Court and High Court on appeal have already determined the validity of that transfer by making the Order for possession of the Property as previously set out in this judgment. In those circumstances, this matter is res judicata and cannot now be re-litigated by Mr. Kavanagh in these proceedings by including same in his counterclaim*"; in relation to interrogatories concerning the "*Purported sale of 36 Beechwood Park*", Roberts J said that "*Some of these interrogatories deal with historic title queries aimed at challenging the transfer of the loan and security from BOSI to BOS and from BOS to the plaintiff. This matter has already been accepted by the courts and I will not give leave to issue interrogatories dealing with these res judicata matters*" and, in relation to "*Events leading to, and imprisonment of, First Named Defendant*" she said "*I fail to see the relevance of these questions to the current proceedings in circumstances where there was no appeal by the first named defendant against the Order of Mr. Justice Allen and where an Order for committal was made by Ms. Justice Egan, as previously set out in this judgment. I refuse leave to issues these questions.*"
23. In circumstances where the first-named defendant did not raise this point and where Roberts J so recently, in a motion in these same proceedings concerning the same test, proceeded without there first being a motion to strike out, and where there is no good reason for me to depart from that approach, I believe that I should follow that approach.

CATEGORIES OF DISCOVERY

Category 1

24. Category 1 is documents relating to "*Capacity and Standing of Plaintiff to issue High Court Plenary Proceedings*". The individual sub-categories are

"1. An attested to be true copy of the Resolution of the board of Start Mortgages DAC company number 391445 to have decided to issue High Court Plenary Number 2021 3794 P

2. An attested to be true copy of the Regulated activities that Start Mortgages DAC are regulated to undertake in statutory based housing loan lending in Ireland as per their licence to be a 'Retail Credit Firm' and the regulated activities as per their secondary claimed role to be a 'Specialised Mortgage Servicer' from the years 2015 to date hereof."

25. In relation to the first of these, the reason given as to why discovery is sought is that "*An Irish registered company cannot act through its officers, or through A.N. Other(s) in legal matters. The legal consent of the company must exist for the company to sue. The only way said consent can exist is through a resolution of the board. No such legal consent has ever been produced or is evidenced on company filings. The Plaintiff's own claims as to limited capacity in paragraph 1 of their Statement of Claim do not state they are both lender and mortgagee with full legal and equitable capacity to be able to act as a Plaintiff in their own name.*"

26. This seems to be grounded in paragraph 1 of the Defence and Counterclaim which pleads, inter alia, "*...Start...have not lawfully sued the Defendants pursuant to company law and pursuant to the Solicitors Act 1954 as amended. There is then no legal consent that Start consented to a) having sued the Defendants for any reliefs in the matter and b) to then having lawfully instructed Ms. Antoinette Roche, Ms. Mairéad Ní Ghabháin and others to swear affidavits for that company at all material times. Persons then are unlawfully using the name 'Start Mortgages Designated Activity Company' to sue and as they do so they are personally liable.*"

27. This plea is difficult to understand but it seems to mean that there is no decision of the company to institute proceedings. It seems from paragraph 11 of the first-named defendant's grounding affidavit that the core of the reason for seeking this category is to assert that the plaintiff should not have obtained relief from Allen J or indeed Egan J. The first-named defendant says "*As but one example of the untenable position the Plaintiff finds themselves in they have made very certain claims as to their capacity in their Statement of Claim but are now refusing to validate and verify the extent of same, even as it pertains to statute. That is a gross abuse of court process and procedure to have a) sued the Defendants in a Plenary Manner, to then b) refuse to verify and validate sufficient lawful capacity to have sued, especially where c) I lost my personal liberty for fifteen days at the hand of the Plaintiff. Unless they provide Discovery of their as of now purported capacity to have sued me and the second named Defendant then they cannot*

provide proofs of capacity to have sued us and then not only was Judge Senan Allen coerced and deceived by them but I was formally and officially falsely imprisoned contrary to s.15 Non-Fatal Offences Against the Person Act 1997."

28. This is a wholly invalid reason for seeking this category of documents. The time to have raised any alleged deficiency in the plaintiff's entitlement to or capacity to seek relief from Allen J (or Egan J) was before those judges and/or by way of appeal from the decision of those judges. He can not now seek documents to retrospectively challenge those decisions. I do not believe that discovery is relevant, necessary or proportionate where it is directed towards prosecuting that sort of collateral challenge.
29. There is reference in the reasons for seeking this sub-category to the appointment of the plaintiff's solicitors. However, no documents are sought. In any event, Roberts J held in relation to interrogatories relating to "*Matters as to appointment of solicitor(s)*" that: "*[T]he manner in which the plaintiff has instructed its own solicitors, and their internal governance and status under the Solicitors Act 1954 or otherwise is not relevant to the claim against the defendants and Mr. Kavanagh cannot make it thus by including it in his counterclaim.*"
30. In relation to the second sub-category, the reason given for requiring discovery is that "*The plaintiff does not claim to be a bank as per Replies to Interrogatories sworn on 13th April 2023 and they then rather claim to be a limited 'Retail Credit Firm' and Specialist Mortgage Servicer' so the boundaries and limitations of both of those capacities need to be laid down. The Plaintiff's own annual company accounts do not make claim to that company being a housing loan lender and mortgagee in Ireland.*" There is nothing pleaded in the Defence and Counterclaim to ground this sub-category and it is not discoverable.

Category 2

31. Category 2 seeks "*Documentation of Title, incorporating Loan contract and Mortgage Deed*". The sub-categories sought are:

3. *An attested to be true copy of Document(s) confirming that Bank of Scotland (Ireland) Limited Trading as Halifax with a place of business of PO Box 40, Dundalk, Co. Louth was by way of constitution and establishment Bank of Scotland (Ireland Limited, company number 545 with registered office of Bank of Scotland House, 124-127 St. Stephens Green, Dublin 2 on dates of 13th June 2007 and 6th July 2007.*

4. *An attested to be true copy of Title Deeds to 36 Beechwood Park, Carlow...being the lands comprised in Folio 9004F County Carlow ("36 Beechwood Park")"*

32. These clearly relate to matters which have already been determined by the Circuit Court and the High Court on appeal and on the basis of the discussion above are not discoverable. I address this further in relation to Category 4.
33. However, even if I am wrong on this, I am not satisfied that the first-named defendant has given good reason for saying that these sub-categories are relevant and necessary by reference to the pleadings.
34. The first reason the plaintiff gives for seeking discovery of these sub-categories is that the plaintiff relies on certain documents in the Statement of Claim (the first-named defendant refers to the loan offer secured by a Mortgage and Charge Deed, a Mortgage and Charge Deed of the 6th July 2007, and a charge in the name of company number 8545). The plaintiffs do not "rely" on the documents referred to by the first-named defendant. The plaintiff relies on the Order of the Circuit Court of the 14th June 2016, the Order of the High Court of the 4th July 2017 to pursue its claim in trespass and for damages for trespass. Of course, the plaintiff had to rely on those documents to obtain those Orders from the Circuit Court and the High Court but this highlights that what is sought to be done in this application is to obtain documents for the purpose of going behind those earlier Orders.
35. The second reason that the first-named defendant gives, specifically in relation to sub-category (4), is that he has a counterclaim either to strike out the charge registered on Folio 9004F or for a Court Order to compel the "*facilitation of Redemption by the Plaintiff*" and that in either case the plaintiff would have to be able to remit the title deeds to the defendants. He refers in correspondence to having a "*Counter Claim statutory requirement in place to be facilitated with s.121 Consumer Credit Act 1995 redemption of claim and Start would pursuant to same in any event be required to produce an originating loan contract and mortgage deed to in turn receipt same as to being paid in full when Redemption is now Court Ordered.*" The fact that the first-named defendant has a counterclaim either to strike out the charge registered in Folio 9004F or "*to compel under Court Order the facilitation of Redemption by the Plaintiff*" and has a "*claim to reverse any purported sale of 36 Beechwood Park, inclusive of any registration made by the Property Registration Authority*" can not make the documentation discoverable. In relation to the claim that the plaintiff should be required to facilitate redemption and that if the loan is redeemed the title deeds will have to be remitted, that does not require discovery at this stage because that relief has not been granted. It is also worth noting that Allen J said "*Section 121 of the Act of 1995 provides for an exemption – save in the case of a fixed interest rate loan – from any liability to pay a redemption fee in the event of early repayment of a housing loan. It has nothing to do with this case.*"

36. The defendant did raise other points at the hearing but these are not grounded in the pleadings.

Category 3

37. In Category 3, the first-named defendant seeks discovery of documents relating to "Purported Sale by the Plaintiff of 36 Beechwood Park". The sub-categories are:

"5. An attested to be true copy of a purported executed contract for sale of 36 Beechwood Park again from the timeframe mid June – end August 2022.

6. An attested to be true copy of a purported Deed of Conveyance of 36 Beechwood Park entered into circa mid June – end August 2022.

7. Attested to be copy of documents entered into by the Plaintiff with the purported purchaser of 36 Beechwood Park, inclusive of via his solicitor Ms. Anne Fitzpatrick of Anne Fitzpatrick & Co Thurles, Co. Tipperary.

8. An attested to be true copy of document(s) showing the destination, thus beneficiary, of the transfer of funds from the Client Account of O'Brien Lynam Solicitors located at Ulster Bank Baggot Street with Sort Code 9985020 Account Number 13287436 to their Client for the purported sale of 36 Beechwood Park.

9. An attested to be true copy of the Stamp Duty document(s) remitting those stamp duty taxation fees to the Revenue Commissioners in Ireland."

38. The plaintiff has agreed to make discovery of the documents at sub-categories (5) and (6) but the first-named defendant has rejected this due to redactions. I therefore consider in the first instance whether they are in fact discoverable.

39. I am not satisfied that Category 3 is discoverable. It is not based on any legitimate contents of the pleadings. The delivery of the Defence and Counterclaim predates the sale of the property and therefore does not include any legitimate pleas in respect of such sale. The Reply and Defence to Counterclaim and the Reply to Defence and Counterclaim do not deal with this issue at all. The only reference to a "sale" is in relief number 64 in the Counterclaim which seeks "If any unlawful sale of the Defendants lands effect then an Order is made to declare the same void and is to be reversed in full inclusive of any unlawful registration(s) made in the Property Registration Authority." This is not a proper form of relief. It is directed towards something which at that time might or might not happen. If the defendant wished to challenge the sale and to seek discovery of documents relating to it then an application to amend the pleadings should have been brought. As

discussed above, the question of discovery is to be determined by reference to the issues in the pleadings and not the issues in the broader dispute between the parties.

40. Even if it was an issue arising on the pleadings I would not be satisfied that the reasons advanced by the defendant had discharged the burden of establishing that these sub-categories are relevant and necessary. Of course, the following discussion and conclusion has to be somewhat hypothetical in circumstances where the claim has not in fact been made.
41. No proper reasons at all are given for sub-categories (5) and (6).
42. The reason for seeking sub-category (7) is *"to ascertain if the purported purchaser had full disclosure from the Plaintiff that a Plenary Claim/Defence/Counterclaim was before the High Court and that Redemption call was open before the Plaintiff, more specifically was he made aware of paragraph 43 of Counterclaim that he would be satisfied to be a party to alleged criminal actions by the Plaintiff and their agents."* I fail to see how these are relevant and necessary as between the plaintiff and the first-named defendant. If matters which should have been disclosed to the purchaser were not disclosed to him that is a potential matter between the purchaser and the plaintiff. Alternatively, if it is alleged that the purchaser is guilty of a wrong to the defendants that is matter between them and the purchaser.
43. I am not satisfied that the first-named defendant has shown that sub-category (8) is relevant and necessary. The reason for seeking this sub-category is that *"In Interrogatories Reply sworn 13th April 2023 Antoinette Roche side stepped the question (No:115) by focusing only on the word 'claim', i.e. that their claim did not reference that account number and so she answered N/A with a qualifier. However, the purported seller, thus purported beneficiary of sale of 36 Beechwood Park must have received those monies through this Bank Account. Ms. Roche merely stated the Plaintiff has no such account at that Bank – a question not asked. Therefore the beneficiary of the transfer of funds from Mr. Damien Cleary or from Precision Property Investments Limited is sought."* I am not satisfied that the plaintiff has discharged the burden of showing how the reason is connected with any issue in the proceedings as defined by the pleadings.
44. Sub-category (9) is *"the Stamp Duty document(s) remitting those stamp duty taxation fees to the Revenue Commissioners in Ireland"*. The reason given for seeking this category is that these documents are relevant and necessary *"to ascertain the Declarations that were made to the Revenue Commissioners of capacity and standing of the purported seller and the type of purported sale of 36 Beechwood Park."* I am not satisfied that this category is relevant or necessary to resolve any issue defined by the pleadings.

Category 4

45. Category 4 is directed towards the previous proceedings. It seeks documents relating to "*Chain of Title of claim from Scotland (Ireland) Limited through to Plaintiff*". The sub-categories sought are:

"10. An attested to be true copy of a Deed of Assignment to Bank of Scotland PLC of a debt owed by the Defendants for a loan of monies extended over 36 Beechwood Park from Irish Registered company number 8545, i.e. from Bank of Scotland (Ireland) Limited.

11. An attested to be true copy of a Deed of Assignment of the claimed loan indebtedness in Paragraph 10 above from BOS to the Plaintiff on any date."

12. An attested to be true copy of documentary legal consent of the Defendants to Instrument Number D2015LR043774A being imposed on them via Folio Entry Number 5 Part 3 of Folio 9004F County Carlow."

46. It is clear that "*the chain of title*" to the charge and the lands has been the subject of the Circuit Court and the High Court proceedings. Noonan J noted that when the possession proceedings came before the Circuit Court a number of affidavits were before the Court (which set out the chain of title) including an affidavit sworn by Mr. Kavanagh and "[T]he language of this affidavit, in which Mr. Kavanagh describes himself as a man living and not dead, is redolent of groups of the kind previously referred to. It contains the now familiar demands for sight of various original documents and contains what appears to be a list of demands for what Mr. Kavanagh considers to be essential proofs to establish Start's title and 'locus standi'. It raises other technical objections to the proceedings. Having considered all the affidavits and heard argument from the parties, the Circuit Court granted an order for possession." Mr. Kavanagh appealed the Circuit Court Order. He first had to obtain an extension of time to do so and same was granted. In the extension of time application and in the appeal he filed a number of additional affidavits. In one, the plaintiff's chain of title was analysed in depth with a view to demonstrating that Start had no locus standi and could not maintain the possession proceedings because its title was defective. Noonan J noted that "*From all of the foregoing, it is clear that an enormous amount of industry and effort has been put into a purported analysis of the plaintiff's title by an unknown third party. Throughout all of this endeavour, the defendants have never disputed the averments of the plaintiff that the monies were advanced on foot of the mortgage and they have defaulted in repayment.*" Noonan J then concluded at paragraphs 24-26:

"24. Further, all of the effort deployed in this elaborate analysis of title documentation entirely fails to have regard to the provisions of s.31(1) of the Registration of Title Act, 1964...

25. *It could not be clearer. The register is conclusive evidence of the plaintiff's title to the charge the subject matter of these proceedings. No amount of analysis of deeds and documents by unknown third parties can change that simple fact.*

26. *I am satisfied therefore that the plaintiff's proofs are now, and were at the time the matter was before the Circuit Court, perfectly in order and the plaintiff is entitled to judgment for possession accordingly..."*

47. The individual sub-categories sought under this heading include the Deed of Assignment to Bank of Scotland PLC from Bank of Scotland (Ireland) Limited and the reasons given for seeking them are "to prove a chain of title" from Bank of Scotland PLC to Bank of Scotland (Ireland) Limited and then to the plaintiff. The Circuit Court granted the plaintiff an Order of Possession and can only have done so if satisfied that the plaintiff had title to the lands. That Order was appealed to the High Court and this Court upheld the Order of the Circuit Court. Thus, the plaintiff's title has already been determined and discovery directed towards that issue can not therefore be necessary or proportionate.
48. Thus, insofar as this category is directed towards those issues they are clearly res judicata.
49. However, it appears that the focus of sub-categories (10) and (11) is on the assignment of the loan rather than of the charge. However, it is manifest that this is directed towards revisiting the Orders of the Circuit Court and High Court. The question of whether or not the plaintiff was the owner of the loan and debt for which the property was security and over which the Order for Possession was being sought is clearly a matter which could and, if it was going to be raised, should have been raised in the Circuit Court and High Court on appeal.
50. The first-named defendant argued that this is an entirely separate matter to possession. He said that the plaintiff had always claimed that they were a mere legal title holder and that they had never produced an instrument of assignment assigning the debt in equity. This is reflected in an argument recorded in paragraph 25 of Allen J's judgment.

"25. The second point identified by Mr. Thullier was the assertion that the plaintiff was a mere servicer. The suggestion was that it was to be inferred from the fact that Ms. Roche averred to the fact that the legal title to the loans and security were held by Start it might not be the beneficial or equitable owner of the charge so that Start could not seek an equitable remedy."

51. I agree with the reasoning of Allen J at paragraph 26:

"There is no substance to this argument either. The uncontested evidence is that Start is the registered owner of the charge. There is no warrant for suggesting that Start is not the beneficial as well as the legal owner of the charge. And in any event, the legal owner of property is perfectly entitled to injunct a trespasser."

52. Sub-category (12) also seeks *"copy of documentary legal consent of the Defendants to Instrument Number D2015LR043774A being imposed on them via Folio Entry Number 5 Part 3 of Folio 9004F County Carlow."* This was stated to be sought because *"the Defendants did not charge their lands...to the Plaintiff"*. However, it was accepted by the first-named defendant that the plaintiff was not claiming that the first-named defendant gave a charge to the plaintiff. Therefore, this reason and the need for discovery of this sub-category simply does not exist.
53. Even if I am wrong on this, the reason given for seeking sub-categories (10) and (11) is because in order to claim equitable relief *"there has to be an equitable claim, i.e. indebtedness of the part of the Defendants lawfully assigned to BOS."* There can no longer be a claim for an injunction in the proceedings in circumstances where the property has been sold. Thus, the only *"equitable relief"* that these sub-categories could be relevant to is the equitable relief granted in the past, such as by Allen J. Thus, the only purpose of seeking these sub-categories now could be to seek to challenge those previous Orders.

Category 5

54. Category 5 is *"Circuit Court Possession Claim and Appeal of same in High Court"*. The documents sought are:

"13. An attested to be true copy of a lawfully revenue stamped and issued Civil Bill for Possession from Carlow Circuit Court offices, of any date, against the Defendants.

14. An attested to be true copy of any document(s) relied upon by BOS that the charge being relied upon by them in 2013 over 36 Beechwood Park was lawful for their needs.

15. An attested to be true copy of the Judgment and Order dismissing the appeal on 4th July 2017 in favour of the plaintiff.

16. An attested to be true a Circuit Court Order ordering possession be recovered of the dwelling of the Kavanagh family located at 36 Beechwood Park."

55. It is absolutely clear from these individual sub-categories that the focus of this category is a challenge to the Order for Possession and the subsequent Orders. This is also clear from the reasons given for each of the individual sub-categories. As such the category is

directed squarely at matters which are res judicata or at matters which could have been raised in the earlier proceedings.

Category 6

56. Category 6 relates to the execution of the Order for Possession. Ten sub-categories are sought.

57. The plaintiff submits that this category also relates to matters which are res judicata or otherwise frivolous or vexatious because the execution of the Order was 'reviewed' by the High Court. I presume this to refer to the applications before Allen J and Egan J in relation to the injunction and the attachment and committal respectively. I do not believe that I can conclude on this basis that the entirety of Category 6 automatically relates to matters which are res judicata in the true sense of the word. Allen J was dealing with an interlocutory injunction and therefore it does not automatically preclude matters being raised at the substantive trial because the test applying in respect of some matters at the interlocutory injunction stage is different to the test at trial. Egan J was dealing with the application for committal and the only matters which had to be determined by her was whether the defendant was properly before the Court on foot of the Order for attachment and whether he was in breach (and would continue to be in breach) of Allen J's Order. Egan J was not required to consider or determine questions relating to the execution of the Order for Possession.

58. However, it may be that some of the individual sub-categories relate to such matters. I therefore consider each sub-category. It is therefore necessary to consider each of the sub-categories.

59. Sub-category (17) is:

"An attested to be true copy of all of the application document(s) made to Carlow Circuit Court offices for the generation of an Execution Order/Order for Possession over 36 Beechwood Park, albeit not as a dwelling but classified as a property."

60. The basis in the pleadings for this is paragraph 32 of the Defence and Counterclaim in which it is pleaded "No Judicial officer of the Irish State, or their lawfully appointed representative authorised a lawful Order of Possession to be generated on 14th March 2019". I have to say that it is difficult to know whether the first-named defendant is claiming that no Order at all issued on that date or whether it is accepted that an Order issued but claims that was not a 'lawful' Order. If it is the latter then discovery would not be necessary because that would be a purely legal issue. I am giving the plaintiff the

benefit of the doubt and taking it that it is the first of these. This is supported by the stated reason for requiring this sub-category, which is that *"It is claimed an Execution Order/Order for Possession issued on 14th March 2019 but could not issue without formal application papers for same."* However, it seems to me that the *"application document(s)"* are not relevant and necessary. The issue, insofar as it can be made out, is whether an Execution Order/Order for Possession issued from the Circuit Court office on the 14th March 2019. That can be addressed by discovery of the Order which is claimed to have issued and I will so Order.

61. Sub-category (18) is:

"An attested to be true copy of appointment document(s) for a Court Messenger to act for the County Registrar for County Carlow against 36 Beechwood Park".

62. The reason given for this category is that *"The County Registrar for County Carlow was not present at the property on either the 18th November 2019 or 17th February 2020 and therefore a lawful representative of that office had to be present."*

63. In relation to the 18th November 2019, it is not denied in the pleadings that a Court Messenger was present on that date. Therefore, the presence of the Court Messenger on that date is not an issue between the parties on the pleadings and discovery is not relevant or necessary.

64. In relation to the 17th February 2020, the first-named defendant pleads at paragraph 10 of his Defence and Counterclaim that *"[A]s per SoC para. 10 the Plaintiff of course do not claim the County Registrar for the County of Carlow put them into lawful possession since of course that office did not and indeed was not present on the date of the 17th February 2020"*; and at paragraph 35 pleads *"No lawfully appointed Court Messenger was present on 17th February 2020..."* These pleas are denied by way of the omnibus denial at paragraph 11 of the Reply and Defence to Counterclaim and indeed evidence was given at the interlocutory injunction application that a Court Messenger was present (see paragraphs 10 and 11 of Allen J's judgment). The presence of the Court Messenger is therefore an issue between the parties on the pleadings. However, the first-named defendant can not attack the validity of the injunction or committal Order at this stage on the basis of alleged deficiency in the execution of the Order for Possession because any points arising could have been raised before Allen J or Egan J.

65. Sub-category (19) and (21) can be taken together:

"19. An attested to be true copy of the executed Execution Order of 17th February 2020 relied upon by the plaintiff."

21. *An attested to be true copy of the Fees applied and charged by the County Registrar for actions on 17th February 2020.*"

66. The reason given for sub-category (19) is that the "*Plaintiff has already exhibited two different such claimed documents before the High Court to gain interlocutory injunction relief*" and for number (21) is "*It is claimed an Execution Order was affected, thus fees had to be incurred by the statutory officer of Country Registrar for County Carlow as it acted in the role of Sheriff as it pertained to 36 Beechwood Park.*" It is entirely unclear from the pleadings what this relates to. Paragraphs 38 & 39 of Allen J's judgment appear to relate to the same issue. He said:

"38. It is true that the copy order of possession referred to in the affidavit...of Ms. Roche upon which Start would have initially relied did not carry an indorsement of execution. When Ms. Roche came to re-swear her affidavit she exhibited a copy of the order with the endorsement in manuscript:- "17-02-20 Lands handed over by Paul Quinn court messenger Carlow to Sean Cahill Mortgages.

39. Absolutely nothing turns on this. Good practice requires that execution of the order should be endorsed but any failure to endorse would not invalidate the execution which has already taken place. It is ridiculous to suggest that the entitlement of the dispossessed householders to break in to the house might turn on whether the execution of the execution order had been endorsed, still less on whether the duly endorsed order might later be produced to the High Court."

However, there is no plea made in the Defence and Counterclaim in respect of an Execution Order dated the 17th February 2020 and there is therefore no basis in the pleadings for these sub-categories.

67. Sub-category (20) is:

"An attested to be true copy of the licence relied upon for the security force engaged by the Plaintiff on both 18th November 2019 and 17th February 2020."

68. The reason for seeking this category is simply stated: "*Any such security forces had to be lawfully licenced by the Irish State.*" It is not pleaded by the defendant that the "*security force*" engaged was not licenced or that the plaintiff wrongfully or unlawfully relied on an unlicensed security firm. That is simply not part of the pleaded case and the application for discovery must be determined by reference to the pleaded case. The defendant does plead that "*The admitted actions of forced entry to 36 Beechwood Park,*

Carlow, Co. Carlow were actions of trespass” and that “The admitted actions of use of Force against the second-named Defendants were actions of criminal use of Force” (paragraphs 38 and 39 of the Defence and Counterclaim) and he seeks “A declaration that the admitted actions of 17th February 2020 by agents acting for the Plaintiff were actions of trespass” and “A Declaration that the admitted actions of Force on 17th February 2020 are criminal use of Force against the person” and “An Order for An Garda Síochána to undertake an investigation of the admitted actions of Trespass and use of Force on 17th February 2020 and of the sequence of events leading to officers of that Force being compelled to attend on that date to give witness to same.” I have considered whether these encompass a claim that the security firm was unlicensed but it seems to me that if such an allegation was to be part of the claim it would have to be specifically pleaded. Furthermore, those paragraphs must be read in context and they follow on from the pleas that there was in fact no valid Circuit Court proceedings at all, no lawful Order for Possession, and that there was no sheriff or court messenger present and the claim seems to be that in those circumstances the use of force was not authorised and that such force as was used was excessive.

69. Sub-category (22) is:

“An attested to be true copy of document(s) appointing A.N. Other to accept possession from the office of the County Registrar for County Carlow on behalf of the Plaintiff.”

70. The stated reason for seeking this category is that *“The effecting of mortgagee in possession standing to a party must be a formal handover process whereby the transferee, if not present themselves, must be lawfully represented by a lawfully appointed agent.”*

71. The basis in the pleadings for this sub-category appears to be paragraph 37 of the Defence and Counterclaim which pleads *“No hand over of possession of 36 Beechwood Park, Carlow, Co. Carlow effected on 17th February 2020 to any party and possession lawfully remains with the Defendants.”* This plea is denied by the omnibus denial at paragraph 11 of the Reply and Defence to Counterclaim. It seems that the case that is sought to be made by the first-named defendant is that possession was not properly handed over to the plaintiff and that in those circumstances the injunction should not have been granted. The injunction can not be challenged in that fashion. That is a matter which could have been raised before Allen J and, if he decided it incorrectly, before the Court of Appeal.

72. Sub-category (23) is:

"An attested to be true copy of document(s) used by the Plaintiff to engage An Garda Síochána on both dates of 18th November 2019 and 17th February 2020."

73. While there is no express admission in the pleadings that An Garda Síochána were present and, indeed, formally the omnibus denial in paragraph 11 of the Reply and Defence to Counterclaim denies that fact, there is no real dispute about their presence. and this sub-category is therefore simply not relevant or necessary to any disputed issue in the pleadings.

74. Sub-category (24) is:

"An attested to be true copy of document(s) relied upon to use both Force to enter 36 Beechwood Park on 17th February 2020 and to use force against the person on that same date."

75. As noted above, it is pleaded that the plaintiff wrongfully used force to obtain possession. That is denied by the omnibus denial at paragraph 11 of the Reply and Defence to Counterclaim. It is not entirely clear whether the use of force is denied or whether it is the characterisation of it as being wrongful or unlawful that is being denied. I have to presume for the purpose of this discussion that it is both. The plaintiff may, in those circumstances, seek to establish that the use of force was justified and lawful on foot of an instrument, such as, for example a Court Order. It seems to me that where that appears likely to be the defence, the document(s) which might be relied upon to make that defence are relevant and necessary and I will make an Order for Discovery of sub-category (24).

76. Sub-category (25) is misconceived. It seeks:

"An attested to be true copy of any document(s) served on each of the Kavanagh adult children as it pertained to any claims for possession as against their dwelling, with proof of service also to be produced."

77. Any wrongs to the first-named defendant's "adult children" are matters for those individuals. The plaintiff can not maintain a claim in respect of alleged wrongs to third parties and therefore can not obtain discovery of documents in relation to such alleged wrongs.

78. Sub-category (26) is:

"An attested to be true copy of the Notice served on the relieving officer in the relevant state department for the intended actions of the Plaintiff of 18th November 2019 and the actual actions of 17th February 2020 with proof of service also to be discovered."

79. The only reason given for this sub-category is "*Statutory Law mandates same*". I am not satisfied the plaintiff has discharged the burden of establishing that this sub-category is relevant and necessary.

Category 7

80. Category 7 is documents relating to "*Imprisonment of First Named Defendant*." The plaintiff has agreed to make discovery of paragraphs (28), (29), (30), (31) and (33) and therefore I do not need to consider them. The remaining sub-categories are (27) and (32):

"27. An attested to be true copy of a signed and Approved Judgment of Justice Senan Allen of 3rd March 2022.

32. An attested to be true copy of document(s) relied upon by the Plaintiff for An Garda Síochána to take tools from the security force present to forcibly break through the front door of the Kavanagh family dwelling located at 36 Beechwood Park."

81. The sub-categories of documents under this heading all concern the arrest and committal of the first-named defendant and the events surrounding them and in my view seek to look behind and mount a collateral challenge to the decision of Allen J and of Egan J to commit him to prison for his refusal to comply with Court Orders. These points could all have been raised in the context of the application for committal. I accept the logic of what Roberts J said at paragraph 53 of her judgment in relation to the interrogatories under the heading "*Events leading to, and imprisonment of, First Named Defendant*". She said "*I fail to see the relevance of these questions to the current proceedings in circumstances where there was no appeal by the first named defendant against the Order of Mr. Justice Allen and where an Order for committal was made by Ms. Justice Egan...*" Furthermore, there is no basis for suggesting that these sub-categories could be discoverable against the plaintiff. For example, the first-named defendant seeks a "*signed and Approved Judgment of Justice Senan Allen of 3rd March 2022*." This judgment has been published on the Courts.ie website and, I understand, was delivered electronically to the parties and an Order was drawn up on foot of the judgment. However, leaving aside any debate about the legal effect of the judgment not being signed (and the fact that this could have been raised at the committal hearing) it is difficult to see how it could be the plaintiff's obligation to produce a signed judgment. The question of An Garda Síochána's use of tools owned by the security firm is not a matter for the plaintiff and the

first-named defendant has, in any event, not established any basis for believing that there may be such documents in existence.

Category 8

82. In Category 8 the first-named defendant seeks documents relating to "*Claimed Indebtedness of the Defendants to the Plaintiff*" and, more particularly, "*a copy of document of sum certain due and owing by the Defendants to the Plaintiff on 31st October 2012, or any subsequent date, which said sum certain to be inclusive of certification of interest from 13th June 2007 and said sum certain to also be English language written and signed by an identifiable Director of the Plaintiff, for the Plaintiff.*" This seems to arise from the plea in paragraph 12 of the Statement of Claim where it is pleaded that "*The Defendants are indebted to the Plaintiff in the sum of €125,232.91, inclusive of arrears in the sum of €73,967.30 as of the 31 October 2021.*" However, this is not a real issue in the proceedings and therefore the discovery sought is not necessary. The plaintiff's claim for relief in the proceedings is clearly grounded on the Order for Possession granted by the Circuit Court and upheld by the High Court and the Order of Allen J. That is clear not least from paragraph 7, 10 and 13 of the Statement of Claim. It is not a money claim based on the defendants' alleged indebtedness.

ORDER

83. I will therefore order discovery of Category 7(28), (29), (30), (31) and (33) (which the plaintiff has already agreed to discover), and Category 6(24). The plaintiff has also provided documents under sub-categories 2(4) and 3(5) but the first-named defendant challenges these on the basis that they did not comply with the request, or were incomplete, or were redacted. I therefore had to consider whether the sub-categories were discoverable at all and I am not satisfied, for the reasons set out above, that they are and so, while the plaintiff has provided some documents, I will not make an Order for discovery in respect of them.