THE COURT OF APPEAL

Record Number: 2023/115
High Court Record Number: 2016/1207S

Faherty J. **Neutral Citation Number [2023] IECA 294**

Allen J.

O'Moore J.

BETWEEN/

NATIONAL ASSET LOAN MANAGEMENT DAC

PLAINTIFF/RESPONDENT

-AND-

DAMIEN STAPLETON

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 6th day of December, 2023

1. The appellant, Mr. Stapleton, owes the respondent, NALM, in excess of €7,000,000. Mr. Stapleton's liability to NALM was established by a judgment of the High Court dated the 20th March, 2018, and affirmed by a decision of the Court of Appeal on the 9th April, 2020. The uncontradicted evidence before this court on this appeal is that, as of the 31st March, 2022, the current value of the debt *"is in the order of €7,532,345.24…"*. Obviously, the value of the debt has only increased since that time.

2. Mr. Stapleton has made no payment whatsoever on foot of the judgment marked against him. Naturally, NALM has attempted to obtain payment of the very considerable sums due to it. Following the perfection of an execution order, a FIFA *"was placed in the hands of the Dublin County Sheriff in September 2021."* The only asset realised on foot of the Sheriff's activities was a Volkswagen Golf vehicle sold by him, resulting in a payment to NAMA of €2,600.

3. In these circumstances, NAMA sought (and obtained) an order of the High Court (Owens J.) requiring Mr. Stapleton to attend before the High Court at a time and date to be determined by the High Court for cross-examination as to his property and means. In addition, it was directed that Mr. Stapleton should make discovery of a number of categories of documents, starting with all documents recording what happened to a sum of €29,000,000 obtained by him in 2005 from the sale of lands in Gorey, County Wexford; and moving on to all documents evidencing Mr. Stapleton's subsequent dealings in immovable property and financial investments and instruments from 2005 until the present time; his bank account statements from 2005 until the present time; and his Capital Gains Tax returns for the years 2006 - 2018. The order also stipulated that the discovery to be made was to be limited to transactions which had a value exceeding €10,000.

4. In his appeal, Mr. Stapleton seeks to have the order for discovery varied, so that it only covers transactions which post-date the 19th October, 2012, and relates only to transactions the value of which exceed €100,000. Put broadly, the basis of the appeal is that the trial judge failed to have proper regard to the principle of proportionality, and that the orders made for disclosure by Mr. Stapleton were unduly oppressive to him.

5. This judgment will be organised under the following headings: -

(1) The factual background;

(2) The submissions of the parties;

(3) Decision.

The factual background

6. The application for the examination of Mr. Stapleton, and the making of discovery by him, was grounded upon an affidavit of Damien Ryan. Mr. Ryan is described as a senior divisional manager in NAMA. Having given evidence of the value of the debt owed by Mr. Stapleton as at the 31st March, 2022 (quoted at para. 1 of this judgment) and having further given evidence of the only asset recovered by NALM in its attempts to enforce the order against Mr. Stapleton (as described at para. 2) Mr. Ryan sets out the background to the current application. In the interests of clarity, the sequencing in this judgment of the background is somewhat different to the order in which it appears in Mr. Ryan's affidavit.

7. Mr. Stapleton's liability to NAMA arises from the transfer to that agency, of borrowings and security previously the property of Allied Irish Banks plc. The liability to AIB, in turn, arose from *"a disposal of property owned by [Mr. Stapleton] at St. Waleran's, Gorey, County Wexford…"*: para. 10 of the affidavit of Mr. Ryan. Mr. Ryan records that, in June 2005, a company called Exito Limited purchased these lands from Mr. Stapleton for the sum of about €29M. AIB had advanced some or all of that amount to Exito, and in turn, Mr. Stapleton had guaranteed a portion of the debt owed by Exito. In other words, Mr. Stapleton received €29M from the sale of lands to a company of which he was a director and shareholder; this company had borrowed some or all of the €29M from AIB; and Mr. Stapleton in turn had guaranteed the payment to AIB by Exito of a certain amount of the money which (on foot of this transaction) went directly to him.

8. In November 2011, Grant Thornton furnished NAMA a breakdown of the disbursement of the €29M which had been prepared by Mr. Stapleton and submitted by him to that firm. At the time, Grant Thornton had been engaged by NAMA as an independent reviewer of Exito's business plan.

9. The 2011 breakdown purports to be a summary of Mr. Stapleton's account of what happened to the €29M received by him in 2005. It constitutes a single sheet, with 34 entries showing where most of the €29,000,000 is supposed to have gone. It includes entries which one would expect - such as a tax payment of in excess of €4.5M, and a repayment of a loan to Ulster Bank of in excess of €9.5M. in respect of part of the acquisition cost of the lands. It also shows family payments (such as *"monies given to brothers and sisters since October 2005 - €250,000);* the purchase of other properties (in Rosslare, South Carolina, and Spain); and the acquisition of a number of investments. There was also a payment to *"Nolans"* of €544,625; a donation to Beaumont Hospital of €100,000; and *"Living Costs 2005 – 2011"* of €450,000. None of these transactions are vouched in any way. In addition, Mr. Ryan complained at para. 12 of his grounding affidavit that *"the references to the properties and investments in the 2011 Breakdown were vague and did not clearly identify them …"*.

10. Separately, and also in November 2011, Mr. Stapleton provided NAMA with a sworn statement of affairs. In his affidavit, Mr. Ryan summarises the interaction between the Breakdown and the sworn statement of affairs as follows:

> *"16. Whilst it is impossible to be certain (given the insufficient level of detail in the 2011 Breakdown), some of the assets referenced in the 2011 Breakdown appear to correspond with assets referenced in the 2011 SOA. However, even if that is the case, it is difficult to reconcile the amounts purportedly spent by Mr. Stapleton as set out in the 2011 Breakdown with the valuations attributed by him to the corresponding*

assets in the 2011 SOA. For ease, I have set out below a summary of such assets containing the description and expenditure amount as set out in the 2011 Breakdown opposite the description and valuation of what appears to be the corresponding asset as set out in the 2011 SOA. If indeed the assets shown in column 1 of the table below correspond with the assets identified in the same row in column 2, it is difficult to comprehend how circa €6.095 million could have been spent acquiring and investing in such assets (according to the 2011 Breakdown) only for them to subsequently be valued by Mr. Stapleton at circa €1.8 million in the 2011 SOA."

It is unnecessary to record here the table to which Mr. Ryan refers. However, his conclusion about the apparent disparity between the two documents raises very real questions for Mr. Stapleton. As will be seen, Mr. Stapleton makes no effort to question the validity of Mr. Ryan's analysis.

11. With regard to the 2011 disclosures made by Mr. Stapleton, Mr. Ryan concludes (at para. 17 of his affidavit): -

"Mr. Stapleton has never provided NAMA with vouching documentation substantiating any of the payments/application of funds set out in the 2011 Breakdown. To all intents and purposes, the plaintiff is in the dark regarding how the €29 million received by Mr. Stapleton for the sale of the [Gorey] lands was applied by him and the discovery which is sought is necessary in order for the plaintiff to overcome that difficulty and understand whether and how that money has in fact been spent by Mr. Stapleton and whether he has the means to satisfy the judgment debt or part thereof."

12. NAMA commenced the current proceedings against Mr. Stapleton in 2016. These resulted in an order of the High Court (Noonan J.) on the 20th March, 2018 that NAMA

recover against Mr. Stapleton the sum of €6,385,044.64, together with interest and costs. That judgment was appealed to the Court of Appeal. During the course of that appeal, and in the context of an interlocutory application relating to a stay on the High Court order, the parties reached an agreement whereby Mr. Stapleton would *"provide the plaintiff/respondent within the next three weeks with a sworn affidavit disclosing his means and assets, to include all disposition of assets within the last six years."*; settlement agreement at para. 2(2). This agreement was appended to an order of Irvine J. (as she then was) in this court striking out the interlocutory motion.

13. The appeal by Mr. Stapleton against the order of Noonan J. was dismissed by order of this court dated the 16th October, 2020.

14. At paras. 18 - 28 inclusive of his affidavit, Mr. Ryan describes the statement of affairs produced by Mr. Stapleton on foot of the settlement in 2018. Since this evidence is not contradicted or challenged in any way by Mr. Stapleton it is unnecessary to go into it in great detail. Mr. Ryan's conclusions with regard to the 2018 statement of affairs are, however, important. They read: -

> *"27. There are a number of aspects therefore to the 2018 SOA which caused concern, namely:*
>
> *(a) the disposal of properties without any payment to NAMA and no information provided in relation to the proceeds received and as to the application of such proceeds;*
>
> *(b) the disposal of a number of properties and assets in what appear to be fundamentally voluntary transactions, albeit characterised as connected to family law proceedings;*

(c) the absence of any explanation in relation to the application of funds from disposals and the comparatively modest amounts recorded in An Post savings and an Ulster Bank savings account;

(d) all of the transfers as referenced in the 2018 SOA appear to have occurred subsequent to Mr. Stapleton being reminded of his substantial liability to NALM pursuant to his guarantee of Exito's debt and the disposals were carried out against a backdrop of the Defendant repeatedly refusing through his family to identify unencumbered assets to NAMA on the basis of the in camera rule and a supposed pending appeal to the Supreme Court in relation to those family law proceedings."

15. As he had in respect of the 2011 disclosures, Mr. Ryan complains that the 2018 SOA leaves NAMA *"effectively in the dark as to [Mr. Stapleton's] financial position and ability, or otherwise, to satisfy his substantial indebtedness to the plaintiff …"*.

16. While the order of this court dismissing the appeal against the decision of Noonan J. in the High Court was not perfected until the 16th October, 2020 (when the question of costs was resolved) this court's judgment on the appeal had been delivered on the 9th April, 2020. After the delivery of that judgment, a chain of correspondence began in which NALM's solicitors sought information and documentation from Mr. Stapleton (through his solicitors). Ultimately no proposal was made either by Mr. Stapleton or his solicitors to address NALM's concerns about the lack of information or documentation available to it in order to assess Mr. Stapleton's ability to satisfy the judgment against him. This correspondence, which began with letters from NALM's solicitors on the 1st and 24th July, 2020, continued until January, 2022. The motion seeking discovery and the cross-examination of Mr.

Stapleton was issued in March of that year. It is a fair summary of the correspondence to say that, on a number of occasions, NALM's solicitors set out quite specific requirements with regard to disclosure on the part of Mr. Stapleton yet Mr. Stapleton's solicitors either failed to respond to correspondence, or alternately said that it had been difficult to obtain instructions from Mr. Stapleton because of health issues on his part. There was no meaningful proposal coming from the Stapleton side to provide NALM with any information or documentation which might be of any use in its pursuit of the debts owed to it by Mr. Stapleton. The motion the subject of this appeal therefore issued.

17. It is possible to set out this account of events, and the views of Mr. Ryan as to the adequacy of the 2011 and 2018 disclosures, in relatively short form because of the lack of any evidence on the part of Mr. Stapleton disputing either Mr. Ryan's factual narrative or the legitimacy and reasonableness of Mr. Ryan's concerns. The affidavit sworn by Mr. Stapleton in response to the motion verged on the dismissive. Over seven paragraphs, he states the following: -

(a) Since Mr. Stapleton delivered his statement of affairs in 2018, he says that he has been diagnosed with a medical condition; has had recent treatment for that condition; and was *"currently undergoing active surveillance for same"*. He also says that he is suffering from depression, and refers to what he describes as *"medical records"*. In fact, these are two notes from general practitioners setting out his medical condition. I will return to these.

(b) Mr. Stapleton says he has been caring for his elderly mother since 2017, and that she has *"now been made a Ward of Court and has now been transferred to residential care"* as of September 2022.

(c) He is not in a position to engage in an extensive search for records nor undergo cross-examination.

(d) He asks that *"the examination be limited to a reasonable period and that [he] be given adequate time to recover from his present medical condition and to obtain records"*.

(e) His present financial situation has not enabled him to discharge the amount of the debt due to the plaintiff *"at this time"*, and that many of the available records are held by accountants and solicitors *"with who (sic) I have had no contact for many years"*. He therefore says that he will *"need several months to obtain further records"*.

18. The medical reports relied on by Mr. Stapleton are dated the 7th November, 2022 and the 8th November, 2022. The first of these, from Dr. Hassan Al Bayyari, of Castleknock, states that Mr. Stapleton has been prescribed medication in order to deal with his anxiety and depression, which he has been suffering from for *"[a] few years"*. This note also states that Mr. Stapleton had *"recently a surgical procedure related to [his medical condition]."* It is said that a result of that procedure, Mr. Stapleton has a particular requirement which he must meet several times a day. However, nothing in this note suggests that Mr. Stapleton is unable to collate the documentation directed by Mr. Justice Owens, nor to be cross-examined as the High Court has directed.

19. The second note is dated the 8th November, 2022, in other words the day after the first. It is signed by a completely different doctor, Dr. Thomas Kieran Finucane, of the Stillorgan Medical Centre. It is stated that Mr. Stapleton is a patient at that practice. It is unclear how two different GP's with two very different addresses (and presumably coming from different

practices) have virtually simultaneously given notes about the medical condition of Mr. Stapleton. In any event, nothing may turn on that.

20. Dr. Finucane's note states that Mr. Stapleton was undergoing treatment for a depressive illness; that *"his symptoms are severe at present"*; and that he is taking anti-depressant medication. While Dr. Finucane states that he did not believe that Mr. Stapleton was *"medically fit to give evidence at this stage"*, he anticipates his symptoms would improve in six to eight months. Dr. Finucane expressed concern that Mr. Stapleton might need inpatient care, and also stated that Mr. Stapleton *"will be undergoing regular review with his specialist in the interim"*. The interim period is over the six to eight months following early November 2022. No specialist has given a note or evidence and, indeed, the identity of the specialist has not been disclosed to either the High Court or to this Court. As with the other medical certificate, there is nothing in Dr. Finucane's note that suggests that the discovery element of the order made by Owens J. cannot be complied with by Mr. Stapleton because of any medical issue. While Dr. Finucane does suggest that, in his view, Mr. Stapleton was not medically fit to give evidence as of November of last year, that part of the order of Owens J. requiring Mr. Stapleton to attend for the purpose of cross-examination has not been appealed.

21. Notably, there is nothing in the evidence of Mr. Stapleton which suggests that the discovery sought by NALM (and ultimately ordered by Owens J.) would be oppressive or disproportionate. With the exception of the comment at the end of his affidavit about documents being with former advisers, Mr. Stapleton does not suggest in any way that he would encounter any difficulty in getting the range of documents which NALM asked the court to order. The height of his complaint about a lack of proportionality or any oppression is that he will need *"several months to obtain further records"*: para. 7 of Mr. Stapleton's

affidavit – which was sworn on 17th May, 2022. In fact, the High Court order gave Mr. Stapleton 15 weeks to collate the relevant records, which would accommodate Mr. Stapleton's own self-selected period within which to make the discovery sought by NALM as ordered by the High Court.

The submissions of the parties

22. In their written and oral submissions on the appeal, counsel for Mr. Stapleton rely extensively on the orders made in two previous cases. The first of those is the order made by Clarke J. (as he then was) in *Moorview Developments Limited v First Active plc* [2011] 3 I.R. 615. The submissions do not analyse the judgment and rely only on one particular portion of the decision. Instead, the submissions focus on the eventual order made by Clarke J. on the 25th March, 2011.

23. Counsel for Mr. Stapleton also rely upon the order made by Finlay Geoghegan J. in *Allied Irish Banks plc v O'Reilly* [2015] IECA 209. Once again, while there is some reference to the text of the decision of Finlay Geoghegan J., the emphasis is on the order resulting from the judgment.

24. It is submitted that the orders made respectively in *Moorview* and *O'Reilly* lead to conclusion that:

(1) any disclosure order against Mr. Stapleton should mirror or closely resemble the terms of O. 42, r.36 and only deal with Mr. Stapleton's current assets, means or property but not engage in an *"interrogation of the full expenditure or use of monies obtained by the appellant through his sale of lands…"*; para. 4.13 of the written submissions; and

(2) Just as the order in *O'Reilly* limited the disclosure to transactions with a value of €100,000 or more, a similar restriction should be imposed in the current case.

25. Subsidiary submissions are also made, in particular about the period covered by the disclosure ordered against Mr. Stapleton. For example, it is described as notable that records dating from five years prior to the establishment of the plaintiff are to be disclosed. This argument is entirely unconvincing. No coherent reason has been advanced as to why the date of the establishment of the plaintiff is a factor to be taken into consideration by the court in determining the period in respect of which disclosure is to be ordered. It would potentially wreak a significant injustice on a commercial body set up for the purpose of acquiring loans if the date of its incorporation was to in some way influence the period that it could obtain discovery in aid to getting repaid such loans. In addition, it is suggested that the agreement made in 2018 that the sworn statement of affairs then made would cover the period from 2012 should in some way affect the entitlement of NALM now to look for documents that go back to 2005. This argument irrationally elevates the significance of the settlement of an interlocutory stay application, equating it with the reasoned argument (based on evidence) advanced before the High Court as to why the discovery should go back to 2005 and no later. It is also of note, in considering this submission on the part of Mr. Stapleton, that (unlike Mr. Ryan) he has given no evidence whatsoever indicating why the date proposed by him would constitute a rational and satisfactory point in time from which his discovery obligation should run.

26. In as much as a point of a legal submission of general application is made on behalf of Mr. Stapleton, it is this. The function of O. 42, r. 36, it is submitted, is to allow for the attendance of a debtor for the purpose of his or her cross-examination, and in aid of that to

direct the discovery only *"of any and all assets or entitlements whether capital or income and whether present or anticipated or contingent, without imposing any interrogation of asset transfers"*; para. 4.12 of the written submissions. Counsel for Mr. Stapleton further rely upon the portion of *Moorview* to which I have already referred. In particular, they rely upon the comment by Clarke J. (at para. 59 of his judgment in *Moorview)* that: -

> *"I am more than satisfied that the court has a jurisdiction to order a debtor to disclose any matters that properly come within the scope of a cross examination under O. 42, r. 36 in advance of the hearing so as to enable the hearing to be focused on issues of real inquiry."*

27. Particular stress is placed on the last eight words of that paragraph. The proposition is then advanced by Mr. Stapleton's counsel that what was sought by NALM, and ordered by Owens J., does not involve a focus *"on issues of real enquiry",* but instead involves *"something of a far more vague and speculative nature"*; para. 4.7 of the written submission.

28. In their submissions, counsel for NALM advanced the following arguments: -

(1) Mr. Stapleton asks this court to decide the application *de novo*. The correct approach (summarised most recently in *Stafford v Rice* [2022] IECA 47 *per* Collins J.) is that: -

> *"The High Court is entitled to some margin of appreciation and some material error of assessment will normally have to be demonstrated if this Court is to intervene."*

Counsel goes on to say that no such *"material error of assessment"* has been identified here, let alone established.

(2) The evidence put forward by Mr. Stapleton is fundamentally unsatisfactory. He has not advanced any reason as to why his proposed date from which the discovery should run – 19th October, 2012 – has been arrived at or should be fixed by the court. Equally, with regard to the question of oppressiveness or proportionality, Mr. Stapleton has neither identified any problem with the availability of documents nor any problems in collating the required documentation.

(3) As to the provisions of O. 42, r. 36, reliance is placed on the observation by Clarke J. in *Moorview* (at para. 62) that: -

> *"The rule is wide. The debtor can be examined in relation to debts owing to him, in relation to his property, and in relation to other 'means of satisfying the judgment'."*

(4) In accordance with the judgment of Finlay Geoghegan J. in *Allied Irish Banks plc v O'Reilly* (at para. 18) the proofs required of the party seeking an order under O. 42, r. 36 are: -

> *"The obligation is on the judgment debtor to pay the amount due under the judgment. If there is proof he has not done so, there is no further evidential obligation on the judgment creditor to establish a prima facie entitlement to the order. There may however be special circumstances established by the judgment debtor which might require evidence in response, to avoid a court being persuaded that they should not exercise its discretion to make the order sought."*;

(5) In as much as Mr. Stapleton's appeal is grounded upon a lack of proportionality or onerousness, the obligation is on him to demonstrate that this is the case. Applications of the current type are *"fact specific"*; (para. 39 of the NALM submissions). Given this, the failure on the part of Mr. Stapleton to identify any specific difficulty which will be presented by compliance with the order of the High Court suggests a complete lack of merit in this appeal.

Decision

29. Order 42, r. 36 of the Rules of the Superior Court reads: -

> *"When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the Court for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, or that any other person be orally examined as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or an officer of the Court as the Court shall appoint; and the Court may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents."*

30. At para. 18 of her judgment in *Allied Irish Banks plc v. O'Reilly*, Finlay Geoghegan J. set out the evidential threshold for the making of such an order, as recited at para. 28 (4) of this judgment. Finlay Geoghegan J. was careful to circumscribe this evidential threshold as being the one appropriate to an order against the judgment debtor himself or herself. She left open the question to whether or not similar proofs would suffice where an application

was made for the examination of a person other than the judgment debtor, which is clearly contemplated by the rule.

31. Here, NALM has established that it is entitled to an order pursuant to O. 42, r. 36 for the attendance of Mr. Stapleton for the purposes of cross-examination as to his assets and means.

32. The issue on this appeal is the scope of the discovery that Mr. Stapleton must make in advance of this examination. In *Moorview*, Clarke J. observed (at para. 58 of the judgment): -

> *"The jurisprudence makes it clear that it is and can be appropriate to ask searching questions of a debtor under such an examination in cases where any real doubt as to the debtor's means may emerge."*

He went on (at para. 60 of the judgment) as follows: -

> *"The rule [O.42, r.36] allows all relevant matters to be explored under cross examination. Providing a practical way to make that cross examination more efficient seems to me to be encompassed within the rule. To exclude a jurisdiction to allow preliminary disclosure as an aide to effective and efficient cross examination would be a course which should only be adopted if the rule made absolutely clear that no such prior disclosure could be directed. The rule does not make that clear. It seems to me to be inherent in the rule that the court can adopt practical measures to ensure that the disclosure which the rule in any event requires is to be made in the most efficient and practical way possible."*

33. In *O'Reilly*, Ms. Justice Finlay Geoghegan unsurprisingly accepted the proposition that the discovery is to allow cross-examination to be *"done in the most efficient and*

practical way possible" as suggested by Clarke J. Importantly, she added the following observation: -

> *"Thus, while the order is referred to as an order for discovery 'in aid of execution' it is more precisely an order made in aid of a proposed examination pursuant to O. 42, r. 36."*

34. These descriptions, by Clarke J. and Finlay Geoghegan J., of the purpose behind the preliminary discovery in aid of the cross-examination of the debtor help to shed light on the observation by Clarke J. in *Moorview* (much relied upon by Mr. Stapleton's counsel) that the discovery is to allow the cross-examination *"to be focused on issues of real enquiry"*. It will be remembered that this is the phrase emphasised by counsel for Mr. Stapleton in the written submissions delivered on his behalf. However, the issue of real enquiry is undoubtedly what assets, property or means the debtor has available to him in order to pay the judgment debt. The simple proposition put up by Mr. Ryan in his grounding affidavit (and nowhere contradicted by Mr. Stapleton, who clearly had the knowledge and means to do so) is that Mr. Stapleton was paid €29M in 2005 and that there is a very real lack of clarity (and complete lack of documentation) as to what happened to that money. Whether or not any asset of any type whatsoever acquired by Mr. Stapleton following his receipt of the €29M in 2005 remains available to him in order to satisfy his debt to NALM is exactly the sort of situation of *"real doubt as to the debtor's means"* anticipated by Clarke J. in *Moorview*, which in turn justifies (and indeed requires) the asking of *"searching questions of a debtor…"*.

35. The necessity for an order of discovery that permits the creditor to look back on the transactions of a debtor over a period of time is recognised by Finlay Geoghegan J. in her judgment in *O'Reilly*. At para. 23, she observes: -

"A person who has made transfers of property in certain circumstances may retain a beneficial interest in or a debt or other entitlement in relation to the transferred property. Thus it appears to me that questions in relation to transfers made in the past five years would be permitted on examination and hence it follows that the order for discovery made was within the ambit of the inherent jurisdiction of the High Court."

36. Many, if not most, orders for discovery have a time period fixed which can appear somewhat arbitrary. For example, in personal injuries cases a local authority might be directed to make discovery of any complaints about the state of a footpath which were made within three years prior to the occurrence of the accident which has given rise to the proceedings. There is no science behind the selection of a three year period in such a case and, quite often, the dates for the period in respect of which discovery is ordered do not have any specific or precise justification. The court is simply doing the best it can on the basis of its own assessment of how likely it will be that a meaningful return in terms of relevant documentation will be obtained in fixing the period over which discovery is to range.

37. Very unusually, in the current appeal there is an obvious starting point for the discovery period. It is the date on which Mr. Stapleton received, even by the standards of the Celtic Tiger, an exceptionally large amount of money. As described by Mr. Ryan, the uses to which this money were put raise questions about assets which Mr. Stapleton may currently have, and the value of these assets. It is singularly unlikely that a court would prevent questions being put to Mr. Stapleton about what happened to the €29M, what assets were acquired by him between 2005 and now, what value these assets had, and what happened to these assets (whether they be property in Spain, the United States or Ireland, or investment instruments). Indeed, even taking into account the non-investment

disbursements (which the 2011 breakdown suggests were made by Mr. Stapleton) it is in my view a legitimate line of enquiry to ask for example about the €250,000 which Mr. Stapleton says he provided to family members. It would be interesting to know whether this was a gift or a loan, whether the loan was ever called in, or subsequently acknowledged by the family members concerned. It is, of course, the case that dealings between family members are less likely to throw up documentation. Nonetheless, given that questions about these dispositions are ones which could properly asked of Mr. Stapleton, such documentation (if it exists) should be made available to the questioner in advance in order that the examination may take place *"in the most efficient and practical way possible."*

38. For the reasons I have set out, the reliance by counsel for Mr. Stapleton on what they describe as *"the function of Order 42, rule 36"* is misplaced. The rule, by referring to *"...debts which are owing"* to the debtor and assets which the debtor *"has"* does not prevent the questioning of the debtor about how he dealt with previous assets which he is known to have had, and the disclosure of documents in order to facilitate that questioning. The purpose of such lines of cross-examination are not to have the creditor paid out of assets which the debtor no longer has. That would be an absurdity. The purpose of the cross-examination is, on the contrary, to determine whether or not assets (which the debtor once had) either continue to be available to the debtor or have been translated into property, assets, or interests which may now be accessed by the creditor. For the same reason, the requirement that Mr. Stapleton disclose documents evidencing or recording *"the expenditure or use"* by him of the €29M *"does not create new ground entirely"*, as is submitted on behalf of Mr. Stapleton in para. 4.13 of the written submissions. As it happens, counsel for NALM explained the phrase *"expenditure or use"* in their written submissions; they say that the phrase was used in order to avoid a *"minimalist"* interpretation of the order being taken by Mr. Stapleton. In my view, the phrase is an entirely proper and appropriate one given the scope of O. 42, r. 36,

the purpose of the cross-examination of Mr. Stapleton, and the need for prior provision of these documents in order to make the cross-examination practical and effective.

39. Even were this a *de novo* hearing, and taking into account the principle of proportionality, my view is that NALM has established an entitlement to the discovery it seeks from 2005 onwards. However, this is not a *de novo* hearing. I do not identify anywhere in the ruling of the High Court that there has been *"some material error of assessment…"*, to use the words of Collins J. in *Stafford.* As Owens J. succinctly put it:-

> *"What [NALM] is trying to do in relation to this exercise is to follow the money … and it seems to me that information relating to following the money is relevant to seeing whether there is anything left from this pot of gold in 2005 available to satisfy the judgment."*

40. Equally, I have not found any error on the part of the High Court judge in directing that documents in respect of transactions with a value in excess of €10,000 should be disclosed. NALM has established an entitlement to cross-examine Mr. Stapleton. I have found that the period over which discovery in aid of that cross-examination should run is the period proposed by NALM. There is not, built into a direction that Mr. Stapleton make discovery, any requirement that this discovery be limited by reference to the value of individual transactions. NALM proposed such a limit, in the words of Mr. Ryan, *"in order to mitigate any oppressive element to the order…"*; para. 28 of Mr. Ryan's grounding affidavit. It is often problematic for a party seeking discovery to know just how difficult (or onerous) the making of that discovery will be. In those circumstances, Mr. Ryan's proposed limit of €10,000 per transaction seems a reasonable and fair one. However, the party being asked to make discovery is in prime position to assess exactly what is involved in the disclosure, the amount of sources that have to be consulted, the number of bank accounts

involved, the likely complexity of the investments and instruments concerned, and the overall burden of making the discovery sought. In fact, it is clear from Mr. Stapleton's brief affidavit that he had already turned his mind to the different agents (or former agents) that he would have to consult about the obtaining of documents, and that he was able to assess (at *"several months"*) the period he would need to gather in *"further records"*. However, Mr. Stapleton gave no evidence at all to support his counsel's subsequent submissions that the making of discovery as proposed by NALM and as ordered by the High Court (documents with a value of €10,000 or more per transaction) as opposed to the discovery which he proposes (documents of transactions with a value of €100,000 or more) would be oppressive. The absence of any such evidence is, in itself, both important and striking. However, it is particularly important and particularly striking when one considers that over 28 months had passed between the original request for documents made on behalf of NALM (1st July, 2020) and the swearing of Mr. Stapleton's replying affidavit (9th November, 2022). Throughout that time, Mr. Stapleton was represented by solicitors; indeed, at one stage these solicitors took umbrage at the suggestion that because they were not replying to correspondence from NALM's solicitors, it could be taken that they were no longer acting for Mr. Stapleton. If there was any substance to the proposition that NALM's proposed limit created a situation which was oppressive of Mr. Stapleton or violated the principle of proportionality, there was an abundance of time to collate and present such evidence. That this was not done, even taking into account the personal circumstances which Mr. Stapleton says applied to him over that period, suggests strongly that there is no reality to these protestations.

41. In any discovery exercise, a mere assertion that discovery would be disproportionate or oppressive rings very hollow when a party in a position to do so nonetheless fails to provide any evidence to stand up these complaints. The failure to provide such evidence is,

in my view, fatal to the submission that the transaction limit fixed by the High Court is either oppressive or disproportionate. Even were it not in itself fatal to such a ground of appeal, I am satisfied that the approach taken by NALM (as I have already described) is a reasonable effort to suggest a limit which would avoid the discovery being oppressive of Mr. Stapleton.

42. The fact that a €100,000 per transaction limit was imposed by the High Court in *O'Reilly*, and therefore features in the order ultimately made by the Court of Appeal in that case, does not seriously advance Mr. Stapleton's argument. Firstly, there may well have been evidence in the *O'Reilly* case which indicated that the higher limit per transaction was appropriate. No such evidence is recorded in the judgment of Finlay Geoghegan J. (no doubt because this was not an issue before her) and the judgment of McGovern J. (in the High Court) is unavailable. Secondly, the fact that Dr. O'Reilly's debts were similar in scale to the debts of Mr. Stapleton does not in itself go anywhere near establishing the proposition that a similar limit per transaction should apply to the disclosure now to be made again considering what is proportionate.

43. As with the question of the period to be covered by the discovery, I would have decided the lower limit of €10,000 per transaction was appropriate were the matter being decided by me on a *de novo* basis. Again, applying *Stafford*, I have not found any material error of assessment on the part of the High Court judge in considering this issue.

44. I therefore propose that the appeal be dismissed in its entirety.