APPROVED **[2023] IEHC 277**

THE HIGH COURT

Record No.: 2020/7347P

BETWEEN:

DOMINIC ELLICKSON, NOELEEN ELLICKSON, ORNA HOBAN and FERGUS HOBAN

Plaintiffs

-and-

SEAMUS WALSH

First Defendant

-and (by order)-

INVISIBLE STRUCTURES LIMITED

Second Defendant

-and (by order)-

STEPHEN TENNANT

Third Party

JUDGMENT of Mr. Justice Rory Mulcahy delivered on the 25th day of May 2023

Introduction

NO REDACTION REQUIRED

1. This is an application by the Defendants to strike out the Plaintiffs' claim for failure to comply with the Order for Discovery of Stack J made on 6 April 2022 ("**the Discovery Order**") and for failure to comply with her Order compelling the Plaintiffs' to reply to particulars made on the same date ("**the Particulars Order**").

2. The Orders of 6 April 2022 were made following the hearing of applications by the Defendants for discovery and to compel replies to particulars in respect of which Stack J delivered judgment on 16 March 2022: [2022] IEHC 203.

3. The Defendants contend that the discovery made and the replies to particulars furnished by the Plaintiffs are clearly inadequate. They further contend that the Plaintiffs failure to engage with their complaints about these inadequacies permits the Court to draw an inference that the failure to make discovery is malicious and deliberate and that justice cannot now be done between the parties. The Defendants very properly accept that there is a high bar to meet in an application to strike out on these grounds and that if the Court is not satisfied to strike out the proceedings, it should order further and better discovery and further replies to particulars.

4. The Plaintiffs initially defended the application on the basis that the discovery made complied with the Court's Order and that the replies to particulars were adequate. During the hearing, Counsel for the Plaintiffs accepted that, at least in certain respects, the discovery was inadequate but that the threshold for striking out his clients' claim had not been met.

5. Although I am satisfied that there has been a clear failure by the Defendants to comply with their obligations pursuant to the two Orders of Stack J, for the reasons set out in the judgment to follow, I do not think that, in the context of an interlocutory application, heard on affidavit, I could conclude that the threshold for striking out has been met. Accordingly, I propose making Orders for further and better discovery and to compel further and better replies to particulars.

Background

6. As set out in the judgment of Stack J, the proceedings concern, in essence, a boundary dispute. In very brief terms, the Defendants purchased certain lands from the third party,

as receiver of the first and second Plaintiffs. The question in these proceedings concerns the extent of the lands which the Defendants acquired.

7. The Receiver had been appointed on foot of a mortgage dated 6 January 2006 ("the 2006 Mortgage Deed") in which the mortgaged property was described as *"ALL THAT AND THOSE the lands at Oaklands, Ballinakill, Waterford, County Waterford, comprising 8.3 acres or thereabouts held in fee simple."*

8. Unfortunately, and this is not disputed, there was no map attached to the 2006 Mortgage Deed. Therefore, the precise extent of lands captured by the 2006 Mortgage Deed cannot be readily ascertained from the Deed. In this regard, it seems that the first and second Plaintiffs had originally acquired their landholding by two conveyances made in 1978 and 1979 but had, by 2005, sold off two plots of land. As appears from their Statement of Claim, the Plaintiffs case is that at the time the 2006 Mortgage Deed was executed, the first and second Plaintiffs' landholding was 10.6 acres, and therefore 2.3 acres was excluded from that Deed.

9. It is not in dispute that the first and second Plaintiff's dwelling house was excluded from the 2006 Mortgage Deed. What is in issue is whether the entranceway to that dwelling house was also excluded. The sale by the Receiver to the Defendants purported to include those lands. The proceedings therefore concern whether or not those lands were included in the 2006 Mortgage Deed and, whether or not, therefore, the Receiver was entitled to sell them to the Defendants.

10. For completeness, it should be explained that the third and fourth Plaintiffs are trustees of the Hoban Family Trust to whom it is claimed that the lands retained by the first and second Plaintiffs, including the entranceway, were transferred in 2018, with the first and second Plaintiffs retaining a life interest in the dwelling house.

11. It is fair to say that the Defendants' request for discovery and for particulars of the Plaintiffs' claim were largely directed to obtaining information relevant to the identification of the lands the subject of the 2006 Mortgage Deed. Discovery was also of documents relevant to the question of the various Plaintiffs interests in the lands.

12. A number of the categories of discovery sought by the Defendants were agreed. Of those in dispute, Stack J ordered that discovery be made of most of the categories, albeit in narrower terms than was sought.

13. It is of some significance that, in relation to certain categories, the Court ordered discovery of documents on the basis that the documents should readily be within the procurement of the Plaintiffs. For instance, the Court directed that discovery be made of any deed of conveyance executed by the Plaintiffs in respect of the lands, noting that although "*the documents are old, deeds will normally be retained by either a solicitor or a lending institution, and should be procurable, if necessary on accountable trust receipt*."

14. The Discovery Order contained 14 categories in respect of which the Plaintiffs were required to make discovery, eight of which, as reflected in the Order, were agreed on consent. The affidavit was to be sworn by the first Plaintiff within 8 weeks of the date of the Order, *i.e.* by 1 June 2022.

15. In relation to particulars, of most relevance is Stack J's conclusion, at paragraph 17 of her judgment, that the Plaintiffs be required to identify on a map the extent of the 2.3 acres of the lands comprising Oaklands that allegedly form part of the subject matter of the 2006 Mortgage Deed.

16. The Plaintiffs did not appeal either of the Orders made.

17. The Plaintiffs were in default in delivering their affidavit of discovery. It was ultimately agreed that the Plaintiffs would deliver replies to particulars and provide an unsworn affidavit of discovery together with their unsworn discovery documentation by 20 July 2022 and a sworn affidavit of discovery by 3 August 2022.

18. In the event, the Plaintiff delivered an unsworn affidavit of discovery on 13 July 2022 together with accompanying documentation.

19. By letter dated 21 July 2022, the Defendants' solicitors raised a number of concerns regarding both the form and content of the Plaintiffs' unsworn affidavit.

20. There was no substantive response to this letter and the Defendants obtained liberty to issue the within motions on 20 October 2022. The motions issued on 8 November 2022. On 9 December 2022, the within motion was fixed for hearing on 18 April 2023.

21. The Plaintiffs thereafter delivered a sworn affidavit of the first Plaintiff. The sworn affidavit was in precisely the same terms as the unsworn affidavit delivered on 13 December 2022.

22. I was informed at the hearing of the motions that the sworn affidavit had not, in fact, been filed as the Central Office of the High Court had refused to accept it. Although no explanation for this was offered by the Plaintiffs, it seems likely that the Central Office refused to accept the affidavit because it was improperly sworn, the jurat being on a separate page from the body of the affidavit.

The Issues

23. An Order for Discovery having already been made and not appealed, the question of whether the documents required to be discovered are relevant to any issue in the case or are necessary for the fair disposal of the case has already been determined and is not in issue for the purpose of this application. The judgment of Stack J sets out the reasons for the Court directing discovery in the terms set out in the Order.

24. Similarly, in relation to the requirement to provide further and better particulars, the Order of Stack J has already determined what further particulars are required.

25. Therefore, the questions for the purpose of this application are:

    (1) whether the Plaintiffs have failed to meet their obligations to make discovery and/or provide particulars in terms of the Orders made; and
    (2) if not, what are the consequences of any such failure.

Relevant principles

26. In relation to the first issue, the obligation when making discovery is described in n **Atlantic Shellfish Ltd v. Cork County Council [2007] IEHC 215**:

"*[An] order for discovery under the Superior Courts Rules carries with it the duty to search archives of records and files diligently for material documents including computer records… A party is required to make a reasonable search for documents falling within the scope of the order"*

27. The Plaintiffs rely on the decision in **Johnston v Church of Scientology [2001] 1 IR 682** regarding the extent of a party to *procure* documents when making discovery. Denham J cited the following passage from the judgment in **Northern Bank Finance Ltd v Charlton** (unreported, High Court, Finlay P., 26 May 1977) which Denham J referred to as being one of the "*rare exceptions*" to the general rule that a party is only required to discover documents within his or her possession or power:

"*I am therefore satisfied that within the meaning of the principle applicable to an affidavit of discovery I must at this stage at least decide prima facie that these documents are within the procurement of the plaintiff and that there is not any reason to believe that if the plaintiff in pursuance of the obligations of the directors of J.G. Mooney & Company properly have to them as their nominees requested the handing over even though it might be on a returnable basis of these documents that that request would be refused. If it is a further application may have to be made to me and different considerations might apply depending upon the grounds for that refusal*

It will be appreciated that the learned President was dealing with a particular document which he believed - having regard to the relationship between the plaintiff company and the company is whose possession it was - could be obtained for the asking. But he made no concluded finding to that effect and, in the terms quoted, effectively reserved the right to the plaintiffs to return to the Court to explain whether the document was forthcoming.."

28. **Johnston** predates the amendment to the Rules of the Superior Courts which occurred in 2009 which inserted the word "procurement" in Order 31, Rules 12. However, in **Thema International Fund plc v HSBC Institutional Trust Service (Ireland) [2013] IESC 5; [2013] 1 IR 274**, the Supreme Court concluded that the obligation when

making discovery had not materially changed following this amendment. Clarke J (as he then was) concluded:

> *"The position adopted in most of the common law jurisprudence to which reference has been made and also adopted under the former rule in this jurisdiction under Johnson v Church of Scientology has, in my view, the considerable merit of certainty. A party either has documents in its possession or has the legal entitlement to require possession. In those circumstances the document must be discovered. In all other circumstances, the document does not have to be discovered."*

29. In **Sterling-Winthrop Group Ltd v Farbenfabriken Bayer AG [1967] IR 97**, Kenny J examined the circumstances in which further and better discovery may be required, that is, the circumstances in which a Court is entitled to conclude that a party has not made adequate discovery:

> "*Such an order will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession relevant to the action which have not been disclosed by the first affidavit. The court will, however, order a further affidavit of documents when it is satisfied (a) from the pleadings, (b) from the affidavit of discovery already filed, (c) from the documents referred to in the affidavit of discovery, or (d) from an admission by the party who made the affidavit of discovery that the party against whom the order is sought has other documents in his possession relating to the issues in the action which have not been disclosed by the first affidavit. The court will also order a further affidavit when there are grounds, derived from the documents discovered, for suspecting that there are other relevant documents in the possession of the party who has made the affidavit or where there are reasonable grounds for believing that the person making the affidavit of discovery has misunderstood the issues in the case and has, in consequence, omitted documents from it."*

30. It seems to me that, in addition to the circumstances outlined above, a Court may also order further and better discovery where there are grounds, derived from documents

previously exhibited in the proceedings, for suspecting that there are relevant documents that are or were in the possession of the party who has made discovery other than those disclosed in the affidavit of discovery.

31. As regards the second issue, the authorities make clear that even where there has been a failure to make discovery, the Court should be very slow to strike out a claim or defence. In **Hurley v Valero Energy (Ireland) Limited [2022] IEHC 651**, Holland J helpfully analysed the relevant jurisprudence at paragraphs 28 to 54 of his judgment. Included in that detailed analysis (at paragraphs 47 and 48) is the identification by Noonan J in **Leahy v OSB Group [2015] IEHC 10**, of a three-limb test before a claim could be struck out:

    - *"[F]irst, that there is an ongoing failure to comply with the discovery order,*
    - *second, that such failure is clearly deliberate and,*
    - *third, that the consequences of that failure will be to deprive the defendants of a fair trial."*

32. In **Go2CapeVerde Limited & anor v. Paradise Beach Aldemento Turistico Algodoeiro S.A. [2014] IEHC 531**, Baker J considered the approach the court must take in an application to dismiss under the order may be summarised as follows:

> *26. In the more recent judgment of Green Pastures (Donegal) v. Aurivo Cooperative Society Ltd and Anor., Ryan J. said the true question before the Court was as to the meaning or scope of the discovery obligation in respect of one category of documents ordered to be discovered. Ryan J., having reviewed the authorities with regard to the striking out of pleadings for failure to make discovery, identified "malicious determination to evade the obligation to make discovery" as a hurdle that an applicant faces in an application to dismiss. I find that phraseology helpful to identify two essential elements of the test. the failure must be malicious and arise from a determination to evade an obligation to make discovery. to save the failure must be malicious means that it must be deliberate and not merely negligent and not merely arising from a flawed*

interpretation of the legal import of the obligation or the true legal interpretation of a category.

27. I am satisfied, having regard to the authorities, that the purpose of O. 31, r. 21 is not to punish the defaulting party, but to secure the interests of justice, and that the true test I must apply is to ask whether there has been a failure to make discovery, and then to consider the reasons for the failure. At that point even in circumstances where that failure is deliberate and malicious, the proceedings should be struck out only if it satisfied that justice cannot be done between the parties. The failure to make discovery is not the determining factor and the fact that a party deliberately obscures documents is not sufficient, there must in addition be a substantial risk of injustice which cannot be remedied by the making of an order for further and better discovery and/or in costs … the court must be satisfied that the risk of injustice has been or can be ameliorated, and that the omitted documentation has or will be furnished before trial. Thus the court must take a view as to the degree of contrition shown by a party in default, as well as whether that party has shown a willingness to remedy the omission, and whether the omission can be dealt with in a way that furthers the interest of both parties."

33. In **Hurley**, Holland J, having reviewed the authorities, concluded:

"[It] seems to me that the ultimate question in a motion under O.31 R.21 should be whether the moving party has been irremediably prejudiced and so deprived of a fair trial. But there are degrees of even irremediable prejudice (or, to put it another way, there are degrees of remediation of prejudice) and whether a party has been deprived of a fair trial may also be a matter of degree and extent. One must also bear in mind:

- *the constitutional right of access to the Courts.*
- *that this is a motion for final – not interlocutory – relief: that is, dismissing a plenary action on information less than that likely to be available at trial on oral evidence and on, as in this case, affidavit evidence in the absence of cross-examination.*

- *that, in consequence the trial judge is likely to be appreciably better placed than am I to discern where justice lies in consequence of the destruction of the documents.*
- *that if this motion fails that outcome will not constrict the trial judge in the exercise of his/her constitutional duty to ensure a fair trial."*

34. As regards the failure to respond to particulars, a similar jurisdiction to strike out in exceptional circumstances exist as made clear in the related cases of **Ryanair Ltd v Bravofly Ltd [2009] IEHC 224** and **Ryanair Ltd v Bravofly Ltd [2009] IEHC 387**.

The Defendants' Case

35. The Defendants make two separate complaints in relation to the affidavit provided. First, they contend that the affidavit is not in the form required by the Rules of the Superior Courts, Order 31, Rule 12(4)(b):

> *"Parties providing discovery shall list documents or categories of information, and shall provide documents and information for inspection, in a manner corresponding with the categories in the agreement or order for discovery and, subject to any such agreement or order, in a sequence corresponding with the manner in which the documents or information have been stored or kept in the usual course of business by the party making discovery."*

36. In this regard, the affidavit of discovery had simply listed, in the First Schedule, First Part, eight documents, or categories of documents which were not referable to the categories of discovery required to be made.

37. Separately, and more significantly, the Defendants argue that it is clear from the discovery made and the documentation previously exhibited in affidavits filed during the course of an earlier application for an injunction in these proceedings, that there are or were documents in existence which the Plaintiffs have not discovered and/or have failed to explain their inability to do so. In this regard, it is noted that the affidavit refers, at paragraph 6, to the first Plaintiff having had, but not now having, in his possession

or power, the documents referred to in the Second Schedule. The draft affidavit contains a Second Schedule, but no documents are listed thereunder. The (improperly) sworn affidavit contains no Second Schedule at all.

38. The Defendants contend that the Court can conclude that there has been a failure to make discovery as Ordered and that, moreover, in the absence of a response to the letter of 21 July 2022 or a replying affidavit, that the Court can infer that the failure was deliberate. Accordingly, they seek an Order striking out the Plaintiffs' claim pursuant to Order 31, Rule 21 of the Rules of the Superior Courts, or, in the alternative, pursuant to the inherent jurisdiction of the Court.

39. In relation to the replies to particulars, the Defendants say that that Plaintiffs have simply not answered the questions which they were required to answer and that, again, the Court can infer that this is deliberate non-compliance. Accordingly, they seek an Order pursuant to the inherent jurisdiction of the Court striking out the Plaintiffs' claim.

The Plaintiffs' case

40. In written submissions filed on behalf of the Plaintiffs, the Plaintiffs asserted that they had complied with both the Discovery Order and the Particulars Order. At the hearing of the motion, counsel for the Plaintiffs properly accepted that the affidavit of discovery was deficient in certain respects but did not, consistent with his instructions, accept all the Defendants' criticisms, and maintained the position that, save for the particular concessions made, the Plaintiffs had fulfilled their obligations under the Discovery Order.

41. As regards the complaint that the discovery had not been provided in accordance with Order 31, Rule 12(4)(b), the Plaintiffs contended that there was no obligation to provide discovery by reference to the categories of discovery contained set out in the Discovery Order.

42. The Plaintiffs' position was that the substance of the Defendants' complaint was that no map showing the extent of the lands the subject of the 2006 Mortgage Deed had been included in the discovery documentation but that this was readily explained by the fact that there was no map.

43. The Plaintiffs' contended that neither the admitted defects in discovery, nor even those alleged by the Defendants, were such as to prejudice a fair hearing of the action and thus the threshold for striking out his clients' claim had not been met. Any lack of documentation was as likely to operate to his clients' detriment as to the Defendants.

44. As regards the Particulars Order, the Plaintiffs similarly maintained that adequate particulars had been provided, but that, in any event, any failure to respond adequately didn't warrant striking out the Plaintiffs' claim.

Discussion

i. The Discovery Order

45. As discussed above, it is first necessary to consider whether the Defendants have established a failure to make adequate discovery before considering the consequences of any such failure. Having regard to the specific complaints made by the Defendants, I am satisfied that they have clearly established that the Plaintiffs have failed to meet their obligations when making discovery.

46. The obligation when making discovery is to make a reasonable search for documents falling within the scope of the Order. There is no evidence hear of any such reasonable search, or indeed of any search or enquiries at all. In effect, the Plaintiffs' argument that all that was required by the Order for discovery was the disclosure of a map which it was accepted did not exist, demonstrates, to say the very least, a failure to understand the scope and requirements of the Order.

47. There is clear evidence that additional documentation exists or existed which was within the power, possession, or procurement of the Plaintiffs but which is nowhere referenced in the affidavit of discovery. In each case, either the documents should have been discovered, or, if no longer available to the Plaintiffs, the documents should have been identified and an explanation given as to what has become of them. Insofar as the Plaintiffs contended in argument that documents would likely have been lost due to the passage of time, there was simply no evidence at all to support this proposition.

48. I am, moreover, satisfied that Order 31, Rule 12(4)(b) requires that discovery be made by reference to the categories detailed in the Discovery Order. This is clear, in my view, from the wording of the Rule which stipulates, in relevant part, that *"shall list documents or categories of information, and shall provide documents and information for inspection, in a manner corresponding with the categories in the agreement or order for discovery […]"*

49. The Plaintiffs affidavit is also defective in this respect.

50. However, in my view, it would be premature at this juncture to conclude that the Plaintiffs' failure to make proper discovery was for the purpose of evading their obligations in this regard or that the Defendants have been irremediably prejudiced by the failures. In the circumstances, I propose ordering that the Plaintiffs make further and better discovery. Any such Order for further and better discovery will be without prejudice to the Defendants' entitlement to renew this application once that affidavit has been received and or to make such arguments as they wish at the trial of the action regarding the inadequacy of the Plaintiffs' discovery.

51. In order to explain the conclusions above and to set out the scope of the further and better discovery required, I now turn to the individual complaints made by the Defendants, as set out in their letter of 21 July 2022, and which the Defendants correctly state have never been addressed.

52. The Discovery Order lists 8 categories of documents of which discovery was to be made on consent ("**the Consent categories**") and 6 categories where discovery was ordered to be made ("**the Compelled categories**").

53. Category 1 of the Consent categories requires discovery of all maps from January 2005 to January 2006 relating to the identification of the lands which were not subject to the 2006 Mortgage Deed. In circumstances where it was accepted that there was no map attached to the Deed itself, I cannot conclude that there has been a failure to make discovery of this category. However, assuming that there are no such maps, any further affidavit sworn should expressly aver that there are (and were) no documents in this Category responsive to this Category.

54. Category 2 of the Consent categories and Category 1 of the Compelled categories require discovery all deeds of conveyance for the lands between 1978 and 2005 and a full copy of the 2006 Mortgage Deed. The judgment of Stack J made clear that she considered that these documents should be procurable on accountable trust receipt from the Plaintiffs' solicitors. That judgment was not appealed. No such documents were disclosed, but moreover no explanation has been given of attempts to obtain them, or of why they are not available. Absent an explanation, there is no reason to suppose that the deeds of conveyance relating to the two plots previously sold by the Plaintiffs and the full 2006 Mortgage Deed are not within the Plaintiffs' power, possession, or procurement. The Plaintiffs will therefore be required to make discovery of the deeds of conveyance from the two previous sales and of the full 2006 Mortgage Deed. If any of these documents cannot be procured by the Plaintiffs, the affidavit of discovery should include an explanation of the efforts made to obtain them.

55. Category 3 of the Consent categories requires discovery of correspondence between the Plaintiffs and the receiver. This is the only category of documents expressly addressed in the affidavit of discovery. The first Plaintiff avers that he is not in a position to make discovery of any documents referred to in this category. The affidavit does not explain why. Confusingly, however, documents responsive to this category *are* included in the affidavit of discovery. Moreover, it is apparent from the documents exhibited in the earlier injunction application that there are additional documents in the possession of the Plaintiffs which has not been discovered. This is the only category of discovery in respect of which the Plaintiffs accept there is a deficiency in their discovery. Any further affidavit should clarify the position in relation to this category of discovery and make good the accepted deficiency.

56. Category 4 of the Consent categories requires discovery of correspondence between the Plaintiffs and Cardinal Surveys. No documents responsive to this category have been disclosed apart from a letter from Cardinal Surveys dated 30 October 2020. However, that letter expressly states that the first Plaintiff had provided Cardinal Surveys with specified documents including the original deed map from 1978/1979 and earlier surveys. These have not been disclosed. Notably, the Deeds of Conveyance which are included in the discovery affidavit do not include any maps. Again, no explanation is

given for failure to disclose documents which seem to have been in the Plaintiffs' possession as recently as 2020, or of why they are no longer available. The Court can conclude, therefore, in accordance with the principles identified in **Sterling-Winthrop** that there has been a failure to make discovery.

57. Category 5 of the Consent categories and Category 4 of the Compelled categories require discovery of any correspondence with Michael Reilly, Engineer, who mapped the lands in 2022. No documents are disclosed which appear responsive to this category. Mr Reilly swore an affidavit in the injunction application which exhibits the map he prepared. Although it might have been anticipated that there would be other documents responsive to those categories, it cannot be concluded on the basis of what is before the Court that there are such documents which have not been discovered. The Plaintiffs' counsel advised that his instructions were that there were no additional documents. Instructions are not evidence. The position should be expressly confirmed in any further affidavit.

58. Category 6 contains a similar requirement in relation to GMC Auctioneers. The category of discovery agreed included the GMC Auctioneers file. GMC Auctioneers provided a valuation to the Plaintiffs dated 11 April 2019. No documents are disclosed responsive to this category other than the valuation itself and no evidence of any efforts to obtain the GMC Auctioneers file have been set out. Again, the Plaintiffs' counsel advised that his instructions were that there were no additional documents under this category. Any further affidavit should disclose, at least, the GMC Auctioneers file or, if it cannot be obtained, or does not exist, the efforts made to obtain it.

59. Category 7 of the Consent categories and Category 6 of the Compelled categories require discovery of documents regarding the interests of the various of the Plaintiffs, including the Hoban Family Trust. Minimal documentation is exhibited in this regard. In particular, there are no documents which purport to evidence the first and second Plaintiffs' alleged life interest in the property. As both parties agreed, the absence of documentation could be more problematic for the Plaintiffs than the Defendants. If the Plaintiffs do not disclose more documentation in any supplemental affidavit or seek to address the absence of documents, then the Plaintiffs will have to address that at the trial of the action. However, the Defendants cannot point to evidence of any further

documents existing, so I do not propose ordering further and better discovery of this category.

60. Category 8 of the Consent categories requires disclosure of the mobile phone footage taken by the first Plaintiff's daughter at the property on 17 October 2020. There is no dispute but that such footage existed, in the affidavits filed in the injunction proceedings, the Plaintiffs said that they would rely on it and, in fact, the affidavit purports to disclose it. However, the Plaintiffs now contend that it is not available. No explanation is given. This matter requires to be addressed in any affidavit of further and better discovery.

61. Category 2 of the Compelled categories requires discovery of any correspondence between the Plaintiffs and their bank or their solicitors regarding the lands the subject matter of the 2006 Mortgage Deed. Although there clearly are such documents in the possession of the Plaintiffs – they were exhibited in the injunction proceedings – none are disclosed. The Court can safely conclude that there has been a failure to make discovery of this category.

62. Category 5 of the Compelled categories relates to valuations of the lands. A single valuation has been disclosed. The affidavit of further and better discovery should confirm that that is the only valuation available.

63. *Prima facie*, therefore, there are documents which exist, or did exist, which are responsive to the categories of discovery agreed or ordered and which the Plaintiffs have not disclosed, nor explained their failure to disclose.

64. In the absence of any explanation or effort to address the Defendants' contention that the discovery is inadequate, the Defendants ask the Court to infer that the failure is deliberate and involves a malicious determination to evade discovery obligations. Although it seems to me that the Plaintiffs have been, to say the least, careless of or indifferent to the requirement to comply with discovery obligations, I do not think it could be inferred at this stage that it involves a deliberate attempt to evade discovery or that the Defendants have been irremediably prejudiced or that a fair trial would be impossible. Indeed, the dearth of discovery on the part of the Plaintiffs may, in due

course, operate to the benefit of the Defendants and, in any event, any potential unfairness can, as suggested in **Hurley**, be addressed at the trial of the action.

65. The Defendants' counsel fairly accepted that if the Court was not persuaded that a fair trial would be impossible, then the Order striking out should not be made but argues that further and better discovery should be ordered. I agree, and it is for those reasons that I have concluded that the appropriate course of action is to direct the Plaintiffs to deliver a further and better affidavit of discovery in the terms set out above.

ii. The Particulars Order

66. There has also been a failure to comply with the Particulars Order. There are two outstanding particulars and, to be frank, it is difficult to understand why they have not been addressed. One simply seeks confirmation regarding the special damages sought. It is very difficult to see why this has not been addressed.

67. More inexplicable still is the failure to provide a map marking out the lands over which the Plaintiffs claim that they have retained ownership. In her judgment, Stack J concluded that if there was no such map, the Plaintiffs could create one. They have simply failed to do so. At the hearing of the motion, there was some suggestion that such a map had, in fact, been provided, though this was clearly incorrect. I am prepared to accept that there may have been some error or confusion on the Plaintiffs' part rather than wilful non-compliance. I will, in the circumstances, extend the time for the Plaintiffs to reply to the request for particulars, as previously ordered by Stack J for a period commensurate with such period as may be allowed for the affidavit of further and better discovery.

68. I will afford the parties a period of time to agree the terms of the Order to reflect the conclusions in this judgment and will list the matter for the making of final Orders on 15 June 2023.

69. Both parties addressed me in relation to the question of costs in the event that the proceedings were not struck out, but further discovery was ordered. The Defendants argued that they would be entitled to their costs in such a scenario, the Plaintiffs said that the costs should be reserved.

70. The Order made in this case may be less than was sought by the Defendants but insofar as that is so, it was in ease of the Plaintiffs. There had been no engagement by them with the issues fairly raised by the Defendants prior to the hearing of the motion and insofar as there has been any acknowledgement of non-compliance it was belated and begrudging. In the circumstances, my provisional view is that the Defendants are entitled to the allowable costs of this application but that any such Order should be subject to a stay on execution pending the determination of these proceedings in the High Court or further order.

71. If either side wishes to contend for a different form of costs order than that proposed, they should file written submissions in the Central Office of the High Court within ten days of today's date. A copy of the written submissions should be sent to the other side and to the registrar. The other side will then have a further ten days within which to file written submissions in reply.