[2017] IEHC 193

**THE HIGH COURT**

**[2014 No. 2799P]**

**BETWEEN**

**CAROL AND JOHN MORRISSEY**

**PLAINTIFFS**

**AND**

**THE NATIONAL ASSET MANAGEMENT AGENCY LIMITED,**

**CAPITA ASSET SERVICES (IRELAND) LIMITED,**

**THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL.**

**DEFENDANTS**

**JUDGEMENT of Mr Justice David Keane delivered on the 24th March 2017**

**Introduction**

1. The plaintiffs in this action move for two separate orders of discovery, pursuant to O. 31, r. 12 of the Rules of the Superior Courts, as amended ('the RSC'); one against the first and second defendants ('the NAMA defendants') and one against the third, fourth and fifth defendants ('the State defendants').

**Background**

2. The plaintiffs are wife and husband. They reside, together with their children, as a family at 36 Palmerston Road, Dublin 6. It is their principal private residence.

3. The first plaintiff is a pharmacist who, in 2002, left her employment in that capacity to work full time in the home. Rather unhelpfully, in the pleadings, on affidavit and in exhibited correspondence, the first plaintiff changes back and forth between the use of the forenames Cearuil and Carol, while consistently using the surname Morrissey. It may be that the former is a gaelic name and the latter an anglicised version of it, but no clarification or explanation has been offered in that regard. Since the plaintiffs have elected to pursue this litigation through the medium of the English language, and have chosen to describe the first plaintiff as 'Carol Morrissey' in the plenary summons with which they commenced proceedings, it seems to me that that is how she should be described, if unnecessary confusion is to be avoided.

4. The second plaintiff is a businessman. His business, according to the first plaintiff, has involved the purchase and development of property.

5. The first defendant ('NAMA') is a statutory body established under the National Asset Management Agency Act 2009 ('the NAMA Act'). The second defendant ('Capita') is a loan management service provider to NAMA. I will refer to those two defendants collectively as 'the NAMA defendants.'

6. The third defendant is the Minister for Finance ('the Minister'). He is sued primarily in respect of the discharge of his functions under the NAMA Act. The fourth defendant is the State as a juristic person and the fifth defendant is the Law Officer of the State designated by the Constitution of Ireland. They are sued to answer the plaintiffs' challenge to the constitutionality of several provisions of the NAMA Act. Collectively, I will refer to those three defendants as the State defendants.

7. From the pleadings and affidavits that have been exchanged between the parties, the following background emerges.

8. Between June 2004 and July 2006, the second plaintiff took out 18 separate loan facilities with the Irish Nationwide Building Society ('INBS'). Those loan facilities were secured by way of mortgages and other security that he provided in his personal capacity over eight separate properties. One of those eight properties is the plaintiffs' principal residence at 36 Palmerston Road. The other seven were purchased by the second plaintiff as investment properties. NAMA refers to the said loan facilities and associated security as 'the JM Connection.' The NAMA defendants contend that the aggregate amount of the relevant loan facilities offered by INBS was €27,578,000, of which the second defendant drew down a total sum of €27,278,000.

9. NAMA was established in December 2009. The Minister for Finance designated INBS as a 'participating institution', as defined under the 2009 Act, in 2010. The loans and 'bank assets' comprising the JM Connection were acquired by National Asset Loan Management Limited ('NALM'), a NAMA group entity within the meaning of s. 4 of the NAMA Act, on 10 December 2010. As a service provider to NAMA, INBS continued to manage the JM connection loan portfolio following its acquisition by NALM.

10. By Order of the High Court, made under s. 34 of the Credit Institutions (Stabilisation) Act 2010, on 1 July 2010, the business of INBS, including the management of the JM Connection loan portfolio, transferred to Anglo Irish Bank Corporation, which had by then been nationalised. By resolution passed on 3 October 2011, Anglo Irish Bank Corporation changed its name to Irish Bank Resolution Corporation ('IBRC'), with effect from 14 October 2011. On 7 February 2013, immediately upon the enactment of the Irish Bank Resolution Corporation Act 2013, the Minister for Finance made the Irish Bank Resolution Corporation (Special Liquidation) Order, providing for the orderly winding up of IBRC. Thus, the Joint Special Liquidators of IBRC assumed management of the JM Connection loan portfolio until, on 12 August 2013, Capita took over in that role, in which it has remained to the present day.

11. The NAMA defendants contend that default first arose with some of the relevant loan accounts in or about January 2006, and that by June 2008 cumulative arrears of €734,538.34 had built up on eight loan accounts.

12. By letter, dated 22 January 2014, NALM demanded repayment of the sum of €32,131,530.21 from the second defendant in respect of certain of the JM Connection loans. The NAMA defendants contend that the sum demanded has not been paid. By deed of appointment, dated 27 January 2014, NAMA purported to appoint Neil Hughes and Joseph Walsh as statutory receivers over the seven investment properties. To date, NAMA has taken no enforcement action against the property at 36 Palmerston Road, the defendants' principal private residence.

**Procedural history**

13. A plenary summons issued on behalf of the plaintiffs on 27 February 2014. They delivered a statement of claim on 3 June 2014. The NAMA defendants delivered a defence and counterclaim on 10 July 2014. The State defendants delivered a defence on the same date. The plaintiffs delivered a reply to each defence, and a defence to the NAMA defendants' counterclaim, on 1 August 2014.

14. The NAMA defendants' counterclaim is primarily one for summary judgment against the second defendant in the amount of €32,516,390.55, plus interest on that sum accruing from 16 April 2014. That claim, it would appear, was originally the subject of separate summary proceedings that issued on 17 April 2014, entitled '*NALM v John Morrissey* [2014 No. 1104S].' As one of several case management directions agreed between the parties, on 24 June 2014, Gilligan J ordered that those proceedings were to be stayed on the basis that the claim advanced in them was to be made the subject of a counterclaim by the NAMA defendants in these proceedings.

15. As reflected in the Order made on 24 June 2014, another direction agreed between the parties is that the trial of the action is to proceed on affidavit, subject to cross-examination. The result is that the following affidavits have been exchanged on the merits of the proceedings: an affidavit of the first plaintiff, sworn on 19 September 2014; an affidavit of the second plaintiff, sworn on the same date; an affidavit of Antoine Mac Donncha, sworn on behalf of the State defendants on the 21 October 2014; an affidavit Ben O'Donoghue, sworn on behalf of Capita on the 20 October 2014; and an affidavit of Michael Broderick, sworn on behalf of NAMA on the same date.

**The plaintiffs' claim**

16. The plaintiffs' statement of claim is very lengthy, running to 64 pages in total and containing 148 paragraphs leading up to the prayer for relief. The relief claimed extends over a further 20 enumerated paragraphs, set out over five of those 64 pages. Whether this reflects the innate complexity of the plaintiffs' claim, as they contend, or merely its discursiveness, as might be argued, is not directly at issue here.

17. Attempting a broad summary, the plaintiffs seek damages for breach of their constitutional rights (including their personal rights; property rights; family rights; marital rights; right to the inviolability of their dwelling; and rights to litigate and of access the courts), negligence (including negligent misrepresentation), breach of duty (including breach of statutory duty), breach of s. 3 of the European Convention on Human Rights Act 2003, and breach of their rights under s. 3 of the Guardianship of Infants Act 1964, together with interest on those damages and costs. They also seek an injunction preventing any future interference with their exercise of the relevant rights, as well as a raft of declarations (approximately 22, by my count) including the following:

> (i) That the NAMA defendants and the Minister have, in respect of their actions concerning the second plaintiff's properties, breached the plaintiffs' constitutional rights as already described.
>
> (ii) That various sections of the NAMA Act are incompatible with the State's obligations under the European Convention on Human Rights ('the Convention').
>
> (iii) That the acts of the NAMA defendants and the Minister constitute breaches of the plaintiffs' rights under various article of the Charter of Fundamental Rights of the European Union ('the Charter').
>
> (iv) That various provisions of the 2009 Act are inapplicable to the plaintiffs as in breach of their constitutional rights or, in the alternative, are invalid as repugnant to the Constitution on that basis.
>
> (v) That various provisions of the 2009 Act are incompatible with the State's obligations under the Convention.

18. The plaintiffs mount their claim on the following grounds. First, they seek to impugn as unlawful the decision of IBRC to reject the second plaintiff's business plan concerning the JM Connection loan portfolio and to require his co-operation with an alternative strategy endorsed by NAMA in relation to it. Those decisions were communicated to the second plaintiff in a letter, dated 15 May 2012.

19. Second, they assert that there was an unlawful delegation of authority within NAMA in considering the second plaintiff's business plan.

20. Third, they contend that the requirements that NAMA made of the second plaintiff in the said letter were *ultra vires* NAMA under the 2009 Act and in breach of the second plaintiff's entitlement to natural and constitutional justice and fair procedures.

21. Fourth, they plead that further requirements made of the second plaintiff in a letter from IBRC, dated 12 February 2013, amount to further *ultra vires* and unlawful action on the part of NAMA.

22. Fifth, the plaintiffs assert that NAMA acted *ultra vires* and unlawfully in failing to properly consider instead either the disposal of the JM Connection loan portfolio or the adoption of an alternative management strategy in respect of it.

23. Sixth, they plead that, insofar as NAMA has pursued the objective of 'renewal of sustainable activity in the property market in Ireland', it has acted *ultra vires* and for an improper purpose and, insofar as this has impacted on the NAMA defendants' management of the JM Connection property portfolio; the appointment of statutory receivers over the seven investment properties; and the institution of summary judgment proceedings against the second plaintiff, those decisions are vitiated by that unlawful conduct.

24. Seventh, the plaintiffs claim that, insofar as NAMA has sought to fix both the period of its own lifespan and certain debt reduction targets to be achieved within that projected period, it has acted *ultra vires* and for an improper purpose and, insofar as this has impacted on the NAMA defendants' management of the JM Connection property portfolio and the appointment of statutory receivers over the seven investment properties at issue, those decisions are vitiated by that unlawful conduct.

25. Eighth, the plaintiffs plead that the Minister has unlawfully interfered with the independence of NAMA by

> (i) purporting to give certain commitments to the European Commission; the European Central Bank ('ECB'), and the International Monetary Fund ('the IMF'), (collectively, 'the Troika'), regarding NAMA bond redemption targets;
>
> (ii) purporting to interfere with NAMA's discharge of its statutory functions by asking it to consider the expedited disposal of properties; and
>
> (iii) purporting to give a direction to NAMA under s. 14 of the NAMA Act to adopt certain measures in respect of the

operation of a NAMA Advisory Committee,

thereby vitiating the NAMA defendants' decisions concerning their management of the JM Connection property portfolio, and the appointment of statutory receivers over the seven investment properties.

26. Ninth, the plaintiffs contend that NAMA's decision to take enforcement action against the second defendant, communicated by letter of 20 January 2014, is invalid as based on: errors of fact; irrelevant considerations; failure to take into account relevant considerations; failure to provide the second defendant with requested information; failure to give adequate reasons for the decision to enforce; fettering NAMA's own discretion; improper influence by the Minister; economic duress of the second defendant; and the reasonable apprehension of bias. The plaintiffs challenge the decision to appoint statutory receivers over the second plaintiff's investment properties and the decision to commence summary judgment proceedings against the second defendant on broadly similar grounds.

27. Tenth, the plaintiffs assert that the management of the second plaintiff's loans by Capita on behalf of NAMA amounted to a breach of the second plaintiff's confidentiality rights or interests.

28. Eleventh, the plaintiffs assert that the loans within the JM Connection loan portfolio are void and unenforceable because INBS breached the duty of care that it owed to the second defendant not to foreseeably imperil his financial interests; his ownership of the investment properties concerned; or his ownership of the property at 36 Palmerston Road as his family home.

29. Twelfth, the plaintiffs plead that, over a series of meetings in 2009 and 2010, there was a renegotiation of the mortgage loan agreement between the second plaintiff and INBS concerning the property at 36 Palmerston Road that resulted in a revised agreement, which, they contend, NAMA is not entitled to repudiate or disavow.

30. Thirteenth, they assert that, insofar as may be necessary, they are entitled to an extension of time under s. 182 of the 2009 Act to prosecute their claims in these proceedings.

31. Fourteenth, the plaintiffs contend that various provisions of the 2009 Act capable of limiting, curtailing or excluding the plaintiffs' right of action are either inapplicable or invalid as in breach of the plaintiffs' constitutional rights; or in breach of s. 3 of the European Convention on Human Rights Act 2003, as being in breach of the State's obligations under various articles of the Convention; or in breach of various articles of the Charter, which the plaintiffs contend applies because the NAMA Act involves the implementation of EU law by the State.

**Background to the discovery application against the NAMA defendants**

32. Through their respective solicitors, the plaintiffs wrote separately to NAMA and Capita on 30 October 2014, seeking discovery of 23 separate categories of documentation by the former and eight separate categories of documentation from the latter. The NAMA defendants replied on 10 November 2014, asserting that the discovery sought from NAMA expressly extended to its servants or agents (presumably, including Capita); criticising the categories of discovery sought as oppressive, disproportionate, repetitive, and amounting to a fishing expedition; and countering with an offer of voluntary discovery of five specified categories of documentation.

33. The plaintiffs then issued a motion against the NAMA defendants on 14 November 2014, returnable on 2 December 2014, seeking an order for the discovery of the 31 categories of documents set out in their two requests for voluntary discovery, grounded on an affidavit sworn by the plaintiffs' solicitor on the same date. A replying affidavit was sworn on behalf of the NAMA defendants on 25 November 2014.

34. On 1 December 2014, the NAMA defendants wrote to the plaintiffs, offering to discover - in addition to the five categories of documentation already identified - a number of specifically listed guidance, policy and training documents. That letter was accompanied by a table in which the NAMA defendants set out the 23 categories of discovery that were being sought against NAMA and purported either to cross-reference each such category to one of the five categories of discovery that NAMA was offering or to identify it as 'refused.' That letter and enclosure were received by the plaintiffs at 4.14 p.m. on 1 December 2014.

35. What happened next is the subject of dispute. Before describing the competing positions of the parties, I pause to make the following observations. It seems to me that three options are open to a party seeking an order for discovery where a motion is pending and a counter offer of more limited discovery has been made. The first is to accept that offer. The second is to reject it and proceed with the application. The third, which most obviously arises where an offer of more limited discovery is made or refined shortly before the hearing, is to agree an adjournment to allow that offer to be considered.

36. The plaintiffs contend that, on 2 December 2014, it was agreed between Counsel that the plaintiffs' motion would be adjourned, for mention, to 5 December 2014 to enable the plaintiffs to consider the terms of the NAMA defendants' letter of 1 December 2014. The plaintiffs wrote again to the NAMA defendants on 4 December 2014. That letter begins by reiterating the plaintiffs' entitlement to discovery of each of the 23 categories of discovery sought. It then goes on to note the NAMA defendants' assertion that the discovery being offered would 'address what remains in dispute.' The plaintiffs appear to have construed those words, not as asserting the NAMA defendants' opposing position on the scope of the discovery to which the plaintiffs were entitled, but rather as the provision of an assurance to the plaintiffs by the NAMA defendants that the five categories of documentation (and additional documents listed) that were being offered somehow encompassed all of the documents within the 23 categories of documentation that the plaintiffs were seeking. Thus, for example, in relation to three of the 21 categories sought that were marked on the NAMA defendants' table as 'refused', the plaintiffs wrote that it was unclear to them whether those documents would be discovered.

37. Thus, apparently treating the NAMA defendants' counter offer as not being a counter offer at all but, rather, an assurance that the plaintiffs would receive all of the documentation within the 23 categories they were seeking discovery of (albeit by reference to the reformulation of those 23 categories as just five categories, and passing over the fact that three of those 23 categories had been explicitly refused), the plaintiffs concluded their letter by stating that they were prepared to have their motion struck out 'with a view to then examining the documentation which you are to furnish as set [out] in your letters.'

38. Having added, unnecessarily I would have thought, that the plaintiffs reserved the right to seek further and better discovery once discovery had been made, the letter then continues:

> *'Furthermore, for the avoidance of doubt, the striking out of the motion is not to be taken as creating a res judicata in respect of [the three categories that had been marked refused in the table enclosed with the NAMA defendants' letter of 1 December 2014] – which in any case would not be the case as a matter of law.'*

39. I pause here to return to the three options available to a party that has received a counter offer or proposal after issuing a motion for discovery. If the plaintiffs accepted the NAMA defendants' offer of discovery as equivalent in scope to, though more concisely formulated than, their own request, there was nothing to prevent them from accepting it as such. If the plaintiffs had any concern that the offer was narrower in scope than their request (and would exclude the discovery of any documentation to which the plaintiffs would be entitled), there was nothing to stop them from proceeding with their application on that basis. If the plaintiffs required any further clarification from the NAMA defendants concerning the nature or scope of the offer that was being made, or if they required any further time to consider the terms of that offer, it was perfectly open to them to seek to agree the adjournment of their application.

40. The plaintiffs, by their own account, did none of those things. Instead, they agreed to have their application struck out, subject – they contend – to the reservation of their entitlement to bring the same application again, at least in part, at some point in the future. On the plaintiffs' argument, their discovery motion was struck out on their understanding that the NAMA defendants were amenable to making voluntary discovery in the terms those defendants had offered but which the plaintiffs had not agreed, and hence subject to that entitlement.

41. The NAMA defendants give a significantly different account of the relevant events. They contend that the plaintiff's motion was struck out on 2 December 2014 by agreement between the parties on the basis that the NAMA defendants would make the discovery offered in their letter of 1 December 2014. Hence, upon receipt of the plaintiffs' letter of 4 December 2014, the NAMA defendants replied on the same date, stating in material part:

> '[T]he discovery offered by our clients in our letter to you of 1 December has been agreed as confirmed by your clients' Senior Counsel to the Court on Tuesday 2 December and, on consent, your clients' motion was struck out by Mr Justice Gilligan on 2 December on that basis. We do not propose to engage in further correspondence with you in this respect.'

42. No Orders were drawn up in respect of the proceedings on either 2 or 5 December 2014, because on each occasion the Court was given to understand that the directions and orders sought were on consent between the parties. However, the Registrar's note of the hearing on each date has been circulated to the parties and provided to the Court. It records that the plaintiffs' discovery motion against the NAMA defendants was struck out on 2 December 2014 'as it's agreed', whereas the plaintiffs' discovery motion against the State defendants was adjourned to 5 December 2014 and, on that date, was adjourned again to 20 March 2015.

43. Accordingly, I find as a fact that the plaintiffs agreed that the NAMA defendants were to make discovery in terms of their letter of 1 December 2014 and that the plaintiffs' discovery motion against the NAMA defendants was struck out on 2 December 2014 on that basis. I reject the plaintiffs' contention that the agreement reached between those parties was instead the entirely novel one set out in the plaintiffs' subsequent letter of 4 December 2014, whereby the NAMA defendants agreed to provide the plaintiffs with discovery in the terms offered 'on approval', acknowledging that the plaintiffs' agreement to strike out their motion for discovery was not to be a bar on the plaintiffs moving an application for some or all of the precisely the same categories of discovery in future, thereby depriving that agreement of any ostensible value from the NAMA defendants' perspective and creating, from that of the Court, a completely undesirable precedent whereby a single issue in discovery might become the subject of two (or more) interlocutory applications.

44. Both the NAMA defendants' letter of 4 December 2014 and the Registrar's note of what was stated to the Court on 5 December 2014 confirm that the NAMA defendants were to make discovery by 6 March 2015. Separate affidavits of discovery were sworn on behalf of NAMA and Capita on 27 March 2015. In total, 2350 documents were discovered, with privilege claimed over 407 of those. A further 25 documents, which the NAMA defendants contend had been omitted in error, were discovered on 6 May 2015.

**The discovery application against the NAMA defendants**

45. The plaintiffs were dissatisfied with the discovery they received. On 8 May 2015, the proposed trial date of 16 June 2015 was vacated and the plaintiffs were given liberty to issue a further motion seeking discovery against the NAMA defendants. The plaintiffs appear to have construed the absence of an express direction that O. 31, r. 12 (6) of the Rules of the Superior Courts ('RSC') was to apply, as absolving them of the requirement to first write to those defendants, specifying the categories of documentation in respect of which discovery was now being sought and identifying the reason or reasons for seeking each such category.

46. The plaintiffs' second motion for discovery against the NAMA defendants issued on 22 May 2015, returnable for 15 June 2015. In it, the plaintiffs seek discovery of 19 categories of documentation. In a replying affidavit, sworn on their behalf on 12 June 2015, the NAMA defendants agreed to make discovery in respect of 10 of those categories. It appears to be common case that agreement has since been reached between the parties concerning seven more. In consequence, only two of the 19 categories remains in dispute. Those are, first, category 11 as described in the plaintiffs' notice of motion and, second, most of the sub-categories comprising category 19. I propose to deal with each of those disputed categories and sub-categories in turn. But first, it may be helpful to set out a brief summary of the principles that govern the discovery of documents.

**The test for discovery**

47. The test for discovery has two limbs. The first is whether the category of documents sought is relevant to a matter in question in the proceedings; O. 31, r. 12 (1) of the RSC, as amended. The matters in question in the proceedings are defined by the pleadings and not otherwise; *BAM PPP PGGM Infrastructure Cooperatie UA v National Treasury Management Agency & Anor.* [2015] IECA 246. The test of relevance is not limited to documents admissible in evidence on any issue, but extends to documents that it is reasonable to suppose, without merely speculating, contain information which may (not must), either directly or indirectly, enable the party requiring discovery to advance his own case or damage the case of his adversary; *Ryanair v Aer Rianta* [2003] 4 I.R. 264 and *Framus v CRH* [2004] 2 I.R. 20, endorsing the formulation of Brett L.J. in *Compagnie Financiere du Pacifique v Peruvian Guano Co.* (1882) 11 Q.B.D. 55.

48. The second limb of the test is whether the applicant for discovery can satisfy the court that the discovery sought is necessary either for disposing fairly of the cause or matter or saving costs, or both; O. 31, r. 12 (4) of the RSC, as amended. If a party is entitled to a document on grounds of relevance to assist him in his case, on the ordinary discovery principles the discovery of that document will usually be necessary also. Save in exceptional circumstances a formal verification of this on affidavit will be sufficient to meet the test on a prima facie basis, but an opposing party may put forward reasons why that is not so; per Geoghegan J in *Taylor v Clonmel Healthcare Ltd*. [2004] 1 I.R. 169 at 182. One such reason is where a too wide-ranging order would itself comprise an obstacle to the fair disposal of the proceedings, given that there must be proportionality between the extent or volume of the documents to be discovered and the degree to which such documents are likely to advance the applicant's case or damage that of his adversary; per Murray CJ in *Framus Ltd v CRH plc* [2004] 2 I.R. 20 at 38. In every case where such a conflicting interest arises, a balance must be struck.

49. There was some argument between the parties concerning the extent to which these proceedings might be viewed as a public law action, analogous to an application for judicial review, and the extent to which, if that analogy is appropriate, the foregoing principles might be in some way modified.

50. I accept that these proceedings involve issues of both public and private law. As a matter of law, that does not make any difference to the appropriate test for discovery. In *Fitzwilton Ltd v Mahon* [2006] IEHC 48, Laffoy J confirmed that the same principles apply to discovery in judicial review proceedings as apply generally in civil proceedings. But as Laffoy J went on to note in *Fitzwilton* and as Geoghegan J commented in *Re Glor na nGael's application* [2004] 1 ILRM 170 at 176, the circumstances in which discovery will be ordered in judicial review proceedings are likely to be much narrower than the circumstances in which discovery will be granted in a plenary action. Or as Ó Caoimh J put it in *Shortt v Dublin City Council* [2003] 2 IR 69 at 89, 'while the remedy of discovery is available in judicial review proceedings, the fact that discovery is rare in such proceedings does not relate to any restriction on the right to apply…, but relates to the fact that its necessity will be more difficult to establish in judicial review proceedings having regard to their nature.'

51. Bearing these principles in mind, I return to the consider the categories of documentation the discovery of which is in dispute between the plaintiffs and the NAMA defendants.

**The disputed categories**
*i. Category 11*

52. Category 11 is identified in the plaintiffs' notice of motion as: '*All documents relating to NAMA's strategy for early disposal*.'

53. Rather unhelpfully, the plaintiffs' arguments on relevance and necessity are consistently directed more towards the evidence that has been put on affidavit for the trial of the action, than to the issues identified in the pleadings. This has made it much more difficult than it should have been to address the issue of whether each category of documentation sought is relevant to a matter in question in the proceedings, since those matters must be identified by reference to the pleadings and not the anticipated evidence at trial.

54. By reference to the pleadings, the plaintiffs submit, without elaboration, that the issue of early disposal 'is the subject matter of numerous pleas in the statement of claim', which include, 'for example', paras. 24 to 27 and 30 to 33. I can find no reference in any of those paragraphs of the statement of claim to a NAMA 'strategy for early disposal.' The Court is left to infer that the plaintiffs' argument is that such a strategy was implied in the requirements in NAMA's letter of 15 May 2012, expressly pleaded at para. 24 of the statement of claim, that 'the [JM] connection fully implement the current proposal strategy (and put plans in place to meet all property disposal targets)' and immediately place each of the eight properties on the open market for sale. However, in the absence of an express plea to that effect, it is hardly surprising that I can find no admission or, more pertinently, denial of the existence of any more general 'early disposal' strategy in the NAMA defendant's defence.

55. Hence, the plaintiffs fail to meet the test of relevance in seeking discovery of this category of documents. It should not need to be said that relevance is not determined by reference to the contents of documents already discovered or to assertions put forward on affidavit to be relied upon at trial (subject to cross-examination), save to the extent that those references or assertions can be shown to be relevant to a matter in question in the proceedings, as defined in the pleadings.

56. Even if the plaintiffs could meet the test of relevance in respect of this category, in my view they would fail the test of necessity. 'All documents relating to NAMA's strategy for early disposal' is an exceptionally broad and general formulation. I am conscious that, even if some basis could be identified for suggesting that the category sought is relevant to a matter in question, a too wide-ranging order would itself comprise an obstacle to the fair disposal of the proceedings, given that there must be proportionality between the extent or volume of the documents to be discovered and the degree to which such documents are likely to advance the applicants' case or damage that of their adversaries.

57. I refuse to order discovery of this category of documentation.

*ii. Category 19 (1) (b) and (c)*

58. Category 19 as identified in the plaintiffs' notice of motion states in material part:

> *'Unredacted copies of documents discovered in particular:*
>
> *…*
>
> *b. Unredacted and complete Primary and Special Servicing Agreement between NAMA and Capita*
>
> *c. S131 Direction issues to Anglo Irish Bank.'*

59. On the fourth day of the hearing of the application, I was informed that the parties had reached agreement in relation to these sub-categories of documentation and, hence, it is unnecessary to consider them further.

*ii. Categories 19 (2), (3) and (4)*

60. Category 19 (2) is described as follows:

> *'All documents, records, notes, memoranda, internal notes (including those made by servants and/or agents of [NAMA], in particular the IBRC, [Capita] and/or any NAMA group entity), which relate to NAMA establishing asset disposal targets and/or requiring disposal of properties (which include and/or would encompass the disposal of the properties of [the second plaintiff]) in order to contribute to the restoration of the Irish property market and/or for the objective of the renewal of sustainable activity in the property market in Ireland and/or to increase housing and/or property supply on the market.'*

61. Category 19 (3) reads:

> *'All documents, records, notes, memoranda, internal notes (including those made by servants and/or agents of [NAMA], in particular the INBS, IBRC, [Capita] and/or any NAMA group entity), which relate to NAMA establishing asset disposal targets and/or requiring asset disposal (which includes and/or would encompass the disposal of the assets of [the*

*second plaintiff]) in order to meet NAMA's debt repayment targets including its debt repayment target of repaying €7.5 million of senior bonds by end of year 2013.'*

62. Category 19 (4) is:

> *'All documents, records, notes, memoranda, internal notes (including those made by servants and/or agents of [NAMA], in particular the INBS, IBRC, [Capita] and/or any NAMA group entity), which relate to communications and/or discussions between NAMA and the Troika in respect of any commitment given by NAMA to the Troika regarding any debt reduction targets and/or asset disposals.'*

63. The plaintiffs acknowledge that these three sub-categories – 19 (2), (3) and (4) – of the current motion, correspond directly to categories 12, 13 and 14 of the plaintiffs' earlier discovery motion against these defendants. I have already found as a fact that the earlier motion was struck out by the High Court on 2 December 2014 by reference to the agreement by the NAMA defendants to make discovery instead by reference to the terms of their letter of offer of 1 December 2014. That offer did not entail discovery of those categories of documentation. Indeed, the said letter was accompanied by a table in which the NAMA defendants expressly marked those categories – 12, 13 and 14 – as 'refused.'

64. In addressing this difficulty, the plaintiffs have made extensive submissions on two propositions: first, that the doctrine of *res judicata* does not apply to an order merely striking out a motion; and second, that it does not apply to the determination of an interlocutory application. It is unnecessary to address either of those propositions here as I do not understand the NAMA defendants to rely on any proposition to the contrary.

65. The real issue on this point is one of abuse of process. In that regard, the plaintiffs place, what seems to me to be, inapposite reliance on para. 32-130 of the textbook Delany and McGrath, *Civil Procedure in the Superior Courts*, 3rd edn. (Dublin, 2012). That paragraph deals with the jurisdiction to strike out proceedings as an abuse of process based on an issue estoppel, where any of the three requirements of the estoppel *per res judicatum* is absent. In that context, it is no doubt true, as those authors suggest, that the doctrine of abuse of process should be kept within reasonable bounds and confined to egregious cases, so as to avoid undermining the entire theory on which the doctrine of *res judicata* is based *i.e*. that it is not generally an abuse of process to re-litigate where one of the three requirements of the doctrine is missing.

66. The abuse of process asserted here is procedural rather than substantive. In 2014, the plaintiffs brought a motion against the NAMA defendants seeking an order for discovery of, amongst others, the three categories of discovery now at issue. I have found that the parties reached agreement that the NAMA defendants would make discovery of several categories of documentation that did not include those three categories of discovery, each of which the NAMA defendants expressly refused to discover. On consent between the parties, the plaintiffs' discovery motion was struck out by this Court. There is no question but that the decision concerned involved the determination of the same issue between the same parties before the same Court. Insofar as it may be argued that an interlocutory decision is not necessarily final, that argument cannot avail the plaintiffs here, since they contend for a right to re-litigate the same interlocutory issue simpliciter, rather than a right to do so based on newly discovered facts, or some other relevant change of circumstance.

67. I am satisfied that it would amount to an abuse of process to permit the plaintiffs to apply again for discovery of precisely the same categories of discovery as were the subject of an earlier discovery application, struck out on consent after agreement had been reached on the discovery that was to be made. To hold otherwise would be to entirely undermine the value of compromise in respect of such applications and would create the spectre of a multiplicity of applications concerning the same issue or issues in this case and in other cases.

68. For those reasons, I refuse to order discovery of these categories of documentation.

**The discovery application against the State Defendants**

69. Through their respective solicitors, the plaintiffs wrote to the State defendants on 30 October 2014, seeking discovery of six separate categories of documentation, and providing reasons for that request. The State defendants replied on 20 November 2014, separately addressing each of the categories identified and refusing to make discovery of any.

70. The plaintiffs then issued a motion against the State defendants on 24 November 2014, returnable on 2 December 2014, seeking an order for the discovery of each of those six categories of documentation. The application is grounded on an affidavit of the plaintiffs' solicitor sworn on the same date. Antoine Mac Donncha, Head of the Legal Unit in the Department of Finance, swore a short replying affidavit on behalf of the State defendants on 28 November 2014, adopting the reasons for refusal set out in the State defendants' letter of 20 November 2014. The plaintiffs' solicitor swore a further short affidavit on 20 July 2015, exhibiting an extract from the Oireachtas Debates concerning a sitting of the Joint Committee on Finance, Public Expenditure and Reform on 9 September 2011, which was attended by John Corrigan and Frank Daly, Chief Executive Officer and Chairman, respectively, of NAMA.

71. When the plaintiffs' application against the State defendants was returned on 2 December 2014, it was adjourned initially to 5 December 2014, for mention, then to 20 March 2014 and, thence, from time to time until it came on for hearing together with the plaintiffs' second application for discovery against the NAMA defendants. I do not know why that was so. There has never been any suggestion on any side that the outcome of one application was, or is, in any way contingent upon the outcome of the other.

**The disputed categories**

*i. Category 1*

72. Category 1 comprises:

> *'All documents, records, notes, memoranda, internal notes and/or background material (including those made by servants and/or agents of [the State defendants]) concerning requests by the [State defendants] relating to NAMA contributing towards the restoration of the property market and/or relating to the objective of renewal of sustainable activity in the property market in Ireland and/or to increase housing and/or property supply on the market in Dublin and/or Ireland.'*

73. The plaintiffs contend that this category is relevant to the sixth broad ground of complaint they raise in their statement of claim, which is in substance that the NAMA defendants have, at the behest of the State defendants, pursued several unlawful objectives, in this instance the 'renewal of sustainable activity in the property market in Ireland', both generally and, more specifically, in their dealings with the JM Connection property portfolio and the plaintiffs. In that regard, the plaintiffs rely on what is pleaded at

paragraphs 57 to 62 of the statement of claim as raising an issue in that regard to which the discovery sought is relevant.

74. In doing so, they are obliged to acknowledge that the principal communication between the Minister and NAMA that they characterise as an unlawful interference by the former with the latter is one that is expressly admitted by the State defendants. At paragraph 57 of the statement of claim, it is pleaded that, on 18 February 2014, the Minister asked NAMA 'to weigh up the pros and cons of selling off its property quickly and that Government was concerned with the lack of housing supply in Dublin.' Paragraph 21 of the State defendants' defence includes the express plea:

> 'It is admitted … that the Minister asked NAMA to examine the advantages and disadvantages ('pros and cons') of accelerated asset disposals. Moreover, it is not in any way unauthorised or unlawful for the Minister to have communicated as outlined. The impact of NAMA's actions on the housing and property markets of the State is a legitimate consideration under the NAMA Act 2009.'

75. Accordingly, I am satisfied that the discovery sought is not relevant to any matter *in question* in the proceedings. Even if it could be argued that the State defendants' express admission leaves some residual matter in question in this regard, it seems to me that the extremely broad formulation of the category of documentation sought means that the burden it would impose on the State defendants to comply with it (even allowing for the extensive resources of the State) is disproportionate to any likely benefit the plaintiffs might obtain.

76. Further, as already noted above, the plaintiffs have exhibited an extract from the Oireachtas Debates concerning a sitting of the Joint Committee on Finance, Public Expenditure and Reform on 9 September 2011, which was attended by the Chief Executive Officer and Chairman of NAMA. The Court's attention was drawn to, amongst others, a statement made by Brendan McDonagh, the Chief Executive Officer of NAMA, concerning a request from the Minister that NAMA suggest initiatives to address issues in the residential property market in Ireland.

77. It seems to me that the situation here is, thus, very closely analogous to that considered by Kelly J in *Sheehy v Ireland* (unreported, High Court, 30 July 2002), where at issue was a request by certain prisoners for discovery of documents pertaining to the decision by the Minister for Justice to refuse their release under the Good Friday Agreement. In refusing the application, Kelly J observed:

> 'In the light of the evidence which they have been able to adduce they have demonstrated in the clearest terms the decision of the Government concerning the applicants. Furthermore, insofar as they may seek to make the case that there is a bias of pre-judgment, they have been able to demonstrate by reference to the parliamentary record the statement made by the Minister for Justice prior to the conviction of the applicants before a Special Criminal Court. In these circumstances, I do not see why these documents are needed so as to determine either the date, the nature or the considerations informing the said decision. It seems to me that they have already done so by reference to the official record of parliament and so discovery is not necessary to fairly dispose of this issue. None of the material sworn or exhibited by the applicants has been controverted. To order discovery would be simply to permit a trawl.'

78. I refuse to order discovery of this category of documents.

*ii. Category 2*

79. Category 2 is:

> *'All documents, records, notes, memoranda, internal notes (including those made by servants and/or agents of [the State defendants](including communication and/or discussions with [NAMA])) concerning the stated objective of the Minister that NAMA should complete its works of deleveraging its portfolio as soon as possible as set out in the Response of NAMA to the recommendation in the Comptroller and Auditor General's Report entitled "National Asset Management Agency Progress Report 2010-12" published in April 2014.'*

80. This category is also one that is alleged to be relevant to the plaintiffs' complaint that that the NAMA defendants have, at the behest of the State defendants, pursued an unlawful objective, in this instance that of 'deleveraging its portfolio as soon as possible', an objective attributed to the Minister by the Chief Executive of NAMA as recorded in the Comptroller and Auditor General's Report. The relevant allegation is pleaded at paragraphs 63 to 68 of the statement of claim.

81. While it is true that the State defendants put the plaintiffs on strict proof of the relevant Comptroller and Auditor's General Report at paragraph 25 of their defence, it is equally true that, whatever its evidential value might be, the report is a public document. The same paragraph of the defence expressly notes that s. 10 (1) (b) of the NAMA Act requires NAMA to 'deal expeditiously' with the assets acquired by it, and that s. 10 (2) requires NAMA to obtain the best achievable financial return for the State 'expeditiously.' This aspect of the plaintiffs' claim resides primarily in the public law sphere and, while the Auditor and Comptroller General's Report is not formally admitted, the facts are not significantly in dispute. It seems to me that plaintiffs fail the following test articulated by Bingham M.R. in R v Secretary of State for Health ex p. Hackney London Borough Council (unreported, 29 July 1994, Court of Appeal (Civil Division)), and endorsed by Finlay Geoghegan J in *K.A. v Minister for Justice* [2003] 2 IR 93:

> 'Have they raised a factual issue of sufficient substance, or adduced evidence which grounds a reasonable suspicion of unlawfulness, such that the application cannot be fairly resolved without discovery.'

In my view, for the reasons I have identified, they have not.

82. I therefore refuse to order discovery of this category of documentation.

*iii. Category 3*

83. Category 3 is constituted by:

> *'All documents, records, notes, memoranda, internal notes (including those made by servants and/or agents of [the State defendants]relating to the commitment given by the State defendants and/or by the Irish authorities in the revised "Memorandum of Understanding on Specific Economic Policy Conditionality" to ensure that NAMA "constructively contributes to the restoration of the Irish property market in the course of meeting the asset disposal targets established and monitored by the NAMA board, including redemption of €7.5 million worth of senior bonds by end of 2013"*

*including but not limited to:*

*(i) communications between the State defendants and NAMA with respect to such commitment,*

*(ii) communications between the State defendants and the Troika relating to such commitment, and*

*(iii) the identity of the "Irish authorities in the Memorandum for the purposes of giving such commitment.'*

84. The plaintiffs argue that this category is relevant to the eighth ground of complaint they raise in their statement of claim, which is that the Minister has unlawfully interfered with the independence of NAMA by purporting to give certain commitments to the Troika regarding NAMA bond redemption targets. That complaint is pleaded at paragraphs 52 to 56 of the statement of claim. Once again, in seeking discovery on that basis, the plaintiffs are obliged to acknowledge an express admission on the part of the NAMA defendants. In this instance, it is that set out at paragraph 16 of their defence, that the relevant commitment was given by the Minister, although it is expressly pleaded that the Minister gave that commitment on behalf of the State rather than on behalf of NAMA.

85. In those circumstances, I am satisfied that this category of discovery does not relate to a matter that remains in question in the proceedings or, alternatively, if it does relate to any residual factual dispute, that, considering the State defendants' admission or concession just described, it is not one of sufficient substance to require discovery.

86. I do not think it is sufficient, as a matter of law, to argue that discovery of this category of documentation should be ordered because, in the context of commitments given to the Troika by the Minister or by NAMA, the Minister might have improperly compromised the independence of NAMA, or NAMA might have allowed its independence to be improperly compromised by the Minister.

87. I reach that conclusion for three reasons. The first is that, as Finlay Geoghegan J put it in *K.A.*, already cited (at 101), albeit in the context of discovery in judicial review proceedings, 'it is not sufficient for an applicant to make an assertion not based upon any substantiated act and then seek discovery in the hope that there will exist documents that support the assertion.'

88. The second reason relates to the agreement between the parties that the trial of the action should be conducted on affidavit, subject to cross-examination. In that context, as already noted, Antoine Mac Donncha, Head of the Legal Unit in the Department of Finance, swore an affidavit on behalf of the State defendants on 21 October 2014. In it, he avers, at paragraph 9, that the Minister did not make a commitment to the Troika on behalf of NAMA and did not fetter or constrain the discretion of the NAMA board to fix NAMA's debt reduction targets in any way. An averment of that kind is significant in the context of a public law challenge because, as Ó Caoimh J pointed out in *Shortt v Dublin City Council* [2003] 2 IR 69 (at 89), in the absence of material suggesting that the averments in the affidavits filed on behalf of the respondent (or, in this case, the relevant defendants) are untrue, it would be oppressive to direct discovery where the only purpose in seeking it is to impugn the integrity of a deponent. For that reason also, I do not accept that a sufficient basis has been made out for an order directing discovery of this category of documentation.

89. The third reason relates to the evidence upon which the plaintiffs rely, and which they obviously propose to adduce, in support of their claims. As I have already noted, the plaintiffs have exhibited an extract from the Oireachtas Debates concerning a sitting of the Joint Committee on Finance, Public Expenditure and Reform on 9 September 2011, which was attended by the Chief Executive Officer and Chairman of NAMA. The plaintiffs rely on, amongst others, that portion of the statement made by Frank Daly, the Chairman of NAMA, regarding NAMA's interaction with the Minister and with the Troika. Once again, applying the same analysis as that of Kelly J in *Sheehy v Ireland*, already cited, the existence of the parliamentary record - upon which the plaintiffs seek to rely as the basis for this aspect of their claim - establishes that no further discovery is necessary to fairly dispose of the issue. Insofar as I am aware, the relevant material has not been controverted for the purpose of these proceedings. In the circumstances, to order discovery here, as in *Sheehy*, would be simply to permit a trawl.

90. Discovery of this category is, therefore, refused.

*iv. Category 4*

91. Category 4 is:

*'All documents records, notes, memoranda, internal notes (including those made by servants and/or agents of [NAMA], in particular, the INBS, IBRC, [Capita] and/or any NAMA group entity) which relate to communications and/or discussions (including meetings) between NAMA and the Troika in respect of any commitment given by NAMA to the Troika regarding any debt reductions targets and/or asset disposals.'*

92. In their letter seeking voluntary discovery, the plaintiffs have not attempted to link this category to any pleading, leaving the Court to infer from the reference to the Troika that it also relates to the plaintiffs' eighth ground of complaint and the matters pleaded at paragraph 52 to 56 of their statement of claim. Accordingly, for the same reasons that I refused to order discovery of the preceding category of documentation, I refuse to order discovery of this category of documentation also.

*v. Category 5*

93. Category 5 comprises:

*'All documentation relating to the communications and requests by [the State defendants] to [NAMA] its servants or agents that NAMA should examine the rapid sale of its loan book.'*

94. In their letter seeking voluntary discovery, the plaintiffs link this request to their eighth ground of claim, pleaded at paragraphs 57 to 68 of their statement of claim. Accordingly, for the reasons I have already given in relation to categories 1 and 2, above, I refuse to order discovery of this category of documentation.

vi. Category 6

95. Category 6 is:

*'All documents, records, notes, memoranda, internal notes of [the State defendants] (including those made by the servants or agents of [the State defendants], which includes the Advisory Group of NAMA) which relates to NAMA facilitating the operation of the NAMA Advisory Group as it relates to a (sic) NAMA's strategy as proposed by the Board of*

*NAMA limited to:*

*(i) Strategies with respect to asset disposal and/or enforcement action against debtors.*

*(ii) Strategies with respect to restoring the Irish property market and/or increasing housing supply on the market.*

*(iii) Strategies relating to NAMA's debt repayment targets.*

*(iv) Strategies relating to any commitment given to the Troika.*

Such documents to include any communications and/or information furnished by NAMA to the NAMA Advisory Group (in relation to the above matters) and/or any communications and/or information furnished by [the State defendants] arising therefrom and/or through such NAMA Advisory Group.'

96. In their letter seeking voluntary discovery, the plaintiffs have asserted that discovery of this documentation is relevant to a matter in question in the proceedings, namely, that part of the plaintiffs' eighth ground of claim that alleges that the Minister's purported direction to NAMA of 7 March 2014, pursuant to s. 14 of the NAMA Act, was *ultra vires* the Minister under that Act and unlawful, as pleaded in paragraphs 69 to 72 of the statement of claim.

97. I am satisfied that the matter in question involves an issue of law, rather than any significant controversy of fact to which the discovery of this category of documentation could be material.

98. Therefore, I refuse to order discovery of this category of documentation.

**Conclusion**

99. In summary, for the reasons I have set out above, I refuse each of the plaintiffs' applications for discovery in its entirety.