

APPROVED

[AMENDED]

[2023] IEHC 711

THE HIGH COURT

Record No. 2015/8471P

BETWEEN:

PATRICK MCKILLEN

PLAINTIFF

-AND-

**THE NATIONAL ASSET MANAGEMENT AGENCY, PAUL
HENNIGAN, ENDA FARRELL, JOHN MORAN AND THE MINISTER
FOR FINANCE**

DEFENDANTS

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 11th day of December

2023

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INTRODUCTION

Preliminary

1. The context for the following motion, insofar as the plaintiff's claims against the fourth named defendant ("Mr. Moran") and the fifth named defendant ("the Minister")¹ are concerned, centres on the allegation that Mr. Moran and the department engaged in contact and correspondence with a representative of Sir David and Sir Frederick Barclay ("the Barclay Brothers" or "the Barclay Interests") concerning the potential purchase of the plaintiff's loans from the Irish Bank Resolution Corporation ("IBRC") in or around October and November 2011.
2. In summary, it is alleged by the plaintiff, Mr. McKillen, that as a result of the National Asset Management Agency ("NAMA") acquiring loans in or around May 2010 which were taken out by companies that he was associated with,² the Department of Finance gained access to confidential information in relation to his business affairs. Mr. McKillen was a shareholder in a company called Coroin Limited and the security for his loans, initially with IBRC and then with NAMA, were his shares with Coroin Limited. He alleges that the Barclay Interests (and entities associated with Sir David and Sir Frederick Barclay) acquired the Coroin Ltd loans and associated security from NAMA and, acting on information obtained from NAMA, the Barclay Interests sought to acquire Mr. McKillen's loans from IBRC and sought the assistance of the defendants in this regard. Mr. McKillen states that this alleged contact between the defendants and the representative of the Barclay Interests amounts to misfeasance of public office

¹ Also referred to as "the department."

² Mr. McKillen successfully challenged that process before the Supreme Court in *Dellway Investments Ltd v NAMA* [2010] IEHC 364.

and/or an abuse of process and/or acting with indifference in relation to Mr. McKillen's commercial interests.

3. A full defence has been delivered on behalf of the Minister and Mr. Moran.
4. For their part, it is submitted on behalf of the Minister and Mr. Moran that the central (and single) factual allegation made against them by the plaintiff in these proceedings is that they engaged in contact and correspondence with a representative of the Barclay Interests³ concerning the potential purchase of Mr. McKillen's loans from IBRC in the period of October and November 2011. The defendants state that their position is straightforward: contact was made by a representative of the Barclay Interests and he was referred via e-mail to IBRC who were the owner of the plaintiff's loans. It is also emphasised on behalf of the Minister and Mr. Moran that Mr. McKillen's loans were not in fact purchased by the Barclay Interests as a result of any contact with them and that, therefore, the only issue between the parties is the alleged contact between the defendants and the representative of the Barclay Interests.
5. The central issue which arises in the application before me concerns the interpretation of an order of this court (Allen J.) dated 11 September 2020 which was made with the consent of the parties and which directed the Minister (on his behalf Mr. Gary Hynds⁴) and Mr. Moran⁵ to make discovery in the terms agreed by the parties and set out in the court order.

³ The terms "Barclay Brothers" and "Barclay Interests" are used interchangeably.

⁴ Mr. Hynds is a Specialist (equivalent to Principal Officer) in the Shareholding and Financial Advisory Division within the Department of Finance.

⁵ Mr. Moran was Secretary General of the Department of Finance from March 2012 to May 2014.

6. I heard oral submissions from Mr. Paul McGarry SC (and received written Legal Submissions from Mr. McGarry SC and Mr. Jack Tchrakian BL) for Mr. Patrick McKillen, the plaintiff. I also heard oral submissions from Mr. Patrick McCann SC (and received written Legal Submissions from Mr. McCann SC and Mr. Michael Binchy BL) for the Minister and Mr. Moran.

Motion dated 3rd May 2022: the application before the court

7. It was indicated at the commencement of the application that the plaintiff was not pursuing the strike out application against the Minister and Mr. Moran in the first relief sought in the notice of motion dated 3rd May 2022.
8. The third relief in the notice of motion, again sought in the alternative, is an order pursuant to O.31, r.12(11) and O.31, r.12(12) of the Rules of the Superior Courts, 1986, as amended and substituted (“RSC 1986”) varying the terms of the consent order dated 11th September 2020 (Allen J.) so as to require the defendants to make discovery on oath of the further categories of documentation (“Further Categories”) set out at Schedule 2 to the notice of motion dated 3rd May 2022.
9. The two remaining applications are the reliefs sought in paragraphs 2 and 4 of the notice of motion dated 3rd May 2022 which were sought as alternatives to the strike out application but which, as stated, is now not being pursued.
10. At paragraph 2 of the notice of motion dated 3rd May 2022, the plaintiff seeks an order pursuant to the inherent jurisdiction of the court and/or O.31 RSC 1986 requiring the defendants to make *further and better discovery* on oath of all documents in their

possession or procurement and which are in the ambit of the categories, to “the sub-categories” set out at Schedule 1 to the notice of motion.

11. At paragraph 4 of the notice of motion dated 3rd May 2022, the plaintiff seeks an order pursuant to the inherent jurisdiction of the court directing the defendants to swear a further affidavit which addresses the issues set out at Schedule 3 (“Issues to Address”) which, it is contended, require further detail and clarification.

PLEADINGS, MOTIONS & AFFIDAVITS

Chronology

12. A plenary summons was issued on 20th October 2015; an appearance was entered on behalf of the Minister on 5th November 2015 and on behalf of Mr. Moran on 4th May 2016; a Statement of Claim was delivered on 9th November 2017; a notice of intention to proceed is dated 24th November 2017; a notice on behalf of Mr. Moran and the Minister seeking further and better particulars was issued on 24th May 2018; replies to particulars from the plaintiff are dated 21st August 2018; a motion on behalf of Mr. Moran and the Minister seeking an order from the court pursuant *inter alia* to O.19, r. 7 RSC 1986 compelling further and better particulars was issued on 30th October 2018; a defence on behalf of Mr. Moran and the Minister was delivered on 1st April 2019; the plaintiff’s motion for discovery is dated 13th January 2020 and grounded on the affidavit of Mr. Eames Solicitor dated 6th January 2020 and this is responded to on behalf of Mr. Moran and the Minister by Martin Hayes, solicitor, of the Chief State Solicitor’s Office (“CSSO”) by an affidavit sworn on 30th July 2020.

13. The order on consent of this court (Allen J.) is made on 11th September 2020 directing discovery on agreed terms and this is followed by an affidavit from John Moran sworn on 2nd December 2020 and an affidavit of Gary Hynds affirmed on 21st December 2020.
14. The notice of motion, the subject of this application, is dated 3rd May 2022, and is grounded on the affidavit of Mr. Aidan Eames solicitor of the same date and this is replied to on behalf of Mr. Moran and the Minister by Mr. John Davis, solicitor in the CSSO by way of an affidavit sworn on 21st June 2022.
15. Mr. Eames replies to Mr. Davis' affidavit in an affidavit sworn on 13th July 2022.
16. Mr. Eames' second affidavit is responded to by the (second affidavit) of Mr. Gary Hynds which was affirmed on 12th October 2022.

ORDER OF DISCOVERY 11TH SEPTEMBER 2020

17. The order of this court (Allen J.) dated 11th September 2020 was consented to by the parties and this directed the fourth named defendant, John Moran, and the fifth named defendant, the Minister for Finance, to make discovery within a period of 12 weeks of the 11th September 2020, of all documents which are or have been in their power, possession or procurement within the following categories:
- (i) all correspondence or records of communications between (1) Mr Moran and the Department of Finance of the one part and (2) Sir David Barclay and Sir

Frederick Barclay (including the servants or agents or corporate entities controlled by them or connected to them) concerning the plaintiff's loans with IBRC and/or the purchase or potential purchase of those loans; and

- (ii) all correspondence or communications between (1) Mr. Moran and the Department of Finance of the one part and (2) IBRC, its Board of Directors and/or servants of the other part, relating to the plaintiff between 01 July 2011 and 06 February 2013.

18. The discovery order recited that Mr. Moran would swear the affidavit on his own behalf and Mr. Gary Hynds would swear the affidavit of discovery on behalf of the Minister for Finance. The affidavit of discovery was affirmed on 21st December 2020 by Gary Hynds, Specialist (Principal Officer) in the Shareholding and Financial Advisory Division of the Department of Finance. The affidavit of John Moran which was sworn on 2nd December 2020 did not discover any records in addition to that set out by Mr. Hynds.

19. The discovery order dated 11th September 2020 was the subject of negotiation and ultimate agreement between the parties.

20. The parties, however, disagree as to what the words and terms used in each of categories (i) and (ii) mean, and as to the reach of the discovery so ordered and depending on that interpretation an issue arises to, whether and what, further steps in the discovery process require to be taken.

21. In summary, the issues before me have netted down to the following matters:

- (i) first, the interpretation of what category (i) and category (ii) mean in the consent discovery order of this court (Allen J.) dated 11th September 2020;
- (ii) second, arising from the interpretation of this first matter, whether sub-categories (i) (1) to (9) and (ii) 10 to (15) of the notice of motion dated 3rd May 2022 meet the requirements for *further and better discovery* or in the alternative, *additional discovery*; and
- (iii) third (and in the alternative), depending on my decision on the second matter, should a *revised affidavit as to documents* be directed.

22. In his judgment in *Daly v Ardstone Capital Ltd.* [2020] IEHC 200, Murray J. deemed it necessary to draw a distinction between *further and better discovery*, on the one hand, and *additional discovery*, on the other hand.

23. Therefore, before addressing first, the request for further and better discovery of the Schedule 1: Sub-Categories and second, the request to file a further affidavit in relation to Schedule 3: Issues to Address, a preliminary issue arises in relation to the order sought for additional discovery and Schedule 2: Further Categories.

ADDITIONAL DISCOVERY

O.31, r.12 RSC 1986

24. As set out earlier, the third relief in the notice of motion dated 3rd May 2022 issued by the plaintiff sought, in the alternative, an order pursuant to O.31, r.12(11) RSC 1986 *varying* the terms of the consent order of Allen J. dated 11th September 2020 so as to require that the defendants make discovery on oath of the further categories of documentation set out in Schedule 2 – the Further Categories.
25. While an application for *further and better discovery* is addressed to the enforcement of categories of discovery which have been agreed (in this case, the two agreed categories (i) and (ii) are set out in the consent order of Allen J. dated 11th September 2020), in contrast, an application for *additional discovery* outside of those agreed categories *i.e.*, to vary what had been agreed, is determined in accordance with O.31, r. 12(11) RSC 1986.
26. O.31, r. 12(11) RSC 1986 provides that “*any party concerned by the effect of an order or agreement for discovery may at any time, by motion on notice to each other party concerned, apply to the Court for an order varying the terms of the discovery order or agreement. The Court may vary the terms of such order or agreement where it is satisfied that: (i) further discovery is necessary for disposing fairly of the case or for saving costs, or (ii) the discovery originally ordered or agreed is unreasonable having regard to the cost or other burden of providing discovery.*”
27. O. 31, r. 12(12) RSC 1986 provides that “*an order under O.31, r.12(11) shall not be made unless: (a) the applicant for same shall have previously applied by letter in*

writing to the other party specifying the variations sought to the order, furnishing the reasons why each variation is sought and requesting that party's agreement to the variations sought, and (b) a reasonable period of time for agreement has been allowed, and (c) the party or person requested has failed, refused or neglected to agree to such variation or has ignored such request."

Mandatory provisions

28. These provisions are couched in *mandatory language* which require compliance before the court can exercise its jurisdiction *i.e.*, they are a jurisdictional pre-requisite which require to be exhausted: *Hireservices (E) and Hireservices (I) Ltd v An Post* [2020] IECA 120 per Murray J. at paragraph 20.

29. Indeed in both *Hireservices (E) and Hireservices (I) Ltd v An Post* [2020] IECA 120 (at paragraph 16) and in *Daly v Ardstone Capital Ltd* [2020] IEHC 200 (at paragraph 5), Murray J. found that O.31, r.12(11) RSC 1986 *defined exhaustively* the circumstances in which additional discovery can be directed after orders for discovery have been consented to.

30. In *Wegner v Murphy* [2022] IEHC 525 the High Court (Holland J.) referred to the review of the case law on O.31, r.12(11) and O.31, r.12(12) by the High Court (Hyland J.) in *Brahmi v Kelleher* [2021] IEHC 611 (who in turn had applied the decision of the Court of Appeal (Murray J.), in *Hireservices (E) Ltd & Hireservices (I) Ltd v An Post*

[2020] IECA 120 and *Micks-Wallace v Dunne* [2020] IECA 282)⁶ and the following applicable principles were set out at paragraph 9 of the judgment of Holland J. :

“...[t]hese rules have replaced the inherent jurisdiction to order additional discovery and now exhaustively define the circumstances in which additional discovery can be directed after orders for discovery have been agreed or made.

- *The court may order additional discovery if satisfied that an injustice would be done otherwise.*
- *Such discovery orders are the exception not the norm. The default position is that the discovery is as agreed or directed, and that some good reason must be given for revisiting that agreement or order.*
- *The interests of all in the efficient disposition of proceedings requires that a party has one chance to seek discovery and having agreed to an order for discovery must “have good reason for coming again”, such as a material change in circumstances.*
- *“Critically”, such discovery will not be granted simply because the documents are relevant and necessary.*
- *A party seeking additional discovery must “show good reason why the discovery was not originally sought... ”.*

⁶ See also *Tobin v Minister for Defence* [2019] IESC 57.

Non-compliance

31. In this case, the correspondence on behalf of the plaintiff dated 10th March 2022 and 2nd May 2022 confirms that there was non-compliance with the substantive and procedural requirements of O.31, r.12(11) and O.31, r.12(12) RSC 1986.

32. The order of discovery (on consent) was made on 11th September 2020. The correspondence from the plaintiff's solicitors (Clark Hill Solicitors LLP) on 10th March 2022 to the CSSO formally requested: (a) the CSSO to make *further and better discovery* on oath of certain documents constituting sub-categories of category (i) and category (ii) (the "sub-categories"); and requested to the defendants (b) that a further affidavit be sworn clarifying certain issues arising out of their affidavit of discovery (the "Explanatory Affidavit"). The letter also stated the following:

"[f]urther and Better Discovery

In accordance with the terms of Order 31, Rule 12 of the Rules of the Superior Courts (as amended) (the "Rules") and/or the inherent power of the High Court, the Plaintiff hereby requires the Defendants to make further and better discovery of all documents (as defined below) which are or have been in their possession, power or procurement as set forth below..."

33. No reference is made in the letter dated 10th March 2022 to *additional discovery* within the meaning of RSC 1986 and neither did the plaintiff "*previously [apply] by letter in writing*" to the defendant "*specifying the variations sought to the order, furnishing the*

reasons why each variation is sought and requesting that party's agreement to the variations sought" which are mandatory requirements of RSC 1986.

34. On 12th April 2022 the CSSO responded to the letters from Clark Hill Solicitors LLP dated 23rd December 2021, 16th February 2022 and 10th March 2022, and this letter refers to the substance of the dispute in this application between the parties.

35. The correspondence from the plaintiff's solicitors on 2nd May 2022 indicated that the motion, which is now before the court, would be brought and the motion was in fact issued the following day, on 3rd May 2022. By so doing, the plaintiff failed to afford the defendants "*a reasonable period of time for agreement*" and as result of the plaintiff's failure to comply with the earlier mandatory provisions of O.31, r.12(12) RSC 1986, the question of the defendants having "*failed, refused or neglected to agree to such variation or has ignored such request*", does not (and could not) arise.

36. Accordingly, because the plaintiff has failed to comply with the mandatory requirements of O.31, r. 12(11) and O.31, r.12(12) RSC 1986, I refuse the alternative relief sought in the notice of motion dated 3rd May 2022 which sought an order pursuant to O.31, r.12(11) of the RSC 1986 varying the terms of the Order (dated 11th September 2020) such as to require the Defendants to make discovery on oath of the further categories of documentation set out at Schedule 2 of the notice of motion dated 3rd May 2022.

37. By way of observation, while it is acknowledged that additional or further and better discovery can be pursued in the alternative, in this case the sub-categories of documents

(sub-categories (1) to (9) and (10) to (15)) seeking further and better discovery and additional discovery are identical in every respect.

38. This fact is acknowledged in paragraph 28 of his affidavit of 3rd May 2022 where Mr. Eames states that “[i]n the Notice of Motion, they have been individually listed at Schedule 2, but they are in fact identical to the Sub-Categories and there is consequentially no need to repeat them...” [emphasis added].

FURTHER & BETTER DISCOVERY

Application of Legal Principles

39. The applicable principles which I have to consider and apply in an application for *further and better discovery* have been discussed by the Superior Courts in a number of relatively recent decisions, including by the Court of Appeal (Murray J.) in *Hireservices (E) Ltd & Hireservices (I) Ltd v An Post* [2020] IECA 120, the High Court (Murray J.) in *Daly v Ardstone Capital Ltd* [2020] IEHC 200⁷, the High Court⁸ in *Victoria Hall Management Ltd v Cox* [2019] IEHC 639 and the High Court⁹ in *Kelland Homes Ltd v Ballytherm Ltd* [2019] IEHC 46.

40. In paraphrasing the observations of Murray J. in *Daly v Ardstone Capital Ltd* and *Hireservices (E) Ltd & Hireservices (I) Ltd v An Post* [2020] IECA 120¹⁰, in the case

⁷ Murray J. gave judgment as a member of the Court of Appeal in *Hireservices (E) Ltd & Hireservices (I) Ltd v An Post* on 29th April 2020, and, sitting as a High Court judge, in *Daly v Ardstone Capital Ltd* on 30th April 2020.

⁸ Barniville J. as he then was.

⁹ Michael Quinn J.

¹⁰ The Court of Appeal was comprised as follows: Birmingham P.; Faherty and Murray JJ.

before me, discovery was made on foot of an agreement between the parties which resulted in a consent order of this court (Allen J.) dated 11th September 2020 and the party in whose favour discovery has been made (here Mr. McKillen, the plaintiff) contends that there are other documents which he believes should be discovered.

41. It was argued on Mr. McKillen's behalf that there are documents which fall within the categories that ought to have been discovered but were not (further and better discovery) and also, that there are documents which are not within the agreed or directed categories but which, it is believed, are relevant and which, it is submitted, should now be discovered (additional discovery). As set out above, this latter application has been refused for the reasons referred to earlier in this judgment.

42. Before looking at the sub-categories which arise in the application for further and better discovery in paragraph 2 of the Notice of Motion dated 3rd May 2022, it is necessary, first, to examine the legal principles that apply when a request for further and better discovery is made and I do so by paraphrasing and adopting their adumbration by Murray J. in *Daly v Ardstone* and then adapting the same to the facts of this case.

43. In summary, further and better discovery will only be directed where it can be established (on behalf of Mr. McKillen in the case before me) that there are documents which the party that has made discovery (Mr. Moran and the Minister for Finance) *was required to discover* but has *not* discovered and/or that the persons making the affidavit of discovery (in this case Mr. Moran and Mr. Hynds) *have misunderstood* the issues in the action and/or that their view as to whether documents are outside their discovery

obligation was wrong.¹¹ Accordingly, initially I am required to interpret what categories (i) and (ii) in the discovery order of Allen J. dated 11th September 2020 mean and then assess whether Mr. Hynds or Mr. Moran erred in their interpretation in that regard.

44. In addressing the first matter, the appropriate question, for example, is whether it has been established that there are documents which are or have been in the power, possession or procurement of the Minister (in this context I will also include and refer to Mr. Hynds who is the deponent on behalf of the Minister) and Mr. Moran and which should have been, but were not, discovered in their original affidavits of discovery.¹² When applied to this case, for example, Mr. McKillen is required to establish that the Minister and Mr. Moran (who are alleged to be in default) have documents within the scope of categories (i) and (ii) as set out in the consent order of the court (Allen J.) dated 11th September 2020 but have not discovered them.

45. It is insufficient for Mr. McKillen to show that the defendants have documents that are relevant to the issues in the proceedings and have not discovered them. They must be captured by the scope of categories (i) and (ii) as set out in the consent order of the court (Allen J.) dated 11th September 2020,¹³ (as agreed to by the parties) and hence the important distinction is between additional discovery, on the one hand and further and better discovery, on the other hand. Accordingly, an order for further and better

¹¹ In *Daly v Ardstone Capital Ltd* [2020] IEHC 200 Murray J. referred to *Sterling Winthorp Group Limited v Farben Fabriken Bayer AG* [1967] IR 97 at pp.100, 103 and 105.

¹² In *Daly v Ardstone Capital Ltd* [2020] IEHC 200 Murray J. referred to *O'Leary v Volkswagon Group Ireland Ltd* [2015] IESC 35 per Laffoy J. at paragraph 56.

¹³ In *Daly v Ardstone Capital Ltd* [2020] IEHC 200 Murray J. observed that documents which are relevant but which, for example, fall outside the agreed categories are required to be addressed by reference to a different procedure and different principles.

discovery will not be made when the application is based solely on an affidavit asserting that the other party has documents in his possession that ought to have been, but were not, disclosed in the first affidavit(s) of discovery.¹⁴

46. The sequence which followed the making of the consent order before Allen J. on 11th September 2020 is as follows:

2 nd December 2020	Affidavit of discovery of John Moran
21 December 2020	Affidavit of discovery affirmed by Gary Hynds (on behalf of the Minister for Finance)
23 December 2021 ¹⁵	Letter from Eames Solicitors to CSSO seeking an affirmed affidavit of discovery and taking issue with what the letter states was “ <i>the absence of expected documents in respect of Category (i) of Court Order dated 11 September 2020</i> ” and “ <i>the absence of expected documents in respect of Category (ii) of Court Order dated 11 September 2020</i> ” and setting this out by reference to the documents discovered (15 for Category (i) and 26 for Category (ii))
12 th April 2022 ¹⁶	Letter from CSSO addressing the letter from Eames solicitors dated 23 rd December 2021.
3 rd May 2022	Affidavit of Aidan Eames Solicitor (for the plaintiff) grounding this motion (also dated 3 rd May 2022) seeking inter alia further and better discovery
3 rd May 2022	Notice of Motion dated 3 rd May 2022
21 st June 2022	Affidavit of John Davis solicitor, CSSO, (replying to the affidavit of Aidan Eames)
13 th July 2022	Second Affidavit of Aidan Eames Solicitor (for the plaintiff) replying to the affidavit of John Davis of 21 st June 2022
12 th October 2022	Second replying affidavit of Gary Hynds (for the Minister for Finance), responding to the second affidavit of Aidan Eames Solicitor

47. The principal affidavit of discovery, therefore, is the affidavit of Gary Hynds affirmed on 21st December 2020.

¹⁴ In *Daly v Ardstone Capital Ltd* [2020] IEHC 200, *Murray J. Sterling Winthorp Group Limited v Farben Fabriken Bayer AG* [1967] IR 97 at p.100.

¹⁵ Similar correspondence is sent on 16th February 2022 and 10th March 2022.

¹⁶ Letters had been previously sent on 20th January 2022 and 25th February 2022.

48. In terms of category (i) in the consent order of Allen J. dated 11th September 2020, Mr. Hynds discovered the following 15 documents set out in the table below (as per his affidavit which was affirmed on 21st December 2020)¹⁷:

Category (i)

	Brief Description	Date of Record	No. of Pages	Subject Matter
1.	2010-02-14 DoF to Aidan Barclay	14/02/2014	1	Maybourne/Coroin Group
2.	2011-02-14 Letter from Aidan Barclay to Min Lenihan	14/02/2014	1	Maybourne/Coroin Group
3.	2011-10-28 Email and attachment from Richard Faber to DoF	28/10/2011	5	Scanned document from Richard Faber
4.	2011-10-28 Email from Richard Faber to John Moran and attachment	28/10/2011	5	RF Letter to IBRC – 28 th October 2011
5.	2011-10-28 Email from Richard Faber to John Moran	28/10/2011	3	Scanned document from Richard Faber
6.	2011-10-28 Email from DoF to Richard Faber	28/10/2011	4	Re: scanned documents
7.	2011-10-29 Richard Faber – Ellerman Investments Limited	29/10/2011	1	Richard Faber – Ellerman Investments Limited
8.	2011-11-14 Email thread and attachments between Richard Faber to DoF	14/11/2011	17	Scanned document from Richard Faber
9.	2011-11-23 Email and attachments from Richard Faber to DoF	23/11/2011	12	Supporting documents
10.	2011-11-23 Email threat between Richard Faber and DoF	23/11/2011	5	Scanned document from Richard Faber
11.	2011-11-25 Email from Danny Buckley to John Moran & Others	25/11/2011	1	Re: contact from Richard Faber
12.	2011-11-29 Richard Faber to DoF fwd offer to IBRC	29/11/2011	4	FW: Offer Letter

¹⁷ The tables are reproduced *verbatim* from the affidavit of discovery and include typographical errors in the original documentation.

13.	2012-08-16 Email and attachments from Rory Godson to DoF	16/08/2012	166	IBRC, Paddy McKillen and Maybourne Hotels
14.	2012-11-23 Email from Rory Godson to DoF	23/11/2012	2	Re: Idea for John Moran re using international financial media and another matter
15.	2013-01-02 Email from Powerscourt to DoF	02/01/2013	2	Re: Meeting with John [Moran] [sic.] ¹⁸

49. In terms of category (ii) in the consent order of Allen J. dated 11th September 2020, Mr. Hynds discovered the following 26 documents set out in the table below (as per his affidavit)¹⁹:

Category (ii)

	Brief Description	Date of Record	P	Subject Matter	Reason for Redaction
1.	2011-08-25 Pages from IBRC Board pack-Redacted	25/08/2011	1	Mention of Paddy McKillen from IBRC board pack	The material is not relevant to the categories ordered or necessary for the disposal of the matters pleaded
2.	2011-09-29 Pages from IBRC Board pack-Redacted	29/09/2011	1	Mention of Paddy McKillen from IBRC board pack	The material is not relevant to the categories ordered necessary for the disposal of the matters pleaded
3.	2011-11-30 Pages from IBRC Board pack-Redacted	30/11/2011	4	Mention of Paddy McKillen from IBRC board pack	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material has no relevance to the proceedings as a whole; the material is not necessary for the disposal of the matters pleaded and the material contains private sensitive personal and commercial financial data at third parties.

¹⁸ The tables are reproduced *verbatim* from the affidavit of discovery and include typographical errors in the original documentation.

¹⁹ Again, the tables are reproduced *verbatim* from the affidavit of discovery and include typographical errors in the original documentation.

4.	2021-01-25 Pages from IBRC Board pack Redacted	25/01/2012	5	Mention of Paddy McKillen from IBRC board pack	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material has no relevance to the proceedings as a whole; the material is not necessary for the disposal of the matters pleaded; and the material contains private sensitive personal and commercial financial data of third parties.
5.	2012-02-23 Pages from IBRC Board pack Redacted	23/02/2012	3	Mention of Paddy McKillen from IBRC board pack	The material is subject to common interest privilege; of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material has no relevance to the proceedings as a whole; the material is not necessary for the disposal of the matters pleaded; and the material contains private sensitive personal and commercial financial data of third parties.
6.	2012-03-28 Min Noonan to Alan Dukes	28/03/2012	3	Irish Times article RE Paddy McKillen	N/A
7.	2012-04-03 Alan Dukes to Min Noonan	03/04/2012	1	Response to Irish Times Article re Paddy McKillen	N/A
8.	2012-04-04 PQ – legal firm	04/04/2012	1	Response from IBRC re PQ	N/A
9.	2012-04-17 Response to Legal Firm to Sec General questions	17/04/2012	2	Additional information on PQ	N/A
10.	2012-04-27 Pages from IBRC Board pack	27/04/2012	7	Mention of Paddy McKillen from IBRC board pack	The material is subject to common interest privilege; of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material has no relevance to the proceedings as a whole; the material is not necessary for the disposal of the matters pleaded; and the material contains private

					sensitive personal and commercial financial data of third parties.
11.	2012-06-27 Pages from IBRC Board pack Redacted	27/06/2012	3	Mention of Paddy McKillen from IBRC board pack	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material has no relevance to the proceedings as a whole; the material is not necessary for the disposal of the matters pleaded; and the material contains private sensitive personal and commercial financial data of third parties.
12.	2012-06-28 RE_ Query re FOI Material	28/06/2012	2	Paddy McKillen FOI	N/A
13.	2012-08-23 Pages from Board Pack Redacted	23/08/2012	1	Mention of Paddy McKillen from IBRC board pack	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material has no relevance to the proceedings as a whole and the material is not necessary for the disposal of the matters pleaded.
14.	2012-09-27 Pages from IBRC Board pack Redacted	27/09/2012	6	Mention of Paddy McKillen from IBRC board pack	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material has no relevance to the proceedings as a whole; the material is not necessary for the disposal of the matters pleaded; and the material contains private sensitive personal and commercial financial data of third parties.
15.	2012-09-27 Pages from IBRC risk and compliance committee_Redacted	27/09/2012	1	Mention of Paddy McKillen from IBRC risk and compliance paper	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material has no relevance to the proceedings as a whole; the material is not necessary for the disposal of

					the matters pleaded; and the material contains private sensitive personal and commercial financial data of third parties.
16.	2012-10-22 Pages from IBRC risk and compliance committee_Redacted	22/10/2012	1	Mention of Paddy McKillen from IBRC risk and compliance paper	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material has no relevance to the proceedings as a whole; the material is not necessary for the disposal of the matters pleaded; and the material contains private sensitive personal and commercial financial data of third parties.
17.	2012-10-25 Pages from IBRC Board pack_Redacted	25/10/2012	2	Mention of Paddy McKillen from IBRC board pack	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material has no relevance to the proceedings as a whole; the material is not necessary for the disposal of the matters pleaded; and the material contains private sensitive personal and commercial financial data of third parties.
18.	2012-11-06 RE_Agenda for meeting on Thursday 8 th November_Redacted	06/11/2012	2	Meeting agenda	The material is not relevant to the categories ordered and the material is not necessary for the disposal of the matters pleaded
19.	2012-11-09 IBRC Meeting Minutes NOV 2012_Redacted	09/11/2012	4	Meeting minutes	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material has no relevance to the proceedings as a whole; the material is not necessary for the disposal of the matters pleaded; and the material contains private sensitive personal and commercial financial data of third parties.

20.	2012-11-12 RE TRC Meeting Papers – 14 Nov at 4pm	12/11/2012	30	Email with transaction review committee paper	The material is subject to common interest privilege; is not relevant to the categories ordered.
21.	2012-11-20 Pages from IBRC risk and compliance committee_Redacted	20/11/2012	1	Mention of Paddy McKillen from IBRC risk and compliance paper	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material is not necessary for the disposal of the matters pleaded; the material has no relevance to the proceedings as a whole; and the material contains private sensitive personal and commercial financial data of third parties.
22.	2012-11-21 Pages from IBRC Board pack_Redacted	21/11/2012	12	Mention of paddy McKillen from IBRC board pack	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material is not necessary for the disposal of the matters pleaded; the material has no relevance to the proceedings as a whole; and the material contains private sensitive personal and commercial financial data of third parties.
23.	2012-12-17 Pages from IBRC Corporate and Institutional Recovery_Redacted	17/12/2012	2	Mention of Paddy McKillen from IBRC corporate and institutional recovery paper	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material is not necessary for the disposal of the matters pleaded; the material has no relevance to the proceedings as a whole; and the material contains private sensitive personal and commercial financial data of third parties.
24.	2012-12-18 Pages from IBRC Board pack_Redacted	18/12/2012	4	Mention of Paddy McKillen from IBRC board pack	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material has no

					relevance to the proceedings as a whole; the material is not necessary for the disposal of the matters pleaded; and the material contains private sensitive personal and commercial financial data of third parties.
25.	2013-01-23 Pages from IBRC risk and compliance committee_Redacted	23/01/2012	4	Mention of Paddy McKillen from IBRC corporate and institutional recovery paper	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material is not necessary for the disposal of the matters pleaded; the material has no relevance to the proceedings as a whole; and the material contains private sensitive personal and commercial financial data of third parties.
26.	2013-01-24 Pages from IBRC Board pack_Redacted	24/01/2013	1	Mention of Paddy McKillen from IBRC board pack	The material is of a confidential and commercially sensitive nature; the material is not relevant to the categories ordered; the material has no relevance to the proceedings as a whole; the material is not necessary for the disposal of the matters pleaded; and the material contains private sensitive personal and commercial financial data of third parties.

50. It is a matter for the party seeking the order for further and better discovery (in this case Mr. McKillen) to establish that there has been a default so as to raise “*a reasonable suspicion that the party who had already made an affidavit had other documents relating to the matters in question in his possession.*”²⁰

²⁰ Murray J. in *Daly v Ardstone Capital Limited* [2020] IEHC 200 at paragraph 9 referred to *Lyell v Kennedy* (No. 3) (1884) 27 Ch.D. 1, 20, *Victoria Hall Management Ltd & Ors v Cox & Ors* [2019] IEHC 639 per Barniville J. as he then was at paragraphs 97 and 99.

51. In order to decide whether Mr. Hynds or Mr. Moran, as the deponents of the discovery affidavits, have either misunderstood the issues in the action or formed erroneous views as to the documents which arise from their discovery obligations, it may be necessary to have regard to other evidence. Explanations of the issues in the case, of the reasons specific documents have been excluded from the discovery and of the context in which documentation that is alleged to exist is said to have come into being may be taken into account provided those explanations are tendered by persons who are in a position to properly aver to them.²¹

52. It is not within the capability nor function of the court, when hearing an application for further and better discovery, to *resolve* disputed issues of fact. In circumstances where each party presents different factual accounts, a court must try to resolve the issues in such a way, that the consented to categories of discovery, work. A court, however, cannot decide that it will make its orders on the assumption that the version of fact averred to by one party is to be preferred to that of the other party.²²

²¹ *Op.cit. Victoria Hall Management Limited & Ors v Cox & Ors* [2019] IEHC 639 at paragraphs 97 and 99. Murray J. in *Daly v Ardstone Capital Limited* [2020] IEHC 200 at paragraph 9 added in this regard that hearsay evidence should not be admitted as of course but only where this was unavoidable for genuine and identified reasons of urgency, or difficulty in procuring direct evidence: *Joint Stock Company Togliattiazot v Eurotoaz Limited* [2019] IEHC 342 at paragraph 16.

²² Murray J. in *Daly v Ardstone Capital Limited* [2020] IEHC 200 at paragraph 11 added that “...[i]n some cases, it may be possible to decide that where the evidence advanced by one party in support of their version of events is properly admissible while that of the other is second hand, it will base its order on the version advanced by the party with proper evidence. In other situations it may be possible to decide that one party’s account of the facts is so corroborated by independent documentary evidence while that of the other is bare assertion, that it will make an order on the basis of the facts alleged by the former. However, where the evidence in support of such a matter is equal and opposite, the court has to apply the onus of proof so as to determine that the party seeking the order for further and better discovery has failed to establish a default so as to justify such an order. It should be said that when categories of discovery are properly drawn, these disputes should not arise. A category should be

53. Generally, the efficient disposition of proceedings requires that a party has one chance to seek discovery, and in these circumstances where the parties have agreed the order for discovery dated 11th September 2020, as well as having regard to the fact that it is an interlocutory order, there is a requirement to establish good reasons for seeking “*to come again*” such as a material change in circumstances.²³

THE CONSENT ORDER & THE SUB-CATEGORIES

Contested interpretation

54. Applying the legal principles set out above, the following matters arise for consideration in determining whether or not the plaintiff has discharged the burden of showing by reference to the sub-categories set out in the Notice of Motion dated 3rd May 2022, namely, sub-categories (i)(1) to (9) and (ii)(10) to (15), that there are in existence further documents within the terms of the consent order of Allen J. dated 11th September 2020, and which I ought to order further and better discovery of.

55. Having regard to the way in which the sub-categories are structured and phrased, the following observations apply to each of the sub-categories (i)(1) to (9) and (ii)(10) to (15) and I will, in addition, set out each sub-category.

framed so as to avoid disputed factual predicates, and the court should not on an application for further and better discovery have to confront these issues at all. Where categories are not so defined, the consequence is applications for further and better discovery which become swamped by evidence as to fact. That is in no-one's interests...".

²³ Murray J. in *Daly v Ardstone Capital Limited* [2020] IEHC 200 at paragraph 15 referred to *Bank of Ireland v Gormley* [2020] IECA 102 at paragraph 27.

56. While there is a certain formulaic quality to the phraseology and structure of the sub-categories in paragraphs (i)(1) to (9) and (ii)(10) to (15) appended to the notice of motion dated 3rd May 2022, the following assessment applies *mutatis mutandis* to each sub-category.
57. Importantly, each of these subcategories uses the same terminology in their respective preambles which is different and more expansive to that employed in the consent order of Allen J., dated 11th September 2020. Stepping back for a moment, it could be said, given the fact that this is a discovery issue, that the rationale for the sub-categories expressed in the correspondence dated 23rd December 2021 and the response to that rationale in the letter from the CSSO dated 12th April 2022 are somewhat repetitive and formulaic, especially when looking at the wording of the particular sub-categories. However, as set out in the following judgment, the responses to the sub-categories are, in my view, reflective of the legal principles which are required to be applied.
58. In *Daly v Ardstone Capital Limited* [2020] IEHC 200, at paragraphs 16 to 18, Murray J. observed that it may be necessary to distinguish between categories of discovery which were agreed, which is the position here, and the circumstances where categories were ordered by the court after a contested hearing.
59. In this case, the order of the court (Allen J.) dated 11th September 2020 directing discovery was on consent.

60. Applying the decision of the court in *Daly v Ardstone Capital Limited* [2020] IEHC 200, categories (i) and (ii) in the consent order of Allen J. dated 11th September 2020, fall to be interpreted in accordance with the rules generally applicable to written instruments, which is to avoid an absurd interpretation in determining the meaning of the words used by the parties having regard to the relevant factual matrix which will include: (a) the issues in the proceedings; (b) the reasons given for seeking discovery in the first place; and (c) the necessary assumption that the underlying purpose of the discovery category was to obtain disclosure of relevant material.

61. I now consider each in turn.

The Issue(s)

62. Mr. McGarry SC argues that Mr. McKillen's claim alleges clandestine activity on behalf of the defendants and he refers, in particular, to the case law in paragraphs 6-34 and 6-35 of Abrahamson, Dwyer and Fitzpatrick, *Discovery and Disclosure* (3rd Ed., 2019) which in turn refers to a number of the judgments of Clarke J. (when a member of the High Court), including, for example, *Ryanair Ltd v Bravofly* [2009] IEHC 41 (per Clarke J. at paragraph 5.16) where an analogy was drawn between alleged fraud and anti-competitive behaviour sharing the characteristic (at least in part) of being clandestine.

63. Mr. McGarry SC places particular emphasis on paragraph 6-35 of *Discovery and Disclosure* where it is stated that “*where the wrongdoing which the plaintiff alleges has occurred is by its nature clandestine and concealed from public view, if the plaintiff is in a position to deliver particulars of his or her claim which, though they may be*

expressed in general terms, persuade the court that he or she has a prima facie case to make with regard to the allegations, he or she may be entitled to proceed to seek discovery of documents concerning that alleged wrongdoing and then deliver supplemental particulars of pleading once he or she has had the opportunity to scrutinise the documents.”

64. While the passage just quoted is under the sub-heading “[f]raud and other clandestine activity” and is dealing generally with the topic of the *relevance* of documents to the matters in question, including the refinement of the *Peruvian Guano*²⁴ test, Mr. McGarry SC submits that it has equal force and application to the situation here and that the plaintiff is entitled to further and better discovery of the sub-categories set out in paragraph 2 and Schedule 1 of the Notice of Motion dated 3rd May 2022 in order to plead out his case through the process of particularisation and, if necessary, the amendment of the statement of claim, which was delivered on 9th November 2017.

65. The passage referenced by Mr. McGarry SC sets out the law as a matter of general principle. The question, however, as with all contestable issues, is whether it has application to the facts of *this* case.

66. On behalf of the defendants, Mr. McCann SC submits that the central (and sole) factual allegation which predicates the claims of alleged misfeasance in public office can be put simply: it is alleged that the defendants engaged in contact and/or correspondence with a representative of the Barclay Brothers concerning the potential purchase of Mr. McKillen’s loans from IBRC in or around October to November 2011.

²⁴ *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 Q.B.D. 55.

67. Specifically, an alleged misfeasance in public office claim is pleaded as against the defendants and particularised under approximately 11 sub-paragraphs at paragraph 17 of the statement of claim (delivered on 9th November 2017).

68. Mr. McCann SC makes the point that, insofar as the Minister and Mr. Moran are concerned, Mr. McKillen's pleaded case is closer to being described as a 'bare allegation' rather than 'a fully pleaded case' and is not a case which involves alleged 'clandestine behaviour'. It is submitted that this is the relevant factual matrix which I should consider.

69. The plaintiff's pleas at paragraph 17 of the statement of claim (delivered on 9th November 2017) are important in assessing the issues in this application.

70. It is pleaded that the 11 particulars at paragraph 17(a) to (k) of the statement of claim were informed by material obtained from a Freedom of Information request made to the Minister and the Department of Finance.

71. The particulars at sub-paragraphs 17(a) to (d) of the statement of claim largely concern the alleged actions of Mr. Richard Faber of behalf of the Barclay Brothers on 28th October 2011.

72. The particulars at sub-paragraphs 17 (e) to (k) inclusive, plead the alleged actions of Mr. Faber and others on the following dates, 1st November 2011, 3rd November 2011,

8th November 2011, 14th November 2011, 18th November 2011, 23rd November 2011 and 29th November 2011.

73. In addition to the above, the central factual allegation upon which it is alleged that the defendants were guilty of misfeasance in public office and/or acted with reckless indifference and/or with a deliberate abuse of process can be seen at paragraphs 17(d) and (e) of the Statement of Claim, where the following is pleaded:

“...(d) Subsequently, at 4.43pm on the same day (28 October 2011), Mr. Faber, at the invitation of Mr. Moran, e-mailed a copy of the proposal described at sub-paragraph (a) above to Mr. Danny Buckley of the Department of Finance who responded on 2 November, 2011 to confirm that the Department of Finance would keep up-to-date with IBRC as to how things were progressing as part of the Department’s “ongoing interaction” with IBRC. The e-mail concluded by reiterating that the Department was to be informed if any further assistance was required with the interactions of the Barclay Brothers with IBRC;

(e) In the meantime, as early as 1 November, 2011, Mr. Faber telephoned Mr. Richard Woodhouse of IBRC pressing for an update;...”.

74. The central issue in the proceedings, therefore, is the factual allegation of Mr. McKillen of the alleged contact between the defendants and the representative of the Barclay Brothers regarding the potential purchase of his loans from IBRC in or around the months of October and November 2011.

75. The next factual matter to be considered is the letter seeking voluntary discovery and the reasons set out therein.

Voluntary discovery: 17th October 2019

76. It was fairly accepted by Mr. McGarry SC, for the plaintiff, that the process which began with the letter seeking voluntary discovery dated 17th October 2019 and culminated with an order of the court on consent dated 11th September 2020, was *a refinement or narrowing* of the initial discovery sought.

77. A consideration and comparison of the terms of what was category (a) in the letter seeking voluntary discovery dated 17th October 2019 and became category (i) in the consent order of Allen J. dated 11th September 2020, and what was category (c) in the letter seeking voluntary discovery dated 17th October 2019 and then became category (ii) in the consent order of Allen J. dated 11th September 2020, confirms this refinement or narrowing.

78. Initially, voluntary discovery was sought in the following terms in the letter dated 17th October 2019:

“[d]iscovery is sought in respect of the following categories of documents (to include written reproduction of all records held in electronic, photographic, computerised or any other form), and to include all relevant notes and memoranda which are or have been in

*the possession, power or procurement of the defendants relating to*²⁵
any matter in question herein: (a) Any and all correspondence or communications (directly or indirectly) between the Defendants, including any servants or agents acting on their behalf, and Sir David Barclay and Sir Frederick Barclay and or entities connected with them including, without limitation, Richard Faber; Aidan Barclay; Philip Peters; B Overseas Limited; Misland (Cyprus) Investments Limited; Maybourne Finance limited; Ellerman Investments Limited; Ellerman Corporation Limited (hereinafter the Barclay Interests), including any servants or agents acting on their behalf, relating to the Plaintiff and/or Coroin Limited.”

79. In addition to setting out the heads of claim, the reason given for this initial category in the letter seeking voluntary discovery dated 17th October 2019 alleged *inter alia* the following: “...*the unlawful use by the Defendants of the Plaintiff’s confidential information...*” that “...*the Defendants conspired and combined together and/or with the Barclay Interests wrongfully with the sole or predominant intention of injuring and/or causing loss to the Plaintiff...*” and also referred to the plea in the defence delivered on 1st April 2019 that the “...*Defendants maintain that the sole material interaction between the Defendants and the Barclay Interests is that pleaded at paragraph 17 of the Statement of Claim which said interaction consists of the Department of Finance forwarding on proposals it received to IBRC relating to the sale of assets. The said documents are clearly relevant to the issues in the proceedings and*

²⁵ Emphasis added in this judgment.

necessary for the fair disposal of the matter and for the saving of costs by ensuring that all evidence in the case is guided by all the communications between the Defendants and the Barclays Interests.”

80. In contrast, category (i) of the discovery order of 11th September 2020 refers to *all correspondence or records of communications between (1) Mr. Moran and the Department of Finance of the one part and (2) Sir David Barclay and Sir Frederick Barclay (including the servants or agents or corporate entities controlled by them or connected to them) concerning the Plaintiff’s loans with IBRC and/or the purchase or potential purchase of those loans.*

81. Initially, in what later became category (ii) of the consent order dated 11th September 2020, voluntary discovery was sought in the following terms in the letter dated 17th October 2019:

*“[d]iscovery is sought in respect of the following categories of documents (to include written reproduction of all records held in electronic, photographic, computerised or any other form), and to include all relevant notes and memoranda which are or have been in the possession, power or procurement of the defendants **relating to**²⁶ any matter in question herein: (c) any and all correspondence or communications (directly or indirectly) between the Defendants and*

²⁶ Italics and emphasis added in this judgment.

IBRC, the IBRC Board of Directors and/or its servants or agents relating to the Plaintiff.”

82. The reason given for this initial category in the letter seeking voluntary discovery dated 17th October 2019 *inter alia* alleged the misuse and unlawful use of confidential information, that the defendants conspired and combined together and/or with the Barclay Interests wrongfully with the sole or predominant intention of injuring the plaintiff and alleged the following: “...[t]he Plaintiff was a shareholder in Coroin Limited and the security for the loans of the Plaintiff with IBRC were his shares with Coroin Limited. Nama, which is controlled by the Minister for Finance, held the security for the loans of Coroin Limited that had previously been taken out by Coroin Limited with IBRC. The Barclay Interests acquired the Coroin loans and associated security from Nama. The Barclay Interests acting on information obtained from Nama sought to acquire the loans of the Plaintiff from IBRC and sought the assistance of the Defendants as part of the Barclay Interests plan to target the Plaintiff...”.

83. The affidavit of Mr. Eames sworn on the 6th January 2020 grounding the initial discovery motion dated 13th January 2020 essentially repeats the voluntary discovery letter dated 17th October 2019.

84. The voluntary discovery letter dated 17th October 2019, and the reasons for (the then) category (a) and (the then) category (c) does suggest, in my view, that the central factual allegation of Mr. McKillen focuses on the alleged contact between the defendants and the representative of the Barclay Brothers regarding the potential purchase of his loans from IBRC in or around the months of October and November 2011.

85. The voluntary discovery letter dated 17th October 2019 when compared to the consent order of Allen J. dated 11th September 2020, in my view, confirms a narrowing or refinement of the categories of discovery sought.

86. As referred to in the introductory part of this judgment, the defendants submit that the plaintiff's loans with IBRC were not purchased by the Barclay Interests as a result of any contact with the defendants and that, therefore, the only issue between the parties is the alleged contact between the defendants and the representative of the Barclay Interests.

87. Finally, in considering the interpretation of categories (i) and (ii) in the order dated 11th September 2020, I have assumed that their underlying purpose was to obtain disclosure of *relevant* material.

88. To recap, category (i) of the consent order of Allen J. dated 11th September 2020 refers to all correspondence or records of communications between (1) Mr. Moran and the Department of Finance of the one part and (2) Sir David Barclay and Sir Frederick Barclay (including the servants or agents or corporate entities controlled by them or connected to them) concerning the Plaintiff's loans with IBRC and/or the purchase or potential purchase of those loans. Category (ii) of the consent order of Allen J. dated 11th September 2020 refers to all correspondence or communications between (1) Mr. Moran and the Department of Finance of the one part and (2) IBRC, its Board of Directors and/or servants of the other part, relating to the Plaintiff between 01 July 2011 and 06 February 2013.

89. In relation to category (i), Mr. McGarry SC (for the plaintiff) characterises the defendants' position as saying first, that this category means all correspondence and communications and then, second, such a position is incorrect.

90. Mr. McGarry SC states that the use of the words '*records of communications*' in the consent order dated 11th September 2020 is more expansive than the word '*communications*' and means something *additional to* the communications themselves. Category (ii), he says, does not have the same ambiguity and is more straightforward and Mr. McCann SC (for the defendants) agrees that category (ii) is more straightforward.

91. It may be observed that the letter dated 12th April 2022 from CSSO (for Mr. Moran and the Minister) when referring to category (ii) would appear to give some support the interpretation posited by Mr. McGarry SC, for the plaintiff. For example, in seeking to make the point that the *ambit* of discovery in category (ii) is *more limited* than that which applies in category (i), the following is stated in the penultimate paragraph on page 7 of the letter dated 12th April 2022:

“...[w]e would also note that this category of discovery is more limited than category (i) as it does not include “record of communications”, only “communications...”.

92. I agree with Mr. McGarry SC, for the plaintiff, that the dispute between the parties is encapsulated in the correspondence between the parties prior to the issuing of the

motion. For example, the letter from the CSSO (on behalf of Mr. Moran and the Minister) dated 12th April 2022 (in response to the letter dated 23rd December 2021 from Eames Solicitors) observes as follows:

“...a. The Plaintiff has failed to state why it is inconceivable that only 15 documents would be discovered under category (i). The category in question is discreet and targeted. It appears that the Plaintiff was expecting documents relating to the correspondence or records of communications referred to in category (i). This is not what the category states.

b. It is telling that the Plaintiff maintains under this indent that it is difficult to understand how there are not handwritten notes; memoranda; typed notes or emails or letters or diary entries or access records relating to any of the meetings and phone call or communications or even internal emails or messages held in respect of category (i). As noted already, the category does not extend to such “related” documents.”

93. Category (i) of the consent order of Allen J. dated 11th September 2020 refers to all correspondence or records of communications between (1) Mr. Moran and the Department of Finance of the one part and (2) Sir David Barclay and Sir Frederick Barclay (including the servants or agents or corporate entities controlled by them or connected to them) concerning the Plaintiff's loans with IBRC and/or the purchase or potential purchase of those loans.

94. On behalf of the defendants, it is submitted that in order for a document to come within the ambit of category (i) of the order of Allen J. dated 11th September 2020, the following three requirements must be fulfilled: (a) the document must be correspondence or a record of communications; (b) the correspondence or communication must be between (1) Mr. Moran or the Department of Finance of the one part and (2) Sir David or Sir Frederick Barclay (including their servants or agents or corporate entities controlled by them or connected to them); and, (c) the correspondence or communication must concern the plaintiff's loans with IBRC or the purchase or potential purchase of those loans.

95. Category (ii) of the consent order of Allen J. dated 11th September 2020 refers to all correspondence or communications between (1) Mr. Moran and the Department of Finance of the one part and (2) IBRC, its Board of Directors and/or servants of the other part, relating to the Plaintiff between 01 July 2011 and 06 February 2013.

96. Similarly, on behalf of the defendants, it is submitted that in order for a document to come within the ambit of category (i) of the order of Allen J. dated 11th September 2020, the following four requirements must be fulfilled: (a) the document must be correspondence or a record of communication; (b) the correspondence or communication must be between (1) Mr. Moran or the Department of Finance of the one part and IBRC, its Board of Directors and/or its servants or agents of the other part; (c) the correspondence or communication must concern the plaintiff; and (d) the correspondence or communication must fall within the temporal window of 01 July 2011 and 06 February 2013.

97. As stated earlier, since many of the individual sub-categories employ the same formula of phraseology the following observations apply to each and are, therefore, of general application.

98. Insofar as it is sought, for example, to cast the discovery net wider than persons other than Mr. Moran, the Department of Finance of the one part and Sir David and Sir Frederick Barclay, their servants or agents or corporate entities controlled by them or connected to them, of the other part, concerning the plaintiff's loans with IBRC and/or the purchase or potential of those loans, the terminology used (and repeated) in the sub-categories – “...*evidencing, recording or otherwise relating to...*” – is more expansive than the word “*between*” which is the term in fact used in both category (i) and category (ii) of the consent discovery order dated 11th September 2020. Indeed, this phraseology employed in the sub-categories is closer to the words “*relating to*” which, as set out earlier, were the words employed in the letter of voluntary discovery dated 17th October 2019. However, these are not the words or phrases agreed to in the consent of discovery dated 11th September 2020.

99. I also agree with counsel on behalf of Mr. Moran and the Minister that the word “*between*” – which is the word used in the consent order dated 11th September 2020 – connotes the meaning of “*to and fro*” or “*back and forth*” and incorporates both a narrowness and direct dialogue which the phrase “...*evidencing, recording or otherwise relating to...*” does not have.

100. In Mr. Eames' Affidavit of 13th July 2022 at paragraph 12, he references the fact that category (i) is worded “correspondence or records of communications” and

category (ii) is worded “correspondence or communications.” Mr. Eames states that “...[i]f the intention was to confine the ambit of discovery to mere correspondence, then the references to communications and records of communications is superfluous. Clearly, I say the wording of the Categories envisages a greater breadth of disclosure than that contended for by Mr. Davis...”.

101. Mr. Eames elaborates on this at paragraph 13 of his affidavit sworn on 13th July 2022 and states: “[m]oreover, if Mr. Davis is correct, then another key issue arises. The Order was agreed on consent between the parties and not made on foot of the Court’s own analysis of the merits of the application. In the latter case, a party’s subjective belief as to what discovery was ordered is irrelevant in light of the Court’s determination of what is relevant and necessary for the fair disposal of issues between the parties. However, in the former case, it must be understood that if the parties have agreed to categories and were at cross-purposes, the lack of true accord between the parties undermines the agreed nature of those categories. Stated differently, if the Order does not reflect what the Plaintiff actually agreed with the Defendants, then he is entitled to seek to have the Order varied and the Further Categories discovered...”.

102. In relation to these issues raised in Mr. Eames’ affidavit sworn on 13th July 2022, guidance on how to resolve such matters is set out in the judgment of the court in *Daly v Ardstone Capital Limited* [2020] IEHC 200 which provides that when these matters have been agreed, or consented to, in a discovery order, they are to be interpreted in accordance with the rules generally applicable to written instruments which is to avoid an absurd interpretation in determining the meaning of the words used.

103. Mr. McCann SC, for the defendants, makes the point that the word “communications” is used in addition to the word “correspondence” because, he submits, that there are other forms of written communications which include, for example, faxes, telexes, text messages and e-mails which are not captured by the word “correspondence”. Further in that part of the letter dated 12th April 2022 from the CSSO under the heading *Schedule I The Sub Categories* which acknowledges “some overlap” with the more particularised response in the earlier part of that letter, a similar formula of response is employed when addressing *each* of the sub-categories, namely: (a) it is stated that the (particular) sub-category is an attempt to extend the discovery beyond category (i) and then repeats the terms of category (i); (b) declines to make discovery; – and for the purposes under consideration here – (c) states that “*if there was any documentation that contained a record of the communication within the scope of the category, it would have been discovered.*” (Underlining added). This addresses the apparent acceptance, referred to earlier, on page 7 of the letter dated 12th April 2022 which noted that the discovery in category (ii) was “...*more limited than category (i) as it does not include “record of communications”, only “communications...”*”.

104. Further, having consented to the terms of the order of discovery dated 11th September 2020, exigencies of efficiency militate against “coming again” and, if a party wishes to do so, there must be a good reason offered. These two matters are important when considering the terms of the initial discovery sought, the order of the court and the sub-categories which are now urged in the context of further and better discovery.

105. Logically, it follows, if it is common case that the consent order was a narrowing or refinement of what was initially sought, then the terms employed in the actual order of the court must also reflect that fact. Notwithstanding an apparent acceptance that the phrase *records of communications* in category (i) is broader than the phrase *communications* in category (ii), the letter from the CSSO dated 12th April 2022 confirms that if there was any documentation which contained a record of the communication within the scope of the category (1), it would have been discovered by the defendants.

106. I find that terms used in category (i) and category (ii) of the discovery order dated 11th September 2020 do reflect a refinement and narrowing of the initial categories set out in the letter seeking voluntary discovery dated 17th October 2019.

Sub-categories (i)(1) to (i)(4)

107. There are a number of common features in the first four sub-categories and it is convenient to deal with them together.

108. It is worth repeating that they are referenced as sub-categories of category (i) of the discovery order of 11th September 2020 which refers to “*all correspondence or records of communications between (1) Mr Moran and the Department of Finance of the one part and (2) Sir David Barclay and Sir Frederick Barclay (including the servants or agents or corporate entities controlled by them or connected to them) concerning the Plaintiff’s loans with IBRC and/or the purchase or potential purchase of those loans.*”

Sub-category (i)(1)

109. Sub-category (i)(1) refers to all documentation in the possession, power or procurement of the defendants evidencing, recording or otherwise related to: (a) how Mr. John Moran furnished Mr. Michael Torpey and Mr. Danny Buckley with copies of correspondence dated 28th October 2011 between him and Mr. Richard Faber; (b) the review by Messrs, Torpey and Buckley of the offer presented by Mr. Faber; and (c) any briefings, communications and/or discussions exchanged between Messrs. Torpey and Buckley, on the one hand, and any colleagues (including Mr. Moran) on the other.

Sub-category (i)(2)

110. Sub-category (i)(2) refers to all documentation in the possession, power or procurement of the defendants evidencing, recording or otherwise relating to communications between Mr. Richard Faber and Mr. Danny Buckley dated 23rd November 2011 and, in particular: (a) Mr. Michael Torpey's involvement in the matter to which the said communications relate; (b) why and how Mr. Torpey was copied on the said correspondence; (c) Mr. Torpey's response or comments; and (d) any communications between Mr. Torpey and other colleagues (including Mr. Buckley) in relation to the matter.

Sub-category (i)(3)

111. Sub-category (i)(3) refers to all documentation in the possession, power or procurement of the defendants evidencing, recording or otherwise relating to the updated offer sent by Mr. Richard Faber to IBRC on 29th November 2011 and forwarded to Mr. Danny Buckley and matters arising therefrom, such documentation to

include: (a) any communications between any Department of Finance official (including Mr. Buckley) and Mr. Faber in relation to the upcoming IBRC board meeting referenced in the said letter; (b) how Mr. Michael Torpey came to be copied on the correspondence by cover of which the said offer was sent; (c) what Mr. Torpey's involvement in the matter was and how it came about; (d) Mr. Torpey's response or comments in relation to the matter; and (e) any discussions between Mr. Torpey and other colleagues (including Mr. Buckley) in relation to the matter.

Sub-category (i)(4)

112. Sub-category (i)(4) refers to all documentation in the possession, power or procurement of the defendants evidencing, recording or otherwise relating to the e-mail correspondence dated 16th August 2012 from the Powerscourt Group to the Department of Finance enclosing legal documentation relating to a case in which the Barclay Brothers and the plaintiff were involved. To include: (a) documentation evidencing previous discussions about the said proceedings and the reason for information relating to the said proceedings being conveyed to the Department of Finance in the first place; (b) replying correspondence following on from the said e-mail correspondence; (c) documentation evidencing internal communications within the Department of Finance relating to the said correspondence and its subject matter; (d) documentation explaining how and why the fifth and sixth named defendants engaged with Powerscourt Group in relation to the above matter; (e) documentation evidencing any previous or subsequent discussions between the Department and Powerscourt Group in relation to the above matter; and (f) documentation evidencing internal discussions and research conducted by the fifth and sixth named defendants, their servants and/or agents relating to the said communications and/or their subject matter.

113. The positions of the parties in relation to the questions of *further and better discovery* and *issues to address* are set out in the main, first on behalf of the plaintiff, in Mr. Eames' letter dated 23rd December 2021 (and largely repeated on 16th February 2022 and 10th March 2022) and in Mr. Eames' affidavits on 3rd May 2022 and 13th July 2022; second, on behalf of the defendants by the response of the CSSO dated 12th April 2022 on behalf of the defendants to the letter of 23rd December 2021.
114. It is noted also that the affidavit of John Davis sworn on 21st June 2022, who is a solicitor in the CSSO, largely repeats the matters set out in the letter dated 12 April 2022 and that Mr. Gary Hynds in his second replying affidavit affirmed on 12th October 2022 "*refers to and relies upon*" Mr. Davis' affidavit.
115. Insofar as the issues which are before me are concerned, Mr. Eames' first affidavit sworn on 6th January 2020 grounds the initial discovery motion and, as with many such affidavits, repeats the reasons seeking discovery which were set out in the initial letter seeking voluntary discovery. Mr. Eames' second affidavit sworn on the 3rd May 2022 grounds the motion the subject of this application and, for example, at paragraph 14 of this affidavit, Mr. Eames refers to the fact that he considered the affidavits from Mr. Hynds and Mr. Moran to be deficient and he exhibits in this affidavit the letter dated 23rd December 2021, which is the central correspondence which engages with all of the issues that I have to consider in this application including, for example, *further and better discovery* and *issues to address* in the notice of motion dated 3rd May 2023.

116. As just mentioned, Mr. Eames' third affidavit is sworn on 13th July 2022 and replies to the affidavit of John Davis (solicitor of the CSSO) whose affidavit was sworn on 21st June 2022 and both Mr. Davis' affidavit and Mr. Eames' third affidavit largely repeat the issues which are set out in the correspondence dated 23rd December 2021 (on behalf of Mr. McKillen) and 12th April 2022 (on behalf of the Minister and Mr. Moran).

117. The contents of the aforesaid affidavits and correspondence are an important factor in deciding: (a) whether or not Mr. McKillen has discharged the burden of showing that there are in existence further documents set out in sub-categories (i)(1) to (9), and (ii) (10 to (15) that ought to have been discovered having regard to the order of the court dated 11th September 2020; and (b) whether Mr. Hynds (and to a lesser extent in this case, Mr. Moran) misunderstood the issues in the action and/or that their views as to whether documents were outside their discovery obligation, was wrong.

118. The letters of the 23rd December 2021 (plaintiff) and 12th April 2022 (defendants) in fact expressly address the sub-categories and set out the parties respective positions.

119. As set out earlier in this judgment, in that part of the letter dated 12th April 2022 from the CSSO under the sub-heading "Schedule 1 The Sub Categories" which acknowledges "some overlap" with the more particularised response in the earlier part of the letter, and which addresses each of the sub-categories, a similar formula of response is employed, namely: (a) it is stated that the (particular) sub-category is an attempt to extend the discovery beyond category (i) and then repeats the terms of category (i); (b) declines to make discovery; and (c) states that if there was any

documentation that contained a record of the communication within the scope of the category, it would have been discovered.

120. The correspondence of 28th October 2011 and the other matters referred to in subcategories (i)(1)(a), (b) and (c) are addressed in each of the letters dated 23rd December 2021 and 12th April 2022. For example, the general point is made that the phrase “*relating to*” encompasses a wider interpretation than the word “*between*.”

121. As mentioned earlier, the phrase “*evidencing, recording or otherwise relating to*” does, in my view, seek to encompass a more expansive range of documentation and a wider reach of persons than the word “*between*.”

122. Mr. Eames’ letter of 23rd December 2021 refers to the matters in item 5 (which is generally referable to the table or schedule in Mr. Hynds’ first affidavit affirmed on 21st December 2020 and reproduced earlier in this judgment).

123. The response on behalf of the defendants dated 12th April 2022 confirmed that Mr. Moran furnished the letter of 28th October 2011 between Mr. Faber and Mr. Moran to Mr. Torpey and Mr. Buckley via e-mail as they are copied in on same.

124. It is further stated that any briefings, communications and/or discussions with Mr. Moran or anyone else would fall under documents “*relating to*” correspondence or records of communication and that these are not encompassed within category (i) and reference is made to Mr. Moran, stating “*I leave it to them to decide if it is appropriate to contact you or the bank in the first instance.*”

125. The point is made in the letter dated 12th April on behalf of the defendants that the plaintiff in relying upon sub-categories (i)(1)(a), (b) and (c) is attempting to extend the discovery category to include all documentation relating to various correspondence, reviews, briefings, communications and/or discussions exchanged between Messrs Torpey and Buckley arising out of correspondence dated 28th October 2011 between Mr. Moran and Mr. Richard Faber, but that category (i) in the discovery order dated 11th September 2020 does not go that far and its express terms are relied upon. The correspondence dated 12th April 2022 confirmed that if there was any documentation that contained a record of the communication within the scope of the discovery agreed, it would have been discovered.

Sub-categories (i)(2)(a), (b), (c) & (d)

126. In relation to sub-categories (i)(2)(a), (b), (c) and (d), Mr. Eames' letter of 23rd December 2021 refers to these matters in item 9 (in the table).

127. The response on behalf of the defendants dated 12th April 2022 states that from the discovery made, Mr. Buckley was liaising with Mr. Faber and not Mr. Torpey and that the plaintiff was “*again seeking documents relating to correspondence of records of communications as opposed to correspondence or records of communications.*”

128. The letter responds to the similar points raised on 23rd December 2021 and states that this sub-category attempts to extend all documentation relating to communications between Mr. Faber and Mr. Buckley dated 23rd November 2011 and repeats the terms of category (i) of the order of Allen J. dated 11th September 2020.

Sub-categories (i)(3)(a), (b), (c), (d) & (e)

129. In relation to sub-categories (i)(3)(a), (b), (c), (d) and (e), Mr. Eames' letter of 23rd December 2021 refers to these matters in item 10 (in the table) and that the discovery made by the defendants includes an e-mail exchange from Richard Faber to Danny Buckley dated 29th November 2011, enclosing a letter which is described as a final revised offer made that day ahead of an IRBC board meeting the next morning and the letter is dated 29th November 2011 from Richard Faber to IBRC for the attention of Richard Woodhouse. The formula of response in the letter dated 12th April 2022 from the CSSO under the sub-heading "Schedule 1 The Sub Categories", referred to above, is repeated.

Sub-categories (i)(4)(a), (b), (c), (d), (e) and (f)

130. In relation to sub-categories (i)(4)(a), (b), (c), (d), (e) and (f), Mr. Eames' letter of 23rd December 2021 refers to the matters in item 11 (in the table above) and the response on behalf of the defendants dated 12th April 2022 *inter alia* states that "*simply if no replying correspondence can be located then we must assume it does not exist. The Plaintiff also seeks internal communications. As noted already it would appear the plaintiff is seeking documentation relating to correspondence or records of communication. Regarding sub point a) this appears to be an unsolicited email. Regarding point b) there is no other correspondence with Powerscourt, other than that provided under discovery. Regarding point c) if there are internal communications, these do not fall within the discovery category. We remind the Plaintiff when it seeks research that the discovery category is limited to correspondence or records of*

communications. It is important once again to point out that no attempt has been made in query (f) to state how the documentation in question falls away within any of the categories of discovery.” The formula of response in the letter dated 12th April 2022 from the CSSO under the sub-heading “Schedule 1 The Sub Categories”, referred to above, is again repeated.

131. Having regard to the above matters, I am satisfied that the plaintiff has not discharged the burden of showing that there are in existence further documents set out in sub-categories (i)(1) to (4) that ought to have been discovered, having regard to the order of the court dated 11th September 2020. In addition, the documents referred to in these sub-categories do not comprise correspondence or records of communications between (1) Mr. Moran and the Department of Finance of the one part, and (2) Sir David Barclay and Sir Frederick Barclay (including the servants or agents or corporate entities controlled by them or connected to them) concerning Mr McKillen’s loans with IBRC and/or the purchase or potential purchase of those loans. I therefore find that the documents set out in sub-categories (i)(1) to (4) do not constitute documents which Mr. Hynds was required to discover but has not discovered.

132. The affidavit of discovery Gary Hynds, affirmed on 21st December 2020 makes reference to the consent discovery order made by the court dated 11th September 2020 and sets out the two categories which were agreed.

133. I am not of the view that the documents set out in sub-categories (i)(1) to (4) of the notice of motion dated 3rd May 2022 are documents which Mr. Hynds, who has made discovery, was required to discover. I am further satisfied that Mr. Hynds in his

affidavits affirmed on 21st December 2020 and 12th October 2020 (including his adoption of Mr. Davis affidavit sworn on 21st June 2022) and Mr. Moran in his affidavit sworn on 2nd December 2020, did not misunderstand the issues in this action and did not err in their consideration of their discovery obligations.

Sub-category (i)(5)

134. Sub-category (i)(5) seeks “*all documentation in the possession, power or procurement of the Defendants evidencing, recording or otherwise relating to discussions between the discussions between Mr. Rory Godson and Ms. Margaret Fitzgerald referenced in correspondence dated 23 November 2012 from Powerscourt Group to the Department of Finance, including any internal communications between Ms Fitzgerald and any other colleagues (including Mr. John Moran) in relation to the said discussions.*”

135. In relation to this sub-category, Mr. Eames’ letter of 23rd December 2021 refers to the matters in item 12 (paragraph (g) in the table).

136. The reply in the letter from the CSSO dated 12th April 2022 repeats the formula of response in the letter dated 12th April 2022 from the CSSO under the sub-heading “Schedule 1 The Sub-Categories”, namely: (a) it is stated that the (particular) sub-category is an attempt to extend the discovery beyond category (i) and then repeats the terms of category (i); (b) declines to make discovery; and (c) states that if there was any documentation that contained a record of the communication within the scope of the communication, it would have been discovered. In addition, earlier in the letter, in specific response to paragraph (g) in Mr. Eames’ letter of 23rd December 2021, it is

stated that “...[i]f there were other correspondence or records of communications, they would have been discovered. Regarding the balance of this query, the Plaintiff is again seeking documents relating to correspondence or records of communications as opposed to correspondence or records of communication.”

Sub-category (i)(6)

137. Sub-category (i)(6) seeks all documentation in the possession, power or procurement of the Defendants evidencing, recording or otherwise relating to a phone call between Ms. Margaret Fitzgerald and the Powerscourt Group referenced in e-mail correspondence dated 2nd January 2013, to include: “(a) any written note or memorandum relating to this call; and (b) any documentation evidencing discussions related to or arising from the said call or its subject matter.”

138. In relation to this sub-category, Mr. Eames’ letter of 23rd December 2021 refers to the matters in item 13 (paragraph (h) in the table).

139. The response in the letter from the CSSO dated 12th April 2022 states that “Margaret Fitzgerald was the personal secretary to the Secretary General of the Department of Finance. Any input by her would be administrative in nature. Any emails of substance would have been forwarded to relevant custodians. If Ms. Fitzgerald had received any contact from IBRC/Barclay representatives to her without other custodians being copied, she would likely have sent such contacts immediately to John Moran. If there were other correspondence or records of communication falling within the categories, they would have been discovered. Regarding the balance of this query, the Plaintiff is again seeking documents relating to correspondence or records of

communications as opposed to correspondence or records of communication.” The formula of response in the letter dated 12th April 2022 from the CSSO under the sub-heading “Schedule 1 The Sub-Categories”, referred to above, is again repeated.

Sub-category (i)(7)

140. Sub-category (i)(7) seeks “*all documentation in the possession, power or procurement of the Defendants evidencing, recording or otherwise relating to the contacts and/or attempted contacts between Mr. John Moran and Mr. Richard Faber referenced in e-mail communications dated 28 October 2011 to include records of any calls, e-mails, letters, communications, handwritten correspondence or communications via third parties relating to same.*”

141. In relation to this sub-category, Mr. Eames’ letter of 23rd December 2021 refers to the matters in item 12 (paragraph (i) in the table).

142. The response in the letter from the CSSO dated 12th April 2022 states that “*...[i]f there were other correspondence or records of communications, they would have been discovered. Regarding the balance of this query, the Plaintiff is gain seeking documents relating to correspondence or records of communications as opposed to correspondence or records of communication. For the avoidance of doubt, this is not to be taken that such documents are in existence. Of course, Mr. Moran will presumably be giving evidence in due course and can presumably be crossed examined on the communications, or lack thereof, between him and Mr. Faber.*”

143. The formula of response in the letter dated 12th April 2022 from the CSSO under the sub-heading “Schedule 1 The Sub-Categories”, referred to above, is again repeated.

Sub-category (i)(8)

144. Sub-category (i)(8) seeks “*all documentation in the possession, power or procurement of the Defendants evidencing, recording or otherwise relating to the context in which correspondence dated 28 October 2011 between Mr. Richard Faber, IBRC and NAMA which forwarded to the Department of Finance, including, in particular documents evidencing: (a) discussions between the Department and Mr. Faber in relation to the subject matter of the said correspondence; and (b) internal Departmental discussions in relation to same.*”
145. In relation to this subcategory, Mr. Eames’ letter of 23rd December 2021 refers to the matters in item 12 (paragraph (j) in the table).
146. The response in the letter from the CSSO dated 12th April 2022 states that “...*[i]f there were other correspondence or records of communication, they would have been discovered. There is no obligation on a party making discovery to provide explanatory context for each of the documents being discovered. Regarding the balance of this query, the Plaintiff is again seeking documents relating to correspondence or records of communications as opposed to correspondence or records of communication.*”
147. Once again, the formula of response in the letter dated 12th April 2022 from the CSSO under the sub-heading “Schedule 1 The Sub-Categories”, referred to above, is repeated.

Sub-category (i)(9)

148. Sub-category (i)(9) seeks “*all documentation in the possessions power or procurement of the Defendants evidencing, recording or otherwise relating to discussions between the officials of the fifth and sixth named defendants, their servants and/or agents, on the other, in relation to a meeting that took place in late 2012 between Mr. John Moran and Mr. Mike Aynesly of IBRC (the “2012 Meeting”), to include communications relating to: (a) Accusations made to Mr. Aynesly at the 2012 meeting in relation to his dealings with the Plaintiff (the “accusations”); and (b) an e-mail which allegedly contained the information forming the basis of the Accusations.*”

149. In relation to this subcategory, Mr. Eames’ letter of 23rd December 2021 refers to these matters at paragraphs (k) and (l).

150. The response in the letter from the CSSO dated 12th April 2022 deals with each specific assertion as follows: “*...k. This query appears to be a matter for evidence and cross-examination, rather than a query directed at the discovery process. The very foundation of the query appears to be what the Plaintiff says he was told by Mr. Aynsley about what Mr. Aynsley says Mr. Moran said to him on an unspecified date in the course of an unspecified meeting at an unspecified location. As a result, we respond to this query in the context of discovery only. This query appears primarily aimed at correspondence between IBRC and the Defendants and therefore does not come under*

category (i). However regarding point d)²⁷ if there were correspondence or records of communications with the Barclays or their agents concerning the Plaintiff's loan, these would have been discovered."

151. In relation to (l) the response of the CSSO in its letter dated 12th April 2022 stated as follows: "...[a]t the outset, we say this is speculative hearsay by the Plaintiff. Any such comment by Mr. Mike Aynsley remains to be proven by the Plaintiff. However, we will respond to this in the context of a concern regarding discovery. Regarding point a), if it is alleged that this email was a communication between Mr. Moran and the Department of Finance and Sir David Barclay and Sir Frederick Barclay, (or servants, agents or corporate entities controlled by them or connected to them) concerning the Plaintiff's loans, it would have been discovered. Regarding point b) if any internal memoranda, briefing notes or copy communications had recorded this communication, it would have been discovered. Regarding point c) if any referral contained a record of communication, this would have been discovered. Regarding point d) if this referral contained a record of communication it would have been discovered."

152. In relation to this sub-category, the letter dated 12th April 2022 from the CSSO under the sub-heading "Schedule 1 The Sub-Categories" observes that "[e]ven if the Defendant were to take it that there was a meeting [with][sic.] between Mr. Moran and Mr. Aynsely (which is quintessentially a matter for evidence at the hearing) we say in this subcategory the Plaintiff attempts to extend the discovery category to include all documentation relating to discussions between the officials of the Fifth and Sixth

²⁷ In Mr. Eames' letter dated 23rd December 2021 this is a reference to there being no documentation or records discovered following the meeting.

Named Defendants, their servants and/or agents, on the one hand, and the Barclay Brothers, their servants or agents, on the other, in relation to a meeting that allegedly took place in late 2012 between Mr. John Moran and Mr. Mike Aynsley of IBRC, Category (i) does extend this far...” and the letter goes on to recite the terms of the consent order of Allen J. dated 11th September 2020 insofar as category (i) is concerned and to repeat the remaining formula of response in the letter dated 12th April 2022 from the CSSO under the sub-heading “Schedule 1 The Sub-Categories.”

153. In addition to his central argument that these sub-categories were outside the four corners of the order of discovery dated 11th September 2020, Mr. McCann SC, for the defendants, submitted that the sub-categories sought in this instance were classic hearsay and should be excluded on that basis alone. In *Daly v Ardstone Capital Limited* [2020] IEHC 200 Murray J. observed (at paragraph 9 of the judgment) that in an application for further and better discovery, which is an interlocutory application, hearsay evidence should not be admitted as of course but only where this was unavoidable for genuine and identified reasons of urgency, or difficulty in procuring direct evidence, referring to the judgment of the High Court (Noonan J.) *Joint Stock Company Togliattiazot v Eurotoaz Limited* [2019] IEHC 342 at paragraph 16. In my view, there are no such exceptional circumstances in this case which would allow the matters sought in sub-category (i)(9) to form the basis of either establishing or supporting a reasonable suspicion that Mr. Hynds (or Mr. Moran) had other documents relating to the matters in question in his possession.

154. Having regard to the balance of Mr. Eames’ letter dated 23rd December 2021, the letter from the CSSO dated 12th April 2022 repeats a previously expressed concern

that “*the Plaintiff continually asserts that there is other documentation or records*” in the defendants possession, power or procurement “*but does not provide any specifics either in terms of documents or how those documents fall within the categories of discovery ordered by the Court in these proceedings.*”

155. In relation to sub-categories (i)(5) to (i)(9), I am satisfied that the plaintiff has not discharged the burden of showing that there are in existence further documents set out in these sub-categories that ought to have been discovered having regard to the order of the court dated 11th September 2020. In addition, the documents referred to in these sub-categories do not comprise correspondence or records of communications between (1) Mr. Moran and the Department of Finance of the one part and (2) Sir David Barclay and Sir Frederick Barclay (including the servants or agents or corporate entities controlled by them or connected to them) concerning Mr. McKillen’s loans with IBRC and/or the purchase or potential purchase of those loans.

156. I therefore find that the documents set out in sub-categories (i)(5) to (9) do not constitute documents which Mr. Hynds was required to discover but has not discovered. I am further satisfied that Mr. Hynds in his affidavits affirmed on 21st December 2020 and 12th October 2020 (including his adoption of Mr. Davis’ affidavit sworn on 21st June 2022) and Mr. Moran in his affidavit sworn on 2nd December 2020 did not misunderstand the issues in this action and did not err in their consideration of their discovery obligations.

CATEGORY (ii)

157. Turning to what the plaintiff refers to as the sub-categories of category (ii), again the correspondence dated 23rd December 2021 (on behalf of the plaintiff) and 12th April 2022 (on behalf of the defendants) enjoin the dispute in relation to the sub-categories (ii)(10) to (15) inclusive. The approach of each party in the correspondence is similar to that set out in relation to category (i).

158. Category (ii) in the order of Allen J. dated 11th September 2020 refers to all correspondence or communications between (1) Mr. Moran and the Department of Finance of the one part, and (2) IBRC, its Board of Directors and/or servants of the other part, relating to the Plaintiff between 01 July 2011 and 06 February 2013.

159. As set out earlier, category (ii) was formerly category (c) in the initial discovery request sought in the letter from the plaintiff's solicitors dated 17th October 2019. As with category (i), what was ultimately agreed between the parties in relation category (ii) was more targeted and focused than the initial discovery sought. The parties agree that the same issues which arose with category (i) do not arise with category (ii).

160. In the letter dated 23rd December 2021 from Mr. Eames to the CSSO, similar general points of objection to that made in relation to category (i) are made, including that it is "inconceivable" that only 26 documents were discovered and expressing a difficulty in understanding why there are no handwritten notes of any meetings and phone calls or communications, memoranda, typed notes, e-mails, letters, diary entries or access records relating to any of the meetings and phone calls or communications, internal e-mails or messages. It is stated that having reviewed the documentation discovered (referred to earlier in the table above) "...it appears that there is a clear

discrepancy of documentation which the Defendants have discovered that would be responsive to Category (ii)...”.

161. As addressed earlier in this judgment, the use of the word “*relating*” once again becomes an important issue in the context of the response of the CSSO to these initial matters in its letter dated 12th April 2022.

162. The letter of reply dated 12th April 2022 states that the plaintiff has failed to say “*why it is inconceivable*” and suggests that this arises from a misunderstanding of the discovery categories by the plaintiff who, it is said, was expecting documents “*relating*” to the correspondence or communications referred to in category (ii) which is not what the category states in the order of Allen J. dated 11th September 2020.

163. Similarly, the point is made that insofar as there is a difficulty on behalf of the plaintiff understanding how there are no handwritten notes, memoranda, typed notes, e-mails, letters, diary entries or access records *relating* to any of the meetings and phone call or communications or even internal emails or messages held, this is because category (ii) does not extend to such “related” documents.

164. As indicated earlier, the same point arises here in relation to *each* of the sub-categories in (ii)(10), (ii) (11), (ii) (12), (ii) (13), (ii) (14) and (ii)(15), which seeks all documentation in the possession, power or procurement of the defendants “*evidencing, recording or otherwise relating to...*” which is much wider than the word “*between.*”

Sub-category (ii)(10)

165. Sub-category (ii)(10), for example, seeks all documentation in the possessions, power or procurement of the defendants evidencing, recording or otherwise relating to the 2012 meeting including, in particular: (a) preparatory correspondence; (b) meeting agendas; (c) attendances or memoranda recording the discussions that took place at the 2012 meeting; (d) documentation evidencing the accusations, including, in particular, the e-mail to which Mr. Moran referred at the said meeting; (e) correspondence with IBRC/Mr. Aynesly following on from the said meeting; and (f) documentation evidencing internal Departmental discussions in relation to the meeting itself or the accusations.
166. In Mr. Eames' letter of 23rd December 2021, this is partially denoted by the letter (h) and is replied to in the CSSO letter dated 12th April 2022 by stating that *"...[t]he Plaintiff attempts to extend the discovery category to include all documentation relating to an email dated 12 November 2012 from IBRC enclosing a meeting agenda. Category (ii) does not extend this far and was limited to correspondence or communications between (1) Mr. Moran and the Department of Finance of the one part and (2) IBRC, its Board of Directors and/or servants or agents of the other part, relating to the Plaintiff between 01 July 2011 and 06 February 2013. If there was correspondence or a communication between the aforementioned parties within the scope of the category of discovery, it would have been discovered. There is no obligation on a party making discovery to provide explanatory context for each of the documents being discovered..."*.

Sub-category (ii) (11)

167. Sub-category (ii) (11) seeks all documentation in the possession, power or procurement of the defendants evidencing, recording or otherwise relating to the meeting between Mr. Danny Buckley and officials of IBRC that was referenced in the correspondence between Mr. Buckley and Mr. Richard Faber in correspondence dated 14 November 2011.

168. In Mr. Eames' letter of 23rd December 2021, this is denoted by the letter (c) and is replied to in the CSSO letter dated 12th April 2022 by stating that "...[t]he Plaintiff attempts to extend the discovery category to include all documentation relating to a meeting between Mr. Buckley and IBRC referenced in correspondence between Mr. Buckley and Mr. Faber in correspondence dated 14 November 2011. Category (ii) does not extend this far and was limited to correspondence or communications between (1) Mr. Moran and the Department of Finance of the one part and (2) IBRC, its Board of Directors and/or servants or agents of the other part, relating to the Plaintiff between 01 July 2011 and 06 February 2013. If there were correspondence or a communication between the aforementioned parties within the scope of the category, it would have been discovered. There is no obligation on a party making discovery to provide explanatory context for each of the documents being discovered."

Sub-category (ii)(12)

169. Sub-category (ii)(12) seeks all documentation in the possession, power or procurement of the Defendants evidencing, recording or otherwise relating to the meeting between Mr. Danny Buckley and officials of IBRC that was referenced in the

correspondence between Mr. Buckley and Mr. Richard Faber in correspondence dated 23rd November 2011.

170. In Mr. Eames' letter of 23rd December 2021, this is denoted by the letter (d) and is replied to in the CSSO letter dated 12th April 2022, in a similar vein, by stating that *"...[t]he Plaintiff attempts to extend the discovery category to include all documentation relating to a meeting between Mr. Buckley and IBRC referenced in correspondence between Mr. Buckley and Mr. Faber dated 23 November 2011. Category (ii) does not extend this far and was limited to correspondence or communications between (1) Mr. Moran and the Department of Finance of the one part and (2) IBRC, its Board of Directors and/or servants or agents of the other part, relating to the Plaintiff between 01 July 2011 and 06 February 2013. If there was correspondence or a communication between the aforementioned parties within the scope of the category of discovery, it would have been discovered. There is no obligation on a party making discovery to provide explanatory context for each of the documents being discovered."*

Sub-category (ii)(13)

171. Sub-category (ii)(13) seeks *"all handwritten notes, attendances, memoranda, e-mails and diary entries evidencing, recording or otherwise relating to communications between the Defendants and IBRC relating to the Plaintiff between 1 July 2011 and 6 February 2013"*, which, again, is referred to Mr. Eames' letter of 23rd December 2021.
172. This is replied to in the CSSO letter dated 12th April 2022, under the sub-heading Category (ii) by stating *"[i]n this sub category the Plaintiff attempts to extend*

the discovery category to include all documentation relating to the Plaintiff between 1 July 2011 and 6 February 2013. Category (ii) does not extend this far and was limited to correspondence or communications between (1) Mr. Moran and the Department of Finance of the one part and (2) IBRC, its Board of Directors and/or servants or agents of the other part, relating to the Plaintiff between 01 July 2011 and 06 February 2013. Therefore, the Defendant declines to make any discovery of this sub category. If there was correspondence or a communication between the aforementioned parties within the scope of the category, it would have been discovered.”

Sub-category (ii)(14)

173. Sub-category (ii)(14) seeks “*all documentation in the possession, power or procurement of the Defendants evidencing, recording or relating to the IBRC Board Packs including all internal e-mails or memoranda or attendances or manuscript notes relating to the receipt of the Board Packs, as well as Board Packs themselves.*”

174. In Mr. Eames’ letter of 23rd December 2021, this issue is denoted by the letters (f) and in a different context by the letters (j) and (k).

175. The reply of the CSSO in its letter dated 12th April 2022 states that “*we assume the Plaintiff is referring to the Board Packs when referring to “Briefing Packs”. The Plaintiff attempts to extend the discovery category to include all documentation relating to the Board Packs furnished by IBRC. Category (ii) does not extend this far and was limited to correspondence or communications between (1) Mr. Moran and the Department of Finance of the one part and (2) IBRC, its Board of Directors and/or servants or agents of the other part, relating to the Plaintiff between 01 July 2011 and*

06 February 2013. If there was correspondence or a communication between the aforementioned parties within the scope of the category of discovery, it would have been discovered. There is no obligation on a party making discovery to provide explanatory context for each of the documents being discovered” and “...j. If there were briefing packs provided by IBRC to the Fifth and Sixth named Defendants in the relevant time period captured by the category, these would have been discovered...” and “...k. We do not understand the reference to the Joint Special Liquidators in the context of discovery given the time period in category (ii). Similarly, the Plaintiff refers interchangeably to Board Packs and Briefing Packs. If the Plaintiff is referring to the Briefing Packs mentioned at point j above, our position remains as set out in that paragraph. It is worth noting that the special liquidators were appointed on 7 February 2013. The temporal limitation on this discovery category is from 1 July 2011 to 6 February 2013...”.

176. A similar response is set out under the correlative paragraph (14) sub-heading Category (ii). This matter of “Board Packs” is also addressed in Mr. Hynds’ affidavit of discovery affirmed on 21st December 2020 where he states as follows at paragraph 4:

“...4. I say that document number 1,2,3,4,5,10,11,12,14,15,16,17,18,22,23,24,25,26, and 27 in Part I of the first Schedule (category ii) are extracts from IBRC Board packs provided to the Department by IBRC. These Board Packs are several hundred pages long and the Plaintiff is mentioned rarely. All mentions of the Plaintiff are disclosed in the extracts. I say the redacted pages of

the Board Packs contain privileged information, confidential and/or commercially sensitive and confidential information and confidential banking information of other individuals who are not parties to these proceedings. Moreover, I say the redacted pages of the Board Packs are not relevant or necessary for the disposal of the matters pleaded...”.

Sub-category (ii)(15)

177. Sub-category (ii)(15) seeks “*all documentation in the possession, power or procurement of the Defendants evidencing, recording or relating to internal discussions within the Department of Finance following on from the meeting of 9 November 2012 at which the Plaintiff’s affairs were discussed with IBRC.*”

178. In Mr. Eames’ letter of 23rd December 2021, this issue is denoted by the letter (g) and is replied to in the CSSO letter dated 12th April 2022, by stating that “*...[t]he Plaintiff attempted to extend the discovery category to include all documentation relating to internal discussions within the Department of Finance following on from the meeting of 9 November 2012 at which the Plaintiff’s affairs were discussed with IBRC. Category (ii) does not extend this far and was limited to correspondence or communications between (1) Mr. Moran and the Department of Finance of the one part and (2) IBRC, its Board of Directors and/or servants or agents of the other part, relating to the Plaintiff between 01 July 2011 and 06 February 2013. There is no obligation on a party making discovery to provide explanatory context for each of the documents being discovered...*” and a similar response is set out under the correlative paragraph (14) sub-heading category (ii).

179. In relation to sub-categories (ii)(10) to (ii)(15), I am satisfied that the plaintiff has not discharged the burden of showing that there are in existence further documents set out in these sub-categories that ought to have been discovered having regard to the order of the court dated 11th September 2020 but were not.

180. In addition, the documents referred to in these sub-categories do not comprise all correspondence or communications between (1) Mr. Moran and the Department of Finance of the one part and (2) IBRC, its Board of Directors and/or servants of the other part, relating to the Plaintiff between 01 July 2011 and 06 February 2013.

181. I, therefore, find that the documents set out in sub-categories (ii)(10) to (15) do not constitute documents which Mr. Hynds was required to discover but has not discovered.

182. I am further satisfied that Mr. Hynds in his affidavits affirmed on 21st December 2020 and 12th October 2020 (including his adoption of Mr. Davis' affidavit sworn on 21st June 2022) and Mr. Moran in his affidavit sworn on 2nd December 2020 did not misunderstand the issues in this action and did not err in their consideration of their discovery obligations.

183. Accordingly, having regard to the terms of categories (i) and (ii) in the order of Allen J. dated 11th September 2020, I am satisfied that the plaintiff has not shown that there are documents which the defendants were required to discover but have not discovered. Ultimately, the fact is that the plaintiff agreed and consented to the wording

of both category (i) and category (ii) in the order of the court (Allen J.) dated 11th September 2020.

ISSUES TO ADDRESS

184. In the fourth relief in the notice of motion dated 3rd May 2022 the plaintiff seeks, in the alternative, an order pursuant to the inherent jurisdiction of the court directing the defendants to swear a further affidavit which addresses the issues set out at Schedule 3 of the motion and which, it is submitted on behalf of the plaintiff, require further detail and clarification.

185. Schedule 3 (Issues to address) sets out the following nine matters which mirror precisely the issues raised in the main correspondence dated 23rd December 2021 (on behalf of the plaintiff) and which were responded to by letter dated 12th April 2022 (on behalf of the defendant) and in the parties' respective affidavits, which have been set out earlier in this judgment in the context of the request for further and better discovery:

(1) "A full explanation of the data retrieval and review process in which the Defendants engaged for the purposes of complying with the Order including:

(a) The custodians whose data was searched for potentially relevant documentation;

(b) For each custodian, the devices processed and searched;

- (c) Insofar as keyword searching was conducted, the key words used in the Defendants document search;*
 - (d) The nature of the review process conducted by the Defendant; and*
 - (e) The person(s) who carried it out.*
- (2) Details of what attempts (if any) were made in relation to securing documentation from the Fifth and Sixth Named Defendants' servants and/or agents, including John Moran, Des Carville, Danny Buckley, Michael Torpey, Margaret Fitzgerald, and Anne Nolan.*
- (3) Details of the steps that the Defendants' solicitors have taken to explain to them the discovery process and the nature of the obligations associated with their compliance with the Order.*
- (4) An explanation as to why the Defendants' search for documents within the ambit Category (i) only turned up 15 documents, which explanation should be supported by exhibiting of all the relevant search records evidencing the same.*
- (5) An explanation as to why the Defendants' searches for documents within the ambit of Category (i) did not turn up any handwritten notes, memoranda, typed notes, letters, e-mails, diary entries or access records relating to any of the meetings, phone calls and/or*

communications or even internal e-mails and messages held in respect of Category (i) , which explanation should be supported by the exhibiting of all relevant search records evidencing the same.

(6) An explanation as to why the Defendants search for documents within the ambit of Category (ii) only turned up 26 documents which explanation should be supported by the exhibiting of all relevant search records evidencing the same.

(7) An explanation as to why the Defendants' searches for documents within the ambit of Category (ii) did not turn up any handwritten notes, memoranda, typed notes, letters, e-mails, diary entries or access to records relating to any of the meetings, phone calls and /or communications or even internal emails and messages held in respect of Category (ii), which explanation should be supported by the exhibiting of all relevant search records evidencing the same.

(8) An explanation, with respect to both Categories , as to why the documentation responsive to the Sub-Categories has not been included.

(9) An explanation as to why no discovery has been made of documents which were within the power, possession or procurement of the Defendants but no longer are.”

186. Mr. McGarry SC, for the plaintiff, submits that if I exercise my discretion not to grant the plaintiff the further and better discovery sought (at paragraph 2 of the notice of motion dated 3rd May 2022) or the additional discovery sought (at paragraph 3 of the notice of motion dated 3rd May 2022), I can in the alternative, pursuant to the exercise of my inherent jurisdiction, direct Mr. Hynds and Mr. Moran to swear affidavits which address these nine issues and give further detail and clarification.

187. I agree with Mr. McGarry SC that, as a matter of principle and as corollary to the court's inherent power to ensure that its orders are complied with, a court *can* – in an application for further and better discovery – direct a deponent, who has previously sworn an affidavit as to documents, to swear affidavits addressing such matters so as to ensure the discovery process was correctly engaged *in lieu* of granting an order for further and better discovery. Murray J. confirmed this in *Daly v Ardstone Capital Limited* [2020] IEHC 200 at paragraph 12 and referenced the decision in *Victoria Hall Management Limited & ors v Cox & Ors* [2019] IEHC 639 where Barniville J. (as he then was) in relation to one aspect of that case, directed an explanation on affidavit within 21 days from the date of the judgment in lieu of an order for further and better discovery stating at paragraph 73 that “...*what the plaintiffs are entitled to is a proper explanation as to the methodology used when the discovery was originally made in October, 2017 and the methodology used on the further review required to be carried out by the personal defendants under para. 1 of the settlement agreement so that the plaintiffs can receive a reasonable degree of reassurance that all documents falling under Category 2 have been discovered.*”

188. Similarly, in *Kelland Homes Limited v Ballytherm Limited & Ors* [2019] IEHC 46 at paragraph 89 (Michael) Quinn J. observed, on the facts of that case, that the court had not “...held a hearing to determine the date by which Covestro B.V. had such knowledge of the existence of a legal claim against it to be under an obligation to implement a litigation hold. However, in circumstances where that date cannot be as late as 12th December, 2017, I shall direct that the fourth named defendant make an affidavit, not by its solicitor, addressing this question and describing the actions, if any, it took to preserve manual, electronic and other records from the time it became so aware.”

189. The question, therefore, is whether in the circumstances of this case, I *should* make such an order.

190. In this case, I am not inclined to accede to this request.

191. The affidavits and correspondence which have been reviewed in detail in the earlier part of this judgment dealing with the application for further and better discovery already address the nine issues raised and establish, in my view, that the discovery process which arose consequent upon the consent order of Allen J. dated 11th September 2020 was correctly engaged in by the defendants and no further explanation is required.

192. In addition, the second replying affidavit of Gary Hynds affirmed on the 12th October 2022 addresses the criticisms of the discovery process, in particular at paragraphs 18 to 26, in the affidavit of Aidan Eames sworn on 13th July 2022.

193. I, therefore, refuse the alternative relief in the notice of motion dated 3rd May 2022 which sought an order pursuant to the inherent jurisdiction of the court directing the defendants to swear a further affidavit to addresses the nine issues set out at Schedule 3 of the motion.

PROPOSED ORDERS

194. Accordingly, I refuse the plaintiff's application set out in the notice of motion dated 3rd May 2022.

195. I will hear the parties on any ancillary or consequential orders that arise including in relation to the title of the pleadings and the consequences of the notices of discontinuance which have been filed.

196. I note, for example, in Mr. Eames' affidavit of 3rd May 2022, at paragraph 7, he clarifies that the proceedings have been discontinued as against the First to Third Named Defendants (National Asset Management Agency, Paul Hennigan and Enda Farrell) but remain extant as against the Fourth to Sixth Named Defendants. Each of the Notices of Discontinuance in this regard have been put before the court.

197. The Fourth Named Defendant is John Moran and the Fifth Named Defendant is the Minister for Finance. As the Department of Finance is not a corporation sole, and the Minister for Finance who is already a party to the proceedings, is a corporation sole (under the Ministers and Secretaries Act, 1924 (as amended)) with perpetual succession, the department's joinder appears, in any event, to be superfluous and,

subject to the views of the parties, the proceedings should be amended and the Department of Finance removed from the title of the proceedings.

198. When this matter came before me on Thursday 21st December 2023, I agreed to the parties' application on consent to amend the title of the proceedings by removing the National Asset Management Agency, Paul Hennigan, Enda Farrell and the Department of Finance.