

**THE HIGH COURT  
COMMERCIAL**

[2017 No. 7825 P.]

**BETWEEN****MUSTARDSIDE LIMITED, LCOSARS LIMITED, HOME GENERATIONS HOMES LIMITED AND GREG KAVANAGH****PLAINTIFFS****AND****TRACRE LIMITED, CREKAV TRADING LIMITED, CREKAV LIMITED PARTNERSHIP, CREKAV TRADING GP LIMITED, KAVCRE INVESTMENTS LIMITED AND VIMOVO INVESTMENTS****DEFENDANTS****Judgment of Mr. Justice David Barniville delivered on the 14th day of March, 2018.****Introduction**

1. This is my judgment on the plaintiffs' application for an order for discovery against the defendants. The plaintiffs initially sought discovery of five categories of documents from the defendants by way of voluntary discovery. Through constructive engagement between the parties, agreement was reached in respect of a number of the categories of discovery sought by the plaintiffs. The dispute between the parties has been narrowed down to three categories of documents, with some of those categories consisting of a number of sub-categories

**The proceedings**

2. The plaintiffs' claim against the defendants arises out of a settlement and purchase deed entered into by the parties on 3rd February, 2017 (the "Deed"). The plaintiffs seek payment from the defendants of certain sums of money which they claim are due and owing by the defendants on foot of the Deed. Further reliefs are also sought, including specific performance of the Deed, and other declaratory reliefs and damages. The plaintiffs' claim that it was agreed in the Deed that the fourth named plaintiff, Greg Kavanagh, ("GK"), would cease to be a director of certain companies referred to in the Deed and that the "Issuers" (a term defined in the Deed) would make certain payments in circumstances provided for under the Deed. The plaintiffs' claim that GK did resign as a director of the relevant companies on 3rd February, 2017 and that on same date, GK and the third named plaintiff, New Generation Homes Limited ("New Gen"), effected a transfer of all of the business, assets and undertakings (excluding certain excluded assets and employees) of New Gen to an entity referred to in the Deed as agreed. The plaintiffs claim that the first instalment of monies payable under the Deed was paid on 3rd February, 2017. However, they claim that the second instalment of monies payable under the Deed (totalling €3,000,000) was not paid on the required date, 3rd August, 2017 (the "second instalment date") and remains outstanding. It is further alleged that the other instalments payable under the Deed have not been paid.

3. The defendants sought to invoke certain provisions in the Deed in order to justify their non-payment of the further instalments. The defendants alleged that certain "forfeiture events" occurred under the Deed as a consequence of which they were not obliged to make the payments. The plaintiffs claim that no such "forfeiture events" occurred and dispute the defendants' purported reliance on provisions of the Deed to justify withholding payment of the second and subsequent instalments payable thereunder. The plaintiffs seek to recover approximately €10,100,000 from the defendants.

4. The defendants dispute the plaintiffs' claim for the second and subsequent instalments under the Deed. They claim that they fully complied with the provisions of the Deed and paid the first instalment on the relevant date. However, they rely on the provisions of the Deed under which the plaintiffs have no right to payment of the relevant instalment payment then due or any payment due thereafter where a "forfeiture event" occurs between the completion date under the Deed (3rd February, 2017) and any instalment date. The defendants allege that between the completion date and the date for payment of the second instalment (3rd August, 2017), the defendants become aware that the two separate "forfeiture events" had occurred. The first concerns a property known as "Annefield" in Dundrum, Dublin 14 (the "Annefield forfeiture event") and the second concerns a property at Castleforbes in Dublin (the "Castleforbes forfeiture event"). The defendants contend that they were not bound to pay and did not pay the second instalment by reason of these "forfeiture events". The defendants also contend that by reason of a misrepresentation by the plaintiffs prior to entering into the Deed and before the date for payment of the first instalment, and by reason of the Annefield forfeiture event, the defendants were entitled to withhold payment of the first instalment to the plaintiffs and that the plaintiffs are not entitled to retain that instalment. The defendants counterclaim for the return of the sum of €9,880,000 paid under the Deed.

5. At the heart of the case, therefore, is whether either or both of the alleged "forfeiture events" occurred. The plaintiffs claim that they did not occur and that the defendants' reliance upon them was contrived. The defendants claim that they did and that, as a consequence, the plaintiffs have no entitlement to payment of the second or subsequent instalments and are obliged to repay the first instalment paid by the defendants.

6. In support of their contention that reliance by the defendants on the forfeiture events was contrived, the plaintiffs allege that the "Issuers" (who were to pay the monies under the Deed) were not in funds on 3rd August, 2017 and that that was the real reason why the monies were not paid on that date (or thereafter). The defendants dispute this and maintain that the question of whether or not they (or the "Issuers") were in funds is irrelevant. They argue that either one (or both) of the forfeiture events occurred or it (or they) not and that the funding position of the defendants is entirely irrelevant to that issue. The relevance or otherwise of the defendants' financial position and its ability to fund the payment of the second instalment is an issue brought into focus by one of the categories of documents sought by the plaintiffs on discovery.

**Procedural background**

7. The plaintiffs requested voluntary discovery of five categories of documents from the defendants by letter dated 23rd November, 2017. That letter set out the reasons for which it was contended that the categories of documents sought by way of voluntary discovery were relevant and necessary for the purposes of O. 31 r. 12 of the Rules of the Supreme Courts ("RSC"). The request for voluntary discovery sought the discovery of documents in relation to the Annefield forfeiture event, the Castleforbes forfeiture event, the defendants' alleged inability or refusal to pay the monies claimed and documents relating to other pleas and matters.

8. The defendants' solicitors replied to the request for voluntary discovery by letter dated 4th December, 2017. In that letter it was indicated that the defendants were agreeable to making voluntary discovery of certain of the categories of discovery sought (namely the discovery sought in categories 1(b) and 5). The defendants offered to make more limited discovery than that sought by the plaintiffs in relation to categories 1(c), 2(a), 2(b), 4(b) and 4(c). The defendants were not agreeable to making discovery in respect of the other categories or sub-categories of documents sought by the plaintiffs. An additional offer of discovery was made at the outset of the hearing of the application for discovery on 16th February, 2018. That offer concerned the discovery sought at category

4(a).

9. The offer of voluntary discovery made by the defendants was not acceptable to the plaintiffs. A motion for discovery was issued on behalf of the plaintiffs on 13th December, 2017. The motion sought an order for discovery in respect of the documents referred to in categories 1(a), 1(c), 2(a), 2(b), 2(c), 4(a), 4(b) and 4(c) of the plaintiffs' solicitors' letter seeking voluntary discovery.

### Legal principles on discovery

10. Before looking at the particular categories and sub-categories of documents in respect of which discovery is now sought on behalf of the plaintiffs, it may be helpful briefly to summarise the relevant legal principles on discovery. It is not intended in this judgment to provide a detailed review on the law on discovery as such would be unnecessary in the context of the present application. Fortunately, the Court of Appeal has recently summarised the relevant principles by reference to a significant body of case law on discovery. The Court of Appeal did so in *O'Brien v. Red Flag Consulting Limited & Others* [2017] IECA 258, ("Red Flag").

11. Having referred to a number of the leading cases on discovery in this jurisdiction including *Hannon v. Commissioners of Public Works* [2001] IEHC 59, *Framus Limited v. CRH plc*. [2004] 2 IR 20, *Ryanair plc v. Aer Rianta cpt* [2003] 4 IR 264 and *Hartside limited v. Heineken Ireland Limited* [2010] IEHC 3, Ryan P. in delivering the judgment of the court summarised the relevant legal principles as follows:-

*"1. The primary test is whether the documents are relevant to the issues in the legal proceedings between the parties. [Stafford v. Revenue Commissioners ]*

*2. Relevance is determined by reference to the pleadings. Order 31, r. 12 specifies discovery of documents relating to any matter in question in the case. [Hannon, para.2]*

*3. There is nothing in the Peruvian Guano test which is intended to qualify the principles that documents sought on discovery must be relevant, directly or indirectly, to the matter in issue between the parties in the proceedings.*

*4. An applicant for discovery must demonstrate that it is reasonable for the court to suppose that the documents contain relevant information. [Peruvian Guano, p. 65]*

*5. An applicant is not entitled to discovery based on speculation. Neither is it available merely to test averments. [Framus Ltd v. CRH plc [2004] 2 IR 20, pp. 34-35]*

*6. In balancing procedural justice the court may require a party whose application is based on a mere assertion to satisfy a threshold criterion of establishing a factual basis for the claim. [Hartside Ltd v. Heineken Ireland Ltd, para.5.9.]*

*7. Although relevance is the primary criterion, and when established in respect of documents it will follow in most cases that their discovery is necessary for the fair disposal of those issues, the question whether discovery is necessary for 'disposing fairly of the cause or matter' cannot be ignored. [Cooper Flynn v. Radio Telefís Éireann [2000] 3 IR 344],*

*8. The court should consider the necessity for the documents having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. [Ryanair plc v. Aer Rianta cpt [2003] 4 IR 264],*

*9. There must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at trial. [Framus, p. 38]*

*10. In certain circumstances, a too-wide ranging order for discovery may be an obstacle to the fair disposal of proceedings. [Independent Newspapers (Ireland) Ltd v. Murphy [2006] 3 IR 566, page 572]*

*11. Discovery could become oppressive and the court should not allow it to be used as a tactic in war between parties. [Hannon, para.4]*

*12. If a party objects to discovery, the Court may reserve the question until a disputed issue in the case has first been decided if it is satisfied that the right to the discovery depends on the decision or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined first and may order accordingly. [McCabe v. Ireland [1999] 4 IR 151, page 156]"*

12. As is well known, the Irish law on discovery is built on the twin requirements of relevance and necessity. Relevance is still assessed by reference to the test outlined by Brett L.J. in the Court of Appeal of England and Wales in *Compagnie Financière du Pacifique v. Peruvian Guano Company* (1882) 11 QBD 55. The test has been approved and applied in many Irish cases. The requirement of necessity, in the sense that it is incumbent upon an applicant for discovery to demonstrate that the discovery sought is necessary for fairly disposing of the case or for saving costs, is now found in O. 31, r. 12 of the RSC (as substituted by the Rules of the Superior Courts (Discovery) 2009 (S.I. No. 93 of 2009)). Relatively little attention was given to the requirement of necessity until the Supreme Court gave judgment in *Brooks Thomas Limited v. Impact Limited* [1999] 1 ILRM 171. In that case, Lynch J. found that notwithstanding the potentially tenuous relevance of the documents sought, the documents were "quite unnecessary". The O. 31, r. 12 of the RSC was amended in 1999 arising from the observations made by Lynch J. in that case and required, for the first time, that an applicant seeking discovery had to verify on affidavit that the discovery sought was "necessary for disposing fairly of the cause or matter or for saving costs". This amendment, while not altering the substantive law on discovery, has led to a greater focus on the need to satisfy the necessity test.

13. The burden of establishing both relevance and necessity in respect of the discovery sought rests on the party seeking the discovery. The relevance of documents for the purpose of discovery is determined by reference to the pleadings in the case. If documents are relevant, discovery of them is normally necessary for disposing fairly of the case or for saving costs, but that is not always the case. (See, for example, *PJ Carroll & Company Limited v. Minister for Health and Children (No. 3)* [2006] 3 I.R. 431, where the Supreme Court found that the documents in question were relevant but unnecessary). The term "necessary" means "required" and a party seeking to establish the requirement of necessity does not need to demonstrate that the documents sought are "in any sense absolutely necessary" (*Ryanair plc v. Aer Rianta cpt* [2003] 4 I.R. 264, per Fennelly J. at 275). The question of necessity should, therefore, always be considered in addition to that of relevance. It is also evident from the summary of the relevant principles conveniently set out by Ryan P. in *Red Flag* that an excessively wide range in order for discovery may amount to an obstacle to the

fair disposal of the proceedings.

14. While the plaintiffs' application for discovery in the present case must be decided in accordance with these legal principles which are well established in Irish law, it is not possible to ignore the increasingly critical remarks about the burden which excessive discovery can place on parties to litigation, particularly in commercial cases.

15. In his forward to the Commercial Litigation Association of Ireland " *Good Practice Discovery Guide*" (November, 2015) Clarke J. (as he was) remarked:-

*"It has often been said in recent times that the growth of the burden of discovery obligations has come to represent a significant barrier to access to justice. It has been anecdotally reported that, in certain categories of cases, the cost of complying with discovery orders can approach 50% of the total cost of the litigation as a whole. Against that background it is hardly surprising that issues arising out of discovery have been the subject of significant debate."*

16. More recently, Kelly P. is quoted in "*The Bar Review*": volume 23: no.1 – February, 2018 as stating:-

*"[Discovery] is the single greatest obstacle in civil litigation, certainly in the High Court, to expeditious dispatch of business. It has become a monster. Huge amounts of time and money are expended on it because we're operating under rules that were formulated in the 19th century, at a time where for the most part you were talking about at most maybe a couple of dozen documents".*

17. While I must decide the present application for discovery on the basis of the existing and well established legal principles applicable to discovery (some of which were, as Kelly P. noted formulated in the 19th Century), these sentiments and others like them have led to an understandable concern on the part of the courts to ensure that excessive discovery is not ordered. There is an increasing awareness on the part of judges of the need to be scrupulous in assessing the requirement for the discovery sought in a particular application. This concern is reflected in para. 10 of the principles set out by Ryan P. in *Red Flag*.

18. Having touched upon these applicable principles and the need to ensure that the discovery sought is properly justified on the basis of the relevance and necessity requirements and is not excessive, I now turn to the categories of documents in respect of which discovery is sought by the plaintiffs and set out my conclusions in relation to those categories.

### **The Categories Sought and My Conclusions**

#### **(1) Categories 1(a) and (c)**

19. In these categories, the plaintiffs seek discovery of the following:-

##### *"1. Annefield Alleged Forfeiture Event*

*(a) All documentation relating to the following properties and the lands attached thereto including any contracts, any deed of conveyance and/or assignment or deed of transfer, rights granted, correspondence and reports prepared in respect of the following:*

*(i) Annefield House, Dundrum, Dublin 14;*

*(b) ...*

*(c) All documentation in relation to the alleged agreement referred to in paragraph 3(c) of the Defence and Counterclaim, including (but not limited to) all documentation relating to how the Defendants 'became aware' of this."*

20. The basis on which it is contended by the plaintiffs that discovery of the documents sought in these two categories is relevant and necessary was set out in the plaintiffs' solicitors' letter seeking voluntary discovery dated 23rd November, 2017. Those reasons were repeated in the affidavit sworn by John O'Riordan on 13th December, 2017, for the purpose of grounding the plaintiffs' application for discovery.

21. It is said that the alleged Annefield forfeiture event is "*integral*" to the defendants' purported justification for their refusal to pay the monies outstanding under the Deed. Reference is made to paras. 51 and 52 of the statement of claim and to concerns raised by the defendants with respect to Annefield and the plaintiffs' plea that those concerns were advanced in order to avoid paying the monies allegedly due. Reference is also made to para. 3(c) of the defence and counterclaim in which the defendants pleaded that GK entered into an agreement purporting to bind the fifth named defendant, Kavcre Investments Limited ("Kavcre") in relation to a right of way over Annefield and that this was not known to the other directors of Kavcre. Reference is also made to para. 15 of the plaintiffs' reply and defence to counterclaim in which it is pleaded that the defendants were being put on proof of all allegations and contentions in para. 3(c) of the defence and counterclaim including "*how, when and through whom they became aware of the alleged matters referred to*" and is further denied that the relevant matters were not known to the other directors of Kavcre. The plaintiffs allege that the full extent of the defendants' knowledge in relation to Annefield and in relation to the alleged Annefield forfeiture event pleaded at para. 3 of the defence and counterclaim is relevant to matters in issue.

22. The discovery sought in these two subcategories is also said to be relevant in light of the plea at para. 53(b) of the statement of claim that no right of way or other right was granted over the Annefield property and that as a result no agreement was executed by GK which could in any way bind Kavcre in relation to a right of way over Annefield. It is said that discovery of the documents sought in these subcategories will assist the plaintiffs to challenge the defendants' assertion as to lack of knowledge in relation to matters directly relevant to this alleged forfeiture event.

23. It is contended that the discovery sought is not only relevant but also necessary for the reasons outlined earlier. It is also said that the discovery sought in category 1(c) concerning the alleged Annefield forfeiture event including documents relating to the reliance (if any) placed on the alleged representation of GK will confer a litigious advantage on the plaintiffs in assisting them to undermine the pleas referred to in relation to the alleged Annefield forfeiture event and in assisting the plaintiffs in making out their claims in the statement of claim including the pleas at para. 46 and 52 that the defendants' alleged concerns in correspondence were raised purely in an attempt to avoid payment.

24. The defendants' solicitors' letter of 4th December, 2017, sets out the basis on which the defendants dispute the relevance and

necessity of the documents sought by way of discovery in these two subcategories. They allege that the request in category 1(a) is extremely broad and that any relevant documentation relating to the alleged Annefield forfeiture event would be captured by the discovery with the defendants are prepared to make in respect of category 1(b) (namely "*all documentation in relation to the representation made by Greg Kavanagh referred to in para. 3 of the defendants' defence and counterclaim delivered on 6th November, 2017...*, including (but not limited to) any reliance thereon") and/or category 1(c). As regards category 1(c), the defendants did not agree to make discovery in the terms requested. They did agree to make discovery of the alleged agreement itself but were not agreeable to make discovery of "*how the defendants 'became aware' of this*" which it was contended was not a matter relevant to any issue in the proceedings. The defendants reiterated this position in the replying affidavit sworn by Paul Horn on 16th January, 2018.

25. The plaintiffs disputed the adequacy of the discovery offered by the defendants in a supplemental affidavit sworn by Mr. O'Riordan on 13th February, 2018. It is contended that a key element of the alleged Annefield forfeiture event was the state of knowledge of some or all of the defendants. The plaintiffs allege that the directors of Kavcre were aware of the matters alleged to give rise to this alleged forfeiture event and, as a result, it is contended that documentation relating to the alleged Annefield forfeiture event and as to how any of the defendants became aware of the matters giving rise to that alleged event are directly relevant to the issues in the proceedings. It is contended that the documentation sought is relevant to the pleas of affirmation, delay and other pleas raised by the plaintiffs at para. 75 of the statement of claim. The plaintiffs further maintain that the discovery offered in respect of category 1(c), namely, the agreement itself is not sufficient as it does not relate to the state of knowledge of the defendants in relation to the alleged Annefield forfeiture event and that documents which "*highlight*" the defendants' state of knowledge of the alleged forfeiture event are key and will assist the plaintiffs in advancing their case and in damaging the defendants' case.

26. The parties reiterated their respective positions by way of written and oral submissions at the hearing of the discovery application. The plaintiffs maintain that awareness of the matters alleged to give rise to the Annefield forfeiture event and the date of that awareness is central to the case which the defendants have to establish if they are to be entitled to rely on this alleged forfeiture event under the Deed. They maintain that the date of knowledge is fundamental by reference to the provisions of Clause 6.5.1(a) of the Deed. As regards the plea of the defendants (at para. 3(c) of the defence and counterclaim) that they "*became aware*" in or around July 2017 that GK had executed the alleged agreement purporting to bind Kavcre in relation to the right of way over Annefield, the plaintiffs claim that the reply put the defendants on proof of all of those matters including "*when*" the defendants became aware of the alleged matters and any alleged lack of awareness on the part of Kavcre's directors. The plaintiffs maintain that the issue of "*how*" the defendants became aware cannot be divorced from the issue of "*when*" they became aware. Various other reasons are advanced on behalf of the plaintiffs in respect of the relevance and necessity of the documents sought in category 1(c).

27. As regards category 1(a), it is contended that those documents are relevant and necessary in order to determine whether the relevant agreement was such as to "*bind or purport to bind*" within the meaning of that phrase in Clause 6.5.1(a) of the Deed and the plaintiffs refer to para. 53(b) of the statement of claim and para. 3(c) of the defence and counterclaim. In particular, the plaintiffs claim that the documents sought in this subcategory are relevant and necessary to enable the plaintiffs to make out their plea that any agreement did not create a right of way which bound or purported to bind the defendants. On the issue as to whether the agreement bound or "*purported to bind*", reliance was placed on behalf of the plaintiffs on the judgment of O'Donnell J. in the Supreme Court in *Law Society v. MIBI* [2017] IESC 31 ("*Law Society*"). It is also said that the documents sought in this subcategory are relevant and necessary in that the documents in category 1(c) might only provide documents relevant to the state of knowledge of Kavcre but not of any other relevant entities for the purposes of Clause 6.5.1(a) of the Deed.

28. The defendants submit that the discovery which they have agreed to provide under category 1(b) combined with their agreement (in the letter of 4th December, 2017) to make discovery of the alleged agreement referred to in para. 3(c) of the defence and counterclaim is sufficient to cover all documentation relevant to the alleged Annefield forfeiture event and necessary for the proceedings. The defendants stress that in respect of these two subcategories, two issues arise in the case. The first is whether the alleged forfeiture event occurred and the second is whether GK misrepresented the position or acted in breach of the representation and warranty contained in Clause 6.5.1(a) of the Deed to the effect that he had not entered into any agreement that would bind or purport to bind any "Issuer" or other relevant entity and that was not known to the directors of the relevant entity as at the date of the Deed, for the purposes of Clause 6.5.1(a). The defendants further submit that a sub-issue arose which was whether, if GK did enter into an agreement which bound or purported to bind any relevant entity, including Kavcre, that was known to the directors of Kavcre or any other relevant entity. The defendant contends that neither of these subcategories of discovery sought by the plaintiffs is actually directed to the question of the knowledge of Kavcre or any of its directors or of any other relevant entity.

29. As regard subcategory 1(a), the defendants submit that the documentation sought is neither relevant nor necessary and that the issue which arises in the case, namely, whether, for the purposes of Clause 6.5.1(a) of the Deed, the alleged agreement was in breach of that provision is a question of interpretation of the agreement. The defendants had agreed (in the letter of 4th December, 2017, responding to the voluntary discovery request) to make discovery of the agreement itself (although the plaintiffs do, in fact, have copy of the agreement). The defendants contend that the documentation sought over and above the agreement itself is not relevant to the interpretation of the agreement and would not be admissible as part of the "*factual matrix*" which regard may be had in interpreting the agreement. Thus, they contend that the documentation sought in this category, essentially consisting of all documentation relating to Annefield is not probative as to whether an agreement of which the directors of Kavcre, the owner of Annefield, were aware was binding or purported to be binding for the purpose of Clause 6.5.1(a).

30. As regards the documents sought in subcategory 1(c), again the defendants have submitted that the documentation sought over and above the agreement itself is neither relevant to an issue in the case nor necessary for the determination of that issue. They contend that the only issue which arises is whether the alleged agreement was in breach of Clause 6.5.1(a) and, in that context, the issue is whether the agreement bound or purported to bind any relevant entity and was not known to the directors of that entity as at the date of the Deed. They further contend that it is not relevant how or when the directors of the relevant entity, Kavcre, became aware of the alleged agreement provided that it was not before the date of the Deed. They further claim that the documentation which they agreed to provide under subcategory 1(b) would encompass documents relevant the defendants' reliance on the representations made by GK which would include documents related to any matters of which the defendants had knowledge and, therefore, did not rely on GK's representations.

31. The defendants confirmed in oral submissions that the discovery agreed to be provided under subcategory 1(b) would encompass documents relevant to the issue as to whether the defendants knew as at the date of the Deed whether GK had entered into an agreement which bound or purported to bind any relevant entity and that, as a consequence, the question of discovery of any other documents did not arise.

32. The defendants further contend that there is no basis for the plaintiffs seeking discovery of documents concerning "*how*" the

defendants were or became aware of the alleged agreement and that the only issue to which documents might be relevant was "whether" the defendants were aware and then only whether that awareness existed as at the date of the Deed.

33. I have reviewed the pleadings (for the purposes of these two subcategories, the relevant pleadings being paras. 51 – 52 and 75 of the statement of claim, paras. 3 and 37 of the defence and counterclaim and paras. 12 – 15 and 32 of the reply and defence to counterclaim) as well as the correspondence, affidavits and submissions. In my view, the dispute between the parties is not about the existence or otherwise of the alleged agreement – the relevant agreement having been referred to and indeed exhibited by GK to the affidavit which he swore for the purpose of grounding the application to enter these proceedings into the Commercial List – but rather above the consequences or effect of that agreement for the purposes of Clause 6.5.1(a) of the Deed. Under that provision, GK represented and warranted that:-

*"(a) Neither he nor any GK Related Party has taken any action or entered into any contract or agreement, whether oral or written and whether directly or indirectly, that would bind or purports to bind any Issuer, any Original Issuer or Holdco Group Company and that is not known to the directors of the applicable Issuer, Original Issuer or Holdco Group Company as at the date of this Deed."*

34. One of the first issues that will arise in the proceedings is whether the agreement at issue, namely, the "Grant of Easements" made on 30th September, 2014, between Kavcre and Orla McDonnell binds or purports to bind any of the relevant entities for the purposes of Clause 6.5.1(a). That issue will turn on the correct interpretation of the agreement itself. The defendants have agreed to make discovery of the agreement. As just noted, the plaintiffs already have a copy of the agreement. Whether the agreement has the effect of amounting to a breach of the representation and warranty contained in Clause 6.5.1(a) will turn on the correct interpretation of the agreement itself in light of well established principles of contractual interpretation. While the plaintiffs rely on a passage from the recent judgment of O'Donnell J. in the Supreme Court in the *Law Society* case. I am not satisfied that the observations of O'Donnell J. in that case provide any warrant or justification for the enormously broad and wide-ranging discovery sought by the plaintiffs under subcategory 1(a). I do not understand O'Donnell J. to have said anything in the passage relied upon by the plaintiffs which would support the admissibility in evidence of the vast documents of which discovery is sought in this subcategory. The extent of the discovery sought here goes far beyond anything which might reasonably be encompassed by the concept of the "factual matrix" of an agreement which is to be interpreted by a court. I do not believe, therefore, that the judgment of O'Donnell J. provides any basis or support for importing all of these other documents into the mix under the guise of "factual matrix" for the purpose of interpreting the agreement at issue. Nor do they properly come within the scope of the term "specific context" or "broader context" as those terms are used by O'Donnell J. at para. 12 of his judgment in the *Law Society* case.

35. I do not accept, therefore, that anything more is relevant to establishing whether the relevant agreement was a breach of the representation and warranty made and given by GK at Clause 6.5.1(a) of the Deed insofar as the issue as to whether the agreement would bind or purport to bind any relevant entity is concerned.

36. Even if it could be said that documents over and above the agreement itself are potentially relevant to that issue, I do not believe that discovery of any such further documents is necessary for the fair disposal of the proceedings in the sense of being required in order to establish any part of the case sought to be made by the plaintiffs or to undermine the defence sought to be advanced by the defendants. Furthermore, the discovery sought in subcategory 1(a) is completely excessive insofar as it seeks documents relating to the Annefield property itself and the lands attached thereto including a vast number of documents such as contracts, deeds of conveyance of assignments, deeds of transfer, documents relating to rights granted, correspondence and reports. No attempt has been made to narrow down or focus on the documents which might potentially be relevant to establish whether the relevant agreement amounted to a breach of the representation and warranty contained in Clause 6.5.1(a) of the deed.

37. In my view, therefore, the only document which should be discovered in respect of subcategory 1(a) is the agreement itself. The defendants agreed to discover this document in their solicitors' letter of 4th December, 2017.

38. As regards the discovery sought in subcategory 1(c), it follows from the views I just expressed that the plaintiffs are entitled to discovery of the agreement itself (and discovery of the agreement was offered on 4th December, 2017). I do not accept that documentation relating to "how" the defendants "became aware" of the agreement is either relevant or necessary for the purposes of the proceedings. I do accept, however, that documents which bear on the issue as to whether the relevant entities had knowledge of the agreement as at the date of the Deed would be relevant to the issues raised in the proceedings and their discovery would be necessary for the fair disposal of the case. It seems to me that having regard to the express provisions of Clause 6.5.1(a), the only relevant question in this context is whether the relevant entity had knowledge of the agreement as at the date of the Deed. If it did, and if the agreement was one which would bind or purported to bind the relevant entity, then no breach of Clause 6.5.1(a) would have occurred. The critical issue, therefore, is "whether" the relevant entity had knowledge of the agreement as of the date of the Deed, being 3rd February, 2017.

39. The defendants have agreed to make discovery of the documents sought in subcategory 1(b) which encompasses all documentation in relation to the representation made by GK as referred to in para. 3 of the defence and counterclaim (including but not limited to) any reliance thereon. The representation made by GK as referred to at para. 3 of the defence and counterclaim is the representation (and warranty) contained in Clause 6.5.1(a) of the Deed. The defendants have accepted in submissions at the hearing of this application that the discovery to be made by them under the subcategory 1(b) would include documents relating to matters of which they had knowledge and, consequently did not rely on GK's representations and that such discovery would include documents relating to the issue as to whether the defendants knew of the agreement as of the date of the Deed.

40. While appearing to accept that documents concerning "how" the defendants "became aware" of the agreement did not differ substantially from documents relevant to "whether" the defendants were aware of the agreement as of the date of the deed, this was not entirely clear from the submissions made on behalf of the plaintiffs. I should, therefore, express my view on this issue. I do not accept that documents in relation to "how" the defendants "became aware" of the agreement are relevant. I do, however, accept that documents relating to "whether" the relevant entities were aware of the agreement at the time the Deed was entered into on 3rd February, 2017, are relevant. Since the defendants have accepted that the alleged knowledge of any of the defendants (and their servants or agents) would be relevant, it seems to me that documents touching on the alleged knowledge of any of the defendants or their servants or agents of the agreement as of the date of the deed are relevant. While the defendants contend that such discovery would be encompassed by the discovery they have agreed to make under subcategory 1(b), it seems to me that it would be more appropriate that I expressly order the defendants to make discovery of such documents under subcategory 1(c).

41. Accordingly, therefore, in respect of subcategories 1(a) and (c), I will direct the defendants to make discovery of the (i) agreement referred to at para. 3(c) of the defence and counterclaim, being the "Grant of Easements" made on 30th September, 2014, between Kavcre and Orla McDonnell and (ii) all documents relating to the knowledge or otherwise of the defendants, their servants or

agents, of that agreement as of the date of the settlement and purchase deed, being 3rd February, 2017.

42. I refuse the balance of the discovery sought in subcategories 1(a) and (c).

## **(2) Category 2**

43. The plaintiffs seek discovery of three subcategories of documents under this category 2. They are as follows:

*"(a) All documentation relating to the property at Castleforbes in Dublin referred to in paragraph 2(c) of the Defence and Counterclaim including any documentation in relation to Greg Kavanagh's alleged involvement with this property.*

*(b) All documentation in relation to the alleged interest held by Greg Kavanagh as pleaded at paragraph 2(d) of the Defence and Counterclaim.*

*(c) All documentation in relation to the other matters pleaded at para. 2(d) of the Defence and Counterclaim, in particular:*

*(i) the Defendant's ' understanding';*

*(ii) all litigation referred to in the said paragraph;*

*(iii) Castleforbes Business Parks;*

*(iv) Bulwark Limited;*

*(v) Samsonmont Limited; and*

*(vi) Peytor Developments Limited (in receivership)."*

44. The plaintiffs contend that the documents sought in the various subcategories of category 2 are relevant to the second of the two alleged forfeiture events relied upon by the plaintiffs, namely, the alleged Castleforbes forfeiture event. The plaintiffs rely on what is pleaded at para. 2 of the defence and counterclaim in respect of an alleged forfeiture event in support of their request for the discovery sought under this category.

45. The plaintiffs dispute the alleged Castleforbes forfeiture event in the statement of claim and criticise the manner in which the defendants have dealt with this issue in para. 2 of the defence and counterclaim. The plaintiffs criticise the defendant's pleading as being *"highly vague"* in relation to this alleged forfeiture event. They contend that discovery of the documents sought in this category and in its various subcategories will assist the plaintiffs in undermining the case that the alleged forfeiture event occurred and will assist the plaintiffs in making out their case that it did not and that the defendant's reliance on this alleged forfeiture event was purely in order to avoid making the required payments under the Deed.

46. The defendants' response to the plaintiffs' voluntary discovery request in respect of this category and its subcategories is that with regard to subcategories 2(a) and (b), the defendants are prepared to offer to make discovery of such documents on which the defendants intend to rely at the hearing in order to advance the matters pleaded at para. 2 of the defence and counterclaim but are not prepared to offer any discovery in respect of subcategory 2(c) on the basis that the documents sought are not relevant and their discovery of them is not necessary. The plaintiffs are not agreeable to the discovery offered and have maintained their request for the discovery sought in category 2 in its entirety.

47. In their submissions both oral and written, the plaintiffs drew attention to the terms of paras. 2(c) and (g), of the defence and counterclaim in particular to support their asserted entitlement to discovery of the documents sought in this category. At para. 2(c), of the defence and counterclaim, the defendants plead that between the completion date of the Deed (being 3rd February, 2017) and the date on which the second instalment fell due, the defendants *"became aware"* that GK *"is concerned, interested and/or engaged in relation to a property at Castleforbes in Dublin ... (not being one of the Excluded Properties as defined in the Deed)."* Having asserted at para. 2(d) of the defence and counter claim that the defendants *"understand"* that GK is the beneficial owner of a 50% interest in the shareholding held by Samsonmont Limited in Bulwark Limited, the defendants then plead at para. 2(g) that *"it is not possible for the defendants to further particularise this pleading pending receipt of replies to interrogatories and discovery"*. The plaintiffs also rely on the provisions of paras. 4(a) and (c) of the defendants' replies to particulars dated 22nd November, 2017. The plaintiffs had sought particulars of how and through whom the defendants *"understand"* that GK had the relevant interest and when and how that understanding first arose. The defendants responded at para. 4(a) of their replies stating that this was a matter of evidence which would be addressed at the hearing. The plaintiffs submit that if the defendants have no documents in respect of the case advanced at para. 2 of the defence and counter claim, then they should just say that and swear to it in an affidavit of discovery. The plaintiffs were not prepared to accept an offer by the defendants to make discovery of the documents in relation to this issue on which the defendants intend to rely on at the hearing and submit that this suggests that there are other documents in existence on the issue but on which the defendants do not intend to rely at the hearing.

48. In their submissions, the defendants criticise the reasons advanced by the plaintiffs for seeking discovery of the documents in this category. They maintain that there is a straightforward and clear issue as to whether GK is concerned, interested or engaged in relation to the property at Castleforbes and that if he is then that is a breach of Clause 9.1.2(a) of the Deed and a forfeiture event under Clause 15 thereof. Any probative material in respect of any alleged interest of GK would therefore be in the possession of GK himself. The defendants contend that whether GK is a beneficial owner of a 50% interest in the shareholding held by Samsonmont in Bulwark is a question of fact and that if he is whether that is a breach of Clause 9.1.2(a) of the Deed. Essentially, the defendants' position is that either GK has that interest or he does not. While accepting that in an abstract or hypothetical situation, an offer by a party to make discovery of documents on which that party intends to rely at the hearing might not be acceptable as it might permit that party to hold back documents unhelpful to the position it seeks to advance at the hearing, the defendants contend that such an offer is appropriate is the situation having regard to the unusual manner in which the issue arises and in circumstances where its submits GK must know whether he does or does not have the alleged interest in the shareholding referred to.

49. The defendants also criticise the extent of the discovery sought in category 2 and in its various subcategories. They further contend that insofar as the plaintiffs appear to seek discovery of documents disclosing the identity of the person or persons who provided the information to the defendants by which they became aware that GK is allegedly concerned, interested or engaged in relation to the property at Castleforbes, that identity is irrelevant and evidence on that question would be inadmissible at the hearing

if an objection were raised to it and that, irrespective of the identity, the issue will be whether GK has or had the relevant interest at the relevant time. Therefore, they submit that should they be ordered to make discovery of documents under category 2 they should be entitled to redact the information concerning the identity of the person or persons who provided the information to them.

50. I consider that the discovery sought in category 2 and in its various subcategories is excessive and the request encompasses documents which are not relevant and not necessary for the purpose of the fair disposal of the case. The relevant provisions of the statement of claim to which the documents are said to relate are principally paras. 41 and 42 and also paras. 54 and 55. At para. 41 of the statement of claim reference is made to an email sent on 31st July, 2017 on behalf of GK confirming that neither GK nor any GK Related Party (as the term is defined in the Deed) carried on, was engaged, concerned or interested in the property at Castleforbes. At para. 42 it is pleaded that that letter correctly stated the position with regard to Castleforbes. The issue of Castleforbes is revisited at paras. 54 and 55 of the statement of claim by reference to another letter sent on behalf of the defendants on 3rd August, 2017 taking issue with the letter of 31st July, 2017.

51. The question as to whether GK had any interest in the Castleforbes property is specifically addressed at para. 2 of the defence and counterclaim. Paragraph 2(a) refers to Clause 9.1.2(a) of the Deed. It provides that the plaintiffs will procure that none of them and no GK Related Party will for a period of twelve months from the date of the deed:

*"... either alone or jointly with, through or as adviser to, or agent of, or manager for, any person directly or indirectly, carry on or be engaged, concerned or interested in the financing, refinancing, management (whether directly or indirectly, including on a consultancy basis), acquisition or development of any property in the Dublin Area."*

52. Having pleaded (at para. 2(b)) that a breach of Clause 9.1.2(a) is a forfeiture event, para. 2(c) of the defence and counterclaim goes on to plead that between the completion date (3rd February, 2017) and the date on which payment of the second instalment fell due, the defendants "*became aware*" that GK is concerned or interested or engaged in relation to the Castleforbes property. Paragraph 2(d) then pleads that the defendants "*understand*" that GK is the beneficial owner of the relevant shareholding and that this constitutes a forfeiture event under the Deed (para. 2(e)). They then plead (at para. 2(f)) that the plaintiffs failed to provide a satisfactory explanation as to GK's alleged interest or involvement in the Castleforbes property and (at para. 2(g)) that it is not possible for the defendants to provide further particulars pending receipt of replies to interrogatories and discovery.

53. The plaintiffs then address these pleas at paras. 4-11 of the reply and defence to counterclaim. With regard to paras. 2(c) and (d), it is pleaded that the plaintiffs are unable to know even in broad outline of the allegations being made against them and that they require full proof "*how and when*" the defendants allegedly became aware of GK's alleged interest or involvement in the property.

54. The question of whether GK or a GK Related Party has an interest or involvement in the Castleforbes property which is precluded by Clause 9.1.2(a) of the Deed is certainly an issue in the case, but that begs the question as to what documents are relevant to that issue and what documents are necessary for the plaintiffs to obtain by way of discovery in order to deal with it. I accept the defendants' submission that the way in which the issue is pleaded by the plaintiffs is somewhat unusual. The plaintiffs do not explicitly plead in the statement of claim or in the reply that GK or a GK Related Party does not have any interest or involvement or engagement in the Castleforbes property. Rather, the issue is addressed in a somewhat roundabout manner in the statement of claim by reference to correspondence sent on the plaintiffs' behalf on 31st July, 2017 and in the reply and defence to counterclaim by asserting a lack of knowledge as to what is being alleged and putting the defendants on proof as to how and when the defendants allegedly became aware of GK's alleged involvement or interest or engagement in the Castleforbes property. I would expect that the primary source of documentation relevant to the question as to whether GK has or had a prohibited interest or involvement in the Castleforbes property would be GK himself or his agents rather than any other person such as any of the defendants.

55. The position is however somewhat complicated by the fact that the defendants have chosen to plead in rather unusual terms that they "*became aware*" of GK's alleged interest in the Castleforbes property at some point between 3rd February, 2017 and 3rd August, 2017. They go on to plead their understanding that GK is the beneficial owner of the relevant shareholding in the company referred to. On one view, it might be said that the question as to whether GK has or had a prohibited interest in the Castleforbes property or not is a question on which GK can give evidence and does not require discovery of any documents from the defendants. On the other hand, the defendants have chosen to plead that they became aware of the alleged interest and what their understanding of that alleged interest is. Furthermore, the defendants have offered to disclose such documents as they have and on which they intend to rely in support of the pleas contained in para. 2 of the defence and counterclaim at the hearing.

56. I am satisfied that in light of the unusual manner in which this issue has arisen on the pleadings, that is in the statement of claim, in the defence and counterclaim and in the reply to the defence and counterclaim, documents concerning the alleged interest of GK in the Castleforbes property are relevant to an important issue in the case. I am also persuaded that it is necessary that the plaintiffs obtain discovery of such documents as the defendants have in their possession, power to procurement on this issue. I would have reached this conclusion irrespective of the offer made on behalf of the defendants to discover such documents as they intend to rely on in respect of this issue at the hearing. I do not think that the offer made by the defendants goes far enough. I would be concerned that if I were to endorse the defendants' agreement, it would allow the defendants to self select the documents to be provided on the basis that they were the only documents on which they intended to rely at the hearing while holding back documents which might potentially be relevant to this issue. There would, in my view, be a risk that the defendants might inadvertently withhold potentially relevant unhelpful documents on the basis that they did not intend to rely on those documents in respect of this issue at the hearing. Consequently, I do not believe that the offer made by the defendants goes far enough. In respect of the documents sought at categories 2(a) and (b), I direct the defendants to make discovery of all documents in relation to GK's alleged involvement with and/or interest in the property at Castleforbes in Dublin referred to at paras. 2(c) and (d) of the defence and counterclaim.

57. I make no comment on the defendants' apparent intention to redact the identity of the source of their knowledge from documents discovered under this category. It would be premature for me to offer my view on that course of action at this stage and I do not wish to be taken as endorsing or approving it in this judgment.

58. I refuse the plaintiffs' application for discovery of the balance of the documents sought under the various subcategories of category 2. I regard the scope of the discovery sought in category 2(a) as being excessive. I believe the potentially relevant documents sought in respect of categories 2(a) and (b) will be covered by the terms of the discovery which I have directed in respect of these categories. I regard the discovery sought at subcategory 2(c) as being excessive and insufficiently justified.

59. Accordingly, I will direct the defendants to make discovery of all documentation in relation to GK's alleged involvement with or interest held in the property at Castleforbes in Dublin referred in para. 2 of the defence and counterclaim.

### **(3) Category 4**

60. This category also contains a number of subcategories. The plaintiffs seek discovery of the following:

*"(a) All documentation in relation to the terms of the Mustardside Tracre loan and the Lcosars Crekav Hordco loan.*

*(b) All documentation evidencing or relating to the funds held by or on behalf of the defendants and/or the Issuers between the date of the execution of the Deed and the date of the institution of the within proceedings, and including but not limited to all documents evidencing the defendants' contention that they were in funds to pay the Second Instalment on the Second Instalment Date, to include bank statements;*

*(c) All documentation relating to the pleaded statutory declarations of solvency and, in particular, documentation evidencing the accuracy of the statutory declarations to include bank statements, financial statements and any reports/accounts prepared to enable the statutory declarations to be executed (to include the statutory declarations of solvency themselves to the extent that same are not produced pursuant to the plaintiff's request under O. 31, r. 15 RSC)."*

61. The plaintiffs seek discovery of the documents sought in these subcategories the purpose of their claim that the defendants were not in funds to make the payments due under the Deed and, in particular, the second instalment which was due on 3rd August, 2017. With regard to the documents sought in category 4(a), namely, documentation in relation to certain loans, the plaintiffs' claim that these documents are relevant and necessary in circumstances where the defendants, while admitting the making of the loans, have denied (at para. 8 of the defence and counterclaim) that the loans were repayable on demand. The plaintiffs also rely on a denial at para. 38 of the defence and counterclaim that sums were due and owing from certain of the defendants to certain of the plaintiffs.

62. As regards the documents sought in category 4(b) the plaintiffs contend that the documents are relevant having regard to the plea contained at para. 46 of the statement of claim that the defendants and other relevant parties were not in funds *"whether at the relevant time or at all"* to make the required payment due on the second instalment date. That plea is denied at para. 21(d) of the defence and counterclaim. While the defendants had offered to make discovery of documents evidencing the defendants' contention that they were in funds to pay the second instalment on the second instalment date, including bank statements, the plaintiffs contend that such offer is inadequate as being too narrow. The plaintiffs argue that bank statements of a company as of a particular date might not represent the true position in relation to the financial state of that company or whether funds are in fact available or free for use by that company as of the relevant date.

63. As regards the documents sought in category 4(c), the plaintiffs rely on para. 60 of the statement of claim in which they plead that, contrary to the statutory declarations of solvency, the relevant defendants were not able to pay their debts as they fell due and that the statutory declarations of insolvency amounted to a misrepresentation which caused the plaintiffs to enter into the Deed. The plaintiffs refer to para. 27 of the defence and counterclaim on which the defendants deny those pleas. While the defendants have offered to make discovery of the declaration of solvency themselves, the plaintiffs submit that this offer is inadequate.

64. The defendants' position in relation to the documents sought in these subcategories is as follows. As regards category 4(a), the defendants offered at the outset of the hearing to make discovery of the loan agreements themselves. They submit that the loan agreements contain the terms of the loans and speak for themselves and that further documents such as documents surrounding the loans are irrelevant and would be inadmissible in interpreting the terms of the loan agreements. In any event, they query the relevance of the loan agreements to the issues in the case.

65. As regards the documents sought in category 4(b), the defendants dispute the relevance of documents concerning their funding position on the grounds that they were either correct or incorrect in relying on one or both of the alleged forfeiture events, irrespective of the funding position of the defendants at the relevant time. However, the defendants go on to state that the only potentially relevant issue in relation to funding is the defendants' funding position as of 3rd August, 2017 when the second instalment fell due. In this regard they refer to the provisions of paras. 46, 57 and 58 of the statement of claim. The defendants submit that the discovery sought by the plaintiffs in this category is, in any event, excessive in that it would require each of the defendants to make discovery of all documents in relation to its financial position not just on 3rd August, 2017 but for the entire period between 3rd February, 2017 and the date of the commencement of the proceedings, on 28th August, 2017. The defendants submit that the offer which they made on 4th December, 2017 which was to make discovery of all documents evidencing the defendants' contention that they were in funds to pay the second instalment on the second instalment date, to include bank statements (redacted as appropriate), is more than sufficient in the circumstances.

66. As regards the documents sought at category 4(c), the defendants contend that the solvency or otherwise of the defendants is not an issue in the case and has no bearing one way or the other on whether the defendants were entitled to rely on either or both of the alleged forfeiture events. Nonetheless, the defendants are prepared to make discovery of the declarations of solvency themselves and so offered on 4th December, 2017.

67. I have again reviewed the parts of the pleadings which are said to demonstrate the relevance of the documents sought in the various subcategories of category 4. I agree with the plaintiffs that the pleadings do raise an issue as to whether the defendants were in funds as of 3rd August, 2017 to enable the second instalment to be paid by the relevant entity on that date. However, there is considerable merit to the point made by the defendants that the funding position of the defendants is, ultimately, not relevant to whether the defendants were or were not entitled to rely on either or both of the alleged forfeiture events. They either were entitled to rely on those events or they were not irrespective of their funding position. That said, the plaintiffs have sought to make the case, for example, at paras. 46 and 58 of the statement of claim, that the defendants were not in funds at the relevant time or at all to make the payments required as of the second instalment date, 3rd August, 2017. Those pleas are denied in the defence and counterclaim albeit that the primary basis on which the defendants have disputed the relevance of the funding documentation is that the defendants have not relied on the absence of funds to justify the failure to make the relevant payment, as it might have been entitled to under Clause 4.7 of the Deed. Nonetheless, the defendants do expressly deny, for the avoidance of doubt, that they were not in funds to make the payment referred.

68. As regards the documents sought in subcategory 4(a), while it is true that the defendants have pleaded that certain sums were due and owing under the terms of various loans made between the parties and while that is denied by the defendants, it does not seem to me that this is a significant issue in the case. Even if it were an issue, and even if the documents sought had a tenuous relevance, it seems to me that the loan agreements themselves should be sufficient for the plaintiffs. The loan agreements will set out the terms of the loans. Insofar as there is any dispute between the parties as to what those terms were, that dispute will be resolved by the court interpreting the terms. The court will do so by reference to established principles of contractual interpretation. Again, as I have indicated earlier, I do not believe that the judgment of O'Donnell J. in the *Law Society* case provides any basis for seeking wider discovery in respect of the terms of the loans or supports the proposition that documents which might be generated in



foot of such an exercise would be admissible in interpreting the terms of the loans in the loan agreements as being part of the "factual matrix" or "context" of the loans. In those circumstances, I am satisfied that the offer made by the defendants to make discovery of the loan agreements themselves is sufficient and no further discovery should be directed under category 4(a).

69. As regards the documents sought in subcategory 4(b), as I have indicated earlier, the question of the defendants' funding position is relevant having regard to the manner in which the case has been pleaded and, in particular, having regard to the case made by the plaintiffs that the defendants' reliance on the alleged forfeiture events was in effect a contrivance and a means to avoid making the required payments in circumstances where they did not have the funds to do so. That said the only documents which could potentially be relevant to this issue are documents evidencing the funds available to the defendants to pay the second instalment on the second instalment date. Documents concerning the funding of the defendants on any other date are, in my view, irrelevant. Furthermore, it would be unnecessarily intrusive and excessive to seek documents relating to the defendants' funding position for any other period or on any other date other than the second instalment date, namely, 3rd August, 2017. I am satisfied, therefore, that the offer made by the defendants to make discovery of all documents evidencing their contention that there were funds to pay the second instalment on the second instalment date, namely, 3rd August, 2017, to include bank statements, is appropriate. While the defendants have professed an intention to redact those bank statements, I offer no view on that issue. If the plaintiffs are dissatisfied with the extent of any redactions made, that issue may have to be resolved on another occasion.

70. As regards the documents sought at subcategory 4(c), I am not satisfied that the plaintiffs have established that the statutory declarations of solvency and any documentation relating to them are relevant to any issue in the proceedings nor does it seem to me to be necessary for the plaintiffs to obtain discovery of these documents for the fair disposal of their case. I note however that the defendants are prepared to make discovery of the declarations of solvency themselves and that the plaintiffs do not already have copies of these declarations. Accordingly, I will direct the defendants to make discovery of the declarations of solvency themselves. However, I refuse to order the defendants to make discovery of the balance of the documents sought in subcategory 4(c).

### **Conclusions in relation to discovery**

71. In conclusion, I have directed the defendants to make discovery of the following documents:-

#### **Categories 1(a) and (c)**

- (i) The agreement referred to at para. 3(c) of the defence and counterclaim, being the "Grant of Easements" made on 30th September, 2014 between Kavcre and Orla McDonnell; and
- (ii) All documents relating to the knowledge of otherwise of the defendants, their servants or agents of that agreement as at the date of the settlement and purchase deed, being 3rd February, 2017.

#### **Categories 2**

All documentation in relation to Greg Kavanagh's alleged involvement with or interest held in the property at Castleforbes in Dublin referred to in para. 2 of the defence and counterclaim.

#### **Categories 4**

- (a) The loan agreements in respect of the Mustardside and Tracre loan and the Lcosars Crekav Holdco loan;
- (b) All documents evidencing the defendants' contention that the defendants were in funds to pay the second instalment on the second instalment date, to include bank statements;
- (c) The statutory declarations of solvency executed by some of all of the defendants on or about the date of enter into the settlement and purchase deed of 3rd February, 2017, referred to at para. 60 of the statement of claim.

72. I will hear counsel in relation to any issues arising from this judgment and my intended order and on the issue of costs.