

**THE HIGH COURT  
COMMERCIAL**

**[2017 No. 6193 P.]**

**[2017 No. 170 COM.]**

**BETWEEN**

**ANN NOLAN, ELIZABETH NOLAN, JOAN NOLAN, RICHARD NOLAN, PATRICIA NOLAN,  
SALLY NOLAN AND QUEST CAPITAL TRUSTEES LIMITED**

**PLAINTIFFS**

**AND**

**DILDAR LIMITED, CIARAN DESMOND AND COLM S. MCGUIRE AND DERVAL M.  
O'HALLORAN, FORMERLY TRADING UNDER THE STYLE AND TITLE OF MCGUIRE  
DESMOND SOLICITORS, A FIRM, JOHN MILLETT, PINNACLE PENSIONER TRUSTEES  
LIMITED, DILDAR LIMITED AND JOHN MILLETT INDEPENDENT FINANCIAL ADVISORS  
LIMITED**

**AND BY ORDER, DILLON KENNY AND DARREN KENNY**

**AND BY FURTHER ORDER**

**PAUL KENNY**

**DEFENDANTS**

**AND BY ORDER**

**STEPHEN DECLAN MURPHY, EDEL MURPHY, KEVIN JOSEPH MCMAHON, JOHN LYNCH,  
EFG BANK AG, BNP PARIBAS WEALTH MANAGEMENT, UNITED OVERSEAS BANK  
LIMITED AND ALLIED FINANCE TRUST AG**

**THIRD PARTIES**

**JUDGMENT of Mr. Justice David Barniville delivered on the 22nd day of May, 2020**

**Introduction**

1. This judgment deals with an application for discovery made in these proceedings by the plaintiffs against Paul Kenny, the eleventh defendant.
2. The judgment is being delivered on the same day as another judgment which I am delivering in the same proceedings, which deals with a number of interlocutory applications made by the seventh, ninth and tenth defendants, Dildar limited ("Dildar Ireland"), Dillon Kenny and Darren Kenny (together, the "Kenny defendants"). That judgment sets out in some detail the nature of the proceedings and the various claims and counterclaims made by the parties. For that reason, it will be unnecessary in this judgment to set out in any great detail what those claims and counterclaims are. However, I propose briefly to summarise the proceedings and the legal principles applicable to the plaintiffs' discovery application. I will then turn to consider the particular categories of discovery which are in dispute between the parties.
3. It should be said that although twelve categories of documents were originally in dispute between the parties, through constructive engagement between the parties, the dispute now concerns only concerns four categories of documents.

**Summary of Decision**

4. I have concluded that, for the reasons set out in this judgment, the plaintiffs are entitled to succeed in part in their application and that they are entitled to an order for discovery against Paul Kenny in respect of three of the categories of documents sought with some revisions. However, I have concluded that the plaintiffs' application should be refused in

respect of one of the categories sought (category 12) on the basis of the pleadings as they stand.

#### **Brief Description of Proceedings**

5. The plaintiffs have brought the proceedings in their capacity as trustees of a pension fund set up for the benefit of members of the Nolan family, the Oaklands Property Trust (the "OPT"). The plaintiffs claim that a sum of in excess €6.96 million, representing a portion of the pension fund, was lost due to the alleged fraud and other wrongdoing on the part of their solicitor, Ciaran Desmond (the second defendant), and their pensions and financial advisor, John Millett (the fifth defendant) and companies operated by him as part of his business. The plaintiffs claim that, without their knowledge or consent, Mr. Desmond and Mr. Millett permitted the plaintiffs' funds, which were in a bank account with EFG Bank in Zurich in the name of a Panamanian company, Clear Vision Solutions SA ("CVSSA") ( which is referred to in the pleadings as the "Clear Vision account"), to be pledged as collateral in order to obtain finance to purchase investment products to be issued by a number of the third parties in Singapore. By reason of a series of events, the plaintiffs claim that the bulk of their monies were misappropriated and lost to them.
6. The plaintiffs also claim that in September, 2013, without their knowledge or consent, Mr. Desmond and Mr. Millett used approximately €2.828 million of the plaintiffs' funds in the Clear Vision account to substantially finance the purchase by an Isle of Man company, Dildar Limited ("Dildar IOM"), the first defendant, of development lands in Cork which were formerly owned by Nemo Rangers GAA Club (the "Nemo lands"). The Nemo lands were purchased by Dildar IOM in September, 2013 for €3.017 million.
7. As well as claiming damages and other reliefs against Mr. Desmond and Mr. Millett arising out of the alleged misappropriation of their funds, the plaintiffs also claim beneficial ownership of Dildar IOM and of the Nemo lands, which they claim were purchased substantially with their funds. Detailed allegations are made by the plaintiffs against Mr. Desmond and Mr. Millett which it is unnecessary to recite in this judgment. They are set out in greater detail in the judgment being delivered today on the Kenny defendants' applications. It should be said that Mr. Desmond and Mr. Millett deny the claims against them. They (together with the Kenny defendants and Paul Kenny) also deny that the Nemo lands were purchased with the plaintiffs' funds and plead that the funds used to purchase the Nemo lands, which were in the Clear Vision account or in some account in the name of CVSSA in EFG Bank in Zurich, were Kenny family monies and not those of the plaintiffs. The plaintiffs dispute this.
8. Mr. Desmond applied for, and obtained, liberty to join several third parties to the proceedings and various detailed allegations and counter allegations have been made as between Mr. Desmond and those third parties concerning the circumstances in which the plaintiffs' funds were lost or misappropriated.
9. The ninth and tenth defendants, Dillon Kenny and Darren Kenny, were joined as co-defendants to the proceedings by the Court of Appeal on 31st October, 2018, on their own application. Paul Kenny, the eleventh defendant, was joined as a co-defendant to the

proceedings on the plaintiffs' application on 15th July, 2019. Paul Kenny is the father of Dillon Kenny and the uncle of Darren Kenny. Following the joinder of Paul Kenny, the plaintiffs delivered an amended statement of claim on 19th July, 2019 setting out their claims in relation to Dildar IOM and the Nemo lands, their claims against Paul Kenny and their claims against the other defendants. A composite document was delivered on 31st July, 2019 by the Kenny defendants and by Paul Kenny in response to the amended statement of claim (the "amended defence"), which included a counterclaim by Dillon Kenny and Darren Kenny in respect of the beneficial ownership of Dildar IOM and of the Nemo lands and denied all of the claims made by the plaintiffs. An amended reply and defence to counterclaim was delivered by the plaintiffs in response on 11th September, 2019.

### **The Discovery Process**

10. Following the joinder of Paul Kenny as a co-defendant to the proceedings, the plaintiffs sought voluntary discovery from him in a letter dated 20th September, 2019. At that stage, the plaintiffs were seeking voluntary discovery from Paul Kenny of eleven categories of documents. Mr. Kenny's solicitors replied on 3rd October, 2019. They indicated that Mr. Kenny was agreeable to make discovery in respect of eight of the categories of documents sought but not in respect of the balance of the categories sought, namely, categories 7, 9 and 10. In respect of one of those categories (category 9), it was indicated that Mr. Kenny was prepared to make a more limited form of discovery than that sought in the category. The plaintiffs' solicitors responded on 22nd October, 2019. They maintained the plaintiffs' claim to discovery in full in respect of the documents sought in categories 7, 9 and 10 and sought voluntary discovery in respect of a further category, category 12.
11. The plaintiffs issued a motion on 24th October, 2019 seeking discovery of the documents sought in categories 7, 9, 10 and 12. The plaintiffs' application was grounded on an affidavit sworn by their solicitor, Jennifer Darcy, on the same date. In her affidavit, Ms. Darcy explained the basis on which it was contended on behalf of the plaintiffs that the documents sought in each of those categories were relevant and necessary for the purposes of discovery. A replying affidavit was sworn on behalf of Paul Kenny by Sean F. Durcan, his solicitor, on 1st November, 2019. In his affidavit, Mr. Durcan set out the basis on which Mr. Kenny was contending that the documents sought were not relevant or necessary. A further affidavit was sworn in response by Ms. Darcy on 11th November, 2019. Finally, Mr. Kenny himself swore an affidavit for the purpose of the discovery application on 21st November, 2019.
12. There is a dispute between the parties in respect of the discovery sought by the plaintiffs in categories 7, 9, 10 and 12 of the schedule to the plaintiffs' notice of motion. Before addressing each of those categories, it is perhaps appropriate that I briefly refer to the relevant legal principles on discovery.

### **Legal Principles on Discovery**

13. There was no real dispute between the parties on the legal principles on discovery. The principles are now well settled and were re-stated in the recent judgment of the Supreme Court in *Tobin v. The Minister for Defence and ors* [2019] IESC 57 (“Tobin”).
14. Discovery will be ordered where the documents sought are relevant and necessary for the fair disposal of the case. As was recently confirmed by the Supreme Court in *Tobin*, the question of relevance is assessed by reference to the test outlined by Brett L.J. in the Court of Appeal of England and Wales in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882) 11 Q.B.D. 55. A document will be relevant where it is reasonable to suppose that the document contains information which “*may – not which must – either directly or indirectly enable the party requiring the affidavit [of discovery] either to advance his own case or to damage the case of his adversary... [and includes] ...a document which may fairly lead him to a train of enquiry which may have either of these two consequences...*” (per Brett L.J. at 63). The requirement of necessity is now found in O. 31, r. 12 RSC.
15. As stated by Fennelly J. in the Supreme Court in *Ryanair plc. v. Aer Rianta cpt.* [2003] 4 I.R. 264, in order to establish that discovery of a particular category of documents is “*necessary for disposing fairly of the cause or matter*”, it is not necessary for the applicant for such discovery to prove that they are in any sense “*absolutely necessary*”. Fennelly J. further stated that the court should:-

*“...consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. It may have regard, of course, to alternative means of proof, which are open to the applicant.”* (at 277).
16. As I pointed out in *Trafalgar Developments Limited v. Mazepin* [2019] IEHC 610 (“Trafalgar”), the Supreme Court in *Tobin* stressed the important role which discovery can play in litigation and the “*valuable contribution*” which discovery can make to the proceedings (at para. 19 of my judgment in *Trafalgar*). Clarke C.J. noted that:-

*“[Discovery] improves the chances of the court being able to get at the truth in cases where facts are contested. In that way, it makes a significant contribution to the administration of justice.”* (per Clarke C.J. at para. 7.5)
17. The Supreme Court in *Tobin* also pointed to the possibility that discovery could hinder access to justice if it became disproportionately burdensome. That issue does not arise on the present application as it has not been suggested on behalf of Paul Kenny that discovery of the documents sought in any of the categories in dispute would be disproportionately burdensome.
18. The Supreme Court in *Tobin* confirmed that the starting point for discovery is to consider whether the documents sought are “*relevant*” and that relevance is to be determined by reference to the pleadings (para. 7.25). This had previously been made clear by the High

Court (McCracken J.) in *Hannon v. Commissioners of Public Works* [2001] IEHC 59 and in many of the judgments including that of the Court of Appeal in *O'Brien v. Red Flag Consulting Limited* [2017] IECA 258 (as pointed out in *Mustardside Limited v. Tracre Limited* [2018] IEHC 124 (Barniville J.), at paras. 11 and 12, and in *Dunnes Stores v. McCann* [2018] IEHC 123 (Barniville J.), at paras. 26 and 27).

19. In *Tobin*, the Supreme Court confirmed that if it cannot be demonstrated that the documents sought are relevant then there can be no entitlement to discovery of those documents (para. 7.15). The Supreme Court considered that the default position should be that a document which is relevant should be considered to be one whose production is necessary, but that that default position is capable of being displaced for a range of other reasons such as where the discovery sought would be excessively burdensome. Therefore, once relevance is established, the test of necessity will *prima facie* also be satisfied and the burden will lie on the opposing party to demonstrate why the test of necessity has not been met.
20. It was correctly contended on behalf of Paul Kenny that the relevance of the documents sought must be determined by reference to the pleadings and not by reference to submissions of alleged facts put forward in affidavits. Mr. Kenny relied on *Hannon* and another decision of the Court of Appeal in *BAM PPP PGGM Infrastructure Cooperative UA v. National Treasury Management Agency* [2015] IECA 246. The plaintiffs did not dispute that contention.
21. I agree that in considering the relevance of the documents sought in the disputed categories, the court must assess the issue by reference to the pleadings and not by reference to the affidavits or submissions. However, once an issue is relevant on the pleadings, I do not see any difficulty with the court considering affidavit evidence which sets out in greater detail the parties' respective contentions on the issues raised on the pleadings. The parties are entitled to adduce affidavit evidence in support of or against their assertions of relevance or lack of relevance, as the case may be. Again, I did not understand there to be any real dispute between the parties on that point.
22. In addition to the general principles applicable to discovery, as I adverted to in *Trafalgar*, the Irish courts have also accepted that special considerations may apply where discovery is sought in fraud or conspiracy cases or other cases where unlawful clandestine acts are alleged, where it may not be possible for the plaintiff to plead fully its case, by reason of the very nature of the cause of action alleged (para. 24 of *Trafalgar*). The plaintiffs do not allege fraud against Paul Kenny, although they do allege (amongst other things) that he was party to a conspiracy with Mr. Millett and engaged in conduct which was intended to misrepresent the position concerning the ownership of Dildar IOM and of the Nemo lands (see paras. 50 to 57 of the amended statement of claim). The principles applicable where discovery is sought in fraud or conspiracy cases are, therefore, relevant in the consideration of the plaintiffs' application for discovery against Paul Kenny, although they were not expressly raised by the parties in their submissions.

23. The approach which the Irish courts should take in assessing a discovery request in cases involving fraud or conspiracy or similar conduct can be traced back to the judgment of Clarke J. in the High Court in *National Education Welfare Board v. Ryan* [2008] 2 I.R. 816 ("*National Education Welfare Board*"). While that judgment concerned an application to strike out proceedings for failure to provide proper particulars in the case of a claim of conspiracy to defraud, the principles set out there have subsequently been applied to discovery applications in such cases. In *National Education Welfare Board*, Clarke J. held that in such cases, it was necessary to strike a balance between the requirement for allegations of fraud to be pleaded with specificity and the difficulty facing a plaintiff in proceedings alleging fraud or some other form of clandestine activity, in having to provide detailed particulars of that activity which may often have been concealed. Clarke J. explained that the balance should be struck as follows:-

"4.7 ...the balance must be struck on a case by case basis but having regard to the following principles. Firstly, no latitude should be given to a plaintiff who makes a bare allegation of fraud without going into some detail as to how it is alleged that the fraud took place and what the consequences of the alleged fraud are said to be. Where however a party in its pleadings, specifies, in sufficient, albeit general, terms, the nature of the fraud contended together with specifying the alleged consequences thereof, and establishes a prima facie case to that effect, then such a party should not be required, prior to defence and, thus, prior to being able to rely on discovery and interrogatories, to narrow his claim in an unreasonable way by reference to his then state of knowledge. Once he passes the threshold of having alleged fraud in a sufficient manner to give the defendant a reasonable picture as to the fraud contended for, and establishes a prima facie case to that effect, the defendant should be required to put in his defence, submit to whatever discovery and interrogatories may be appropriate on the facts of the case, and then pursue more detailed particulars prior to trial." (pp. 824-825)

24. Clarke J. applied the same approach to an application for discovery in *Hartside Limited v. Heineken Ireland Limited* [2010] IEHC 3 ("*Hartside*"). In the course of his judgment in the High Court, Clarke J. referred to the approach which he had taken in *National Education Welfare Board* and in *Moorview Developments Limited v. First Active PLC* [2008] IEHC 211 and stated:-

"5.9 ...Both of those cases involved allegations of fraud which are not, of course, of any relevance to this case. However, it does not seem to me that the issues raised are confined to fraud cases (indeed, I had occasion to indicate that similar principles applied in the competition field in *Ryanair v. Bravofly* [2009] IEHC 41). The overall problem is one between balancing, on the one hand, the need to facilitate a party who may have a legitimate claim but who may require access to information available only to its opponent in order to fully plead and ultimately substantiate that claim on the one hand, and the need to prevent, on the other hand, a party, by making a mere allegation, from being able to have a wide range of access to its opponent's documentation, including what may well include highly confidential

*documentation. The balance struck in both Moorview, National Education Board and Ryanair, leads to the conclusion that a party may be required to pass a limited threshold of being able to specify a legitimate basis for their case before being given access to their opponent's relevant documentation. The need for such a restriction seems to me to stem from the undoubted undesirability of allowing a mere allegation to give rise to an entitlement to access highly confidential information."* (p. 13)

25. The requirement for a balance to be drawn and for a limited threshold to be met by a plaintiff who alleges fraud or some other form of clandestine activity, was endorsed by the Supreme Court in *Keaney v. Sullivan and ors* [2015] IESC 75 (in the context of a strike out or dismissal application) and by the Court of Appeal in the context of discovery in *Red Flag*. In that case, the Court of Appeal specifically endorsed the application of the balancing exercise in the discovery context and adopted the requirement that a party must pass a "limited threshold" of specifying a legitimate basis for that party's case before obtaining discovery. I also applied those principles in *Trafalgar*. It seems to me that they are relevant to the plaintiffs' application for discovery in respect of the documents sought in one of the disputed categories, category 12.
26. There was one issue of principle on which the parties could not agree. That issue was whether, in proceedings in which claims are made against a number of parties, it is necessary in order to obtain discovery against one party to demonstrate that the discovery sought is relevant to the claims against that party and that documents relevant to the claims made against other parties will not be required to be discovered by that party, on the grounds that they are not relevant to the claims made against it.
27. It was argued on behalf of Paul Kenny that in respect of certain of the categories, the documents sought might potentially be relevant to claims made by the plaintiffs against one or more of the other defendants, but are not relevant to the claims made against Mr. Kenny. On that basis, it was contended that the plaintiffs had not satisfied the requirement of relevance in respect of those documents and that Mr. Kenny should not be ordered to discover them. No authority was advanced for that proposition. The plaintiffs took a different view. They contended that the discovery sought in each of the disputed categories relates to the claims pleaded against Paul Kenny and that the issue simply does not arise. However, in the event that the court were to conclude that the documents sought are relevant to the claims made by the plaintiffs against other defendants, but not Paul Kenny, it would nonetheless be open to the plaintiffs to obtain discovery of those documents against Mr. Kenny (subject, of course, to any issue in relation to necessity). The plaintiffs argued that it would be very surprising if it were possible to obtain discovery (in the form of non-party discovery) against one person who is not even a party to the case in respect of documents relevant to claims made against the parties, but not possible to obtain discovery against a party in respect of claims made against other parties in the proceedings.

28. I agree with the position adopted by the plaintiffs. As I have indicated, Mr. Kenny was unable to point to any authority to support the position for which he contended. In my view, that is because he is wrong in principle. It would be surprising if a plaintiff could obtain non-party discovery of documents against someone who is not a party to the proceedings in respect of claims made by it against parties to the proceedings, but could not obtain discovery against one party of documents relevant to its claims against other parties to the proceedings. That would make no sense. In my view, once the documents sought are relevant to any of the claims made or issues arising in the proceedings, the party seeking discovery satisfies the test of relevance even though the documents may not be relevant to the particular part of the case made by the plaintiff against the party from whom the discovery is sought. The documents would nonetheless satisfy the test of relevance. Consequently, if Mr. Kenny is correct in contending that the documents sought in some of the categories are not relevant to a case made by the plaintiffs against him (although they might be relevant to the plaintiffs' case against some of the other parties), the plaintiffs would nonetheless satisfy the test of relevance for the purposes of obtaining discovery of those documents from Mr. Kenny.
29. I now turn to consider and rule on the disputed categories.

### **Categories in Dispute**

#### **Category 7**

30. Category 7 is headed "*Terms of engagement with and investments through second and/or fifth defendants*". The documents sought in this category are described as follows:-

*"All documents relating to or evidencing the terms of engagement or scope of the second and/or fifth defendants' retainer by the Kenny defendants and/or any of them in relation to the Nemo property and/or Dildar IOM together with documents relating to the monies passing through Clear Vision accounts (including Clear Vision Solution Holding) and/or other monies relied in support of the beneficial ownership claims."*

31. In summary, the reasons advanced by the plaintiffs for seeking discovery of the documents in this category are as follows. The plaintiffs rely on the fact that the Kenny defendants (that term is defined in the amended defence as comprising Dildar Ireland, Dillon Kenny and Darren Kenny and Paul Kenny) have pleaded that Mr. Desmond and Mr. Millett were advisors to the Kenny family and that the Kenny family had placed substantial monies under their care and management. The plaintiffs say that they are strangers to that relationship. They maintain that the documents are relevant and necessary in order to understand the "*advisory structure through which the Kenny defendants claimed to have invested monies*" and to understand "*the modus operandi*" of Mr. Desmond and Mr. Millett, "*in the context of a misappropriation of funds claim where their monies appear to have passed through similar structures to those of the Kenny defendants*".
32. In oral submissions, the plaintiffs contended that the documents are relevant in terms of the provenance of the funds used to purchase the Nemo lands and to the person or

persons who gave the instructions or authority for the payment or transfer of those funds. I pause here to note that it is not in dispute between the parties that the plaintiffs' funds (or at least some of them) were in an account in the name of CVSSA with EFG Bank in Zurich, as were monies belonging to members of the Kenny family (some of which had, like the plaintiffs' monies, come from an entity in the UAE called Middle East Continental Development Limited ("MECD")). The plaintiffs also rely on the alleged participation of Paul Kenny and his level of awareness in connection with the incorporation and filing of details in the Isle of Man concerning the beneficial ownership of Dildar IOM and the use of the plaintiffs' personal data for that purpose, which suggested that members of the Nolan family were beneficial owners of that company. In their submissions at the hearing the plaintiffs pointed to certain parts of the pleadings in support of their claim of relevance.

33. Paul Kenny is opposed to making discovery of the documents sought in this category. It is contended on his behalf that the plaintiffs failed to tie documents in this category to any issue in the pleadings. He maintains that there is no issue in the pleadings as to investments made by the Kenny defendants generally, still less in relation to any "*advisory structure*" as between the Kenny defendants or any of them and Mr. Desmond or Mr. Millett. Consequently, he contends that the terms of engagement are irrelevant. He further contends that the "*modus operandi*" of Mr. Desmond and Mr. Millett is a matter for discovery which should be obtained by the plaintiffs from those defendants and not from Mr. Kenny. It is further contended that the documents sought in this category, if ordered, would involve an impermissible general trawl of the relationship between and advisor and his client and in relation to bank accounts, in circumstances where he maintains that the only issue between the plaintiffs and the Kenny defendants (including Paul Kenny) concerns the true beneficial ownership of the Nemo lands and of Dildar IOM. It is contended that the only aspect of the relationship between Paul Kenny and Mr. Desmond and Mr. Millett, which is relevant to the proceedings, is in relation to communications regarding the Nemo lands and Dildar IOM which he agreed to discover under other category 2 (in relation to the beneficial ownership of Dildar IOM), category 3 (in relation to the provenance of the funds used to purchase the Nemo lands) and category 4 (concerning the respective claims of ownership to the Nemo lands and Dildar IOM).
34. It was also argued in submissions on his behalf that it was necessary to focus on the case pleaded against Mr. Kenny himself and not against any of the other defendants in order to satisfy the requirement of relevance. It was submitted that the case against Paul Kenny is much more limited than the case made against the other defendants and that this was an additional reason for which discovery under this category should be refused.
35. I am satisfied that the plaintiffs have established an entitlement to discovery of the documents sought in this category. I have already rejected the submission advanced by Mr. Kenny to the effect that the court must only look at the case as pleaded against him. It is open to the court to consider the relevance of the documents sought by reference to the case made against other defendants in the proceedings. However, it must also be noted that Mr. Kenny has joined in the amended defence delivered by the other Kenny defendants and has not in any way sought to distance himself from the matters pleaded

by those defendants in the composite document which they have delivered by way of their defence.

36. It is clear from the pleadings that both the plaintiffs/members of the Nolan family and members of the Kenny family, retained Mr. Desmond and Mr. Millett as advisors and both claim to have placed substantial family monies under their care and management (see, for example, para. 43 of the Kenny defendants' defence). The plaintiffs plead in response, at para. 18 of their amended reply, that they are strangers to the advisory role played by Mr. Desmond and Mr. Millett towards the Kenny family and that they awaited particulars and proof, in particular, with regard to the identity of the specific individual clients and individuals whose monies were placed under their care and management. The terms on which Mr. Desmond and Mr. Millett were engaged by the Kenny defendants/members of the Kenny family are, in my view, relevant based on these paragraphs of the pleadings.
37. However, the pleadings go much further than that. The amended statement of claim sets out the circumstances in which the plaintiffs claim that their funds were transferred from Investec Bank in Dublin, to an account of MECD in the UAE and then to an account in the name of CVSSA in EFG Bank in Zurich. The plaintiffs allege wrongdoing in respect of their funds in that account in two respects (at para. 26 of the amended statement of claim). The first concerns the pledging of their funds as collateral as part of a wider investment arrangement, which they allege was carried out without their knowledge or consent. The second concerns the use of their funds to finance the purchase by Dildar IOM of the Nemo lands in September, 2013, without their knowledge or consent. Further pleas are made by the plaintiffs at para. 32 to 39 of the amended statement of claim, concerning the purchase of the Nemo lands and the representations made at the time of the incorporation of Dildar IOM and, subsequently, concerning the beneficial ownership of that company and of the Nemo lands. Specific reference is made in the amended statement of claim to the claims made by Mr. Millett that the Kenny family, and not the Nolan family, were beneficial owners of Dildar IOM.
38. A completely different version of events is pleaded by the Kenny defendants in their amended defence at paras. 13 to 17. At para. 13, they plead that Paul Kenny submitted bids for the purchase of the Nemo lands on behalf of Dillon Kenny and Darren Kenny and on behalf of a corporate entity originally intended to be the purchaser of those lands which was Clear Vision Solutions Holding Inc. ("CVSH"), a British Virgin Islands company (CVSH is also referred to at para 33(c) of the amended defence). The ultimate purchaser of the lands was, however, Dildar IOM. The Kenny defendants further plead that insofar as Mr. Desmond was involved in the bidding, he was acting for and on behalf of "*the Kennys and their corporate entities*". At para. 14, they plead that Mr. Millett gave instructions for the incorporation of Dildar IOM on the instructions of Paul Kenny, which were given on behalf of Dillon Kenny and Darren Kenny. At para. 15, they plead that they are strangers to whatever representations may have been made by Mr. Millett to Mann Made in the Isle of Man concerning the origin of any funds for the acquisition of the Nemo lands or as to the identity of the beneficial owners of Dildar IOM. The Kenny defendants

further deny that any funds for the purchase of the nemo lands came from the OPT or otherwise from the Nolan family (para. 16).

39. Issue is joined by the plaintiffs in relation to the pleas at paras. 13, 14 and 16 of the amended defence in their amended reply. At para. 7 of the amended reply, the plaintiffs plead that Mr. Millett acted on behalf of Dildar IOM in the purchase of the Nemo lands. They do not accept that CVSH is owned by Paul Kenny and, his brother, John Kenny and the Kenny defendants are put on full proof of that assertion. At para. 8, they deny that Paul Kenny gave the instructions alleged to Mr. Millett on behalf of Dillon Kenny and Darren Kenny. They reserve the right to rely (*inter alia*) on the record of contemporaneous instructions communicated to the officers of Dildar IOM and to the corporate service provider which incorporated that company, namely, Mann Made.
40. Reference can also be made to pleas contained in the defence delivered by Mr. Millett and his companies in June, 2018 and, in particular, to paras. 31 to 37 of that defence. At para. 32, Mr. Millett makes reference to instructions received from Mr. Desmond and from Paul Kenny concerning the formation of an Isle of Man company as a vehicle for the Kenny family to seek to acquire the Nemo lands. He expressly pleads that the funds used to purchase the Nemo lands came from Kenny family funds that had been transferred to MECD and onwards from there to CVSSA (together with other funds not originating from MECD). The plaintiffs responded to those pleas in their reply delivered in July, 2018. In addition to denying that the funds used to purchase the Nemo lands came from family funds and not from the Nolan family funds, is also pleaded that the plaintiffs are not in a position fully to plead to the matters alleged prior to discovery and that the plaintiffs reserve the right to lead evidence to contradict the pleas contained in paragraph 32.
41. I am satisfied that the documents sought in this category are relevant to critical matters in issue in the proceedings. They are relevant not only to the claims made by the plaintiffs against the Kenny defendants (including Paul Kenny), but also to the claims made against Mr. Desmond and Mr. Millett. The terms on which Mr. Desmond and Mr. Millett were retained by the Kenny defendants in relation to the Nemo lands and Dildar IOM are clearly relevant to issues which are at the heart of the case, not only as against the Kenny defendants but also as against Mr. Desmond and Mr. Millett. So too are documents concerning the provenance of the monies passing through the CVSSA account or accounts with EFG Bank in circumstances where both the plaintiffs and the Kenny defendants make competing claims to the ownership of the monies in that account or those accounts in terms of their use to purchase the Nemo lands. If Paul Kenny has documents relating to or evidencing the terms of the engagement or scope of retainer of Mr. Desmond and Mr. Millett by the Kenny defendants or any of them in relation to the Nemo lands and Dildar IOM, they are clearly relevant and must be discovered. No argument was advanced by Mr. Kenny that the test of necessity has not been met by the plaintiffs. In any event, I am satisfied that the documents are necessary as that term has been interpreted in this jurisdiction.

42. I am similarly of the view that Mr. Kenny should make discovery of documents in his possession, power or procurement relating to or evidencing the monies passing through the accounts held by CVSSA with EFG Bank in Zurich (including any monies which are alleged to have come from CVSH) as well the provenance or origin of any other monies relied upon by the Kenny defendants and by the plaintiffs in support of their respective beneficial ownership claims. Those documents too are clearly relevant on the pleadings (as elaborated upon in the affidavits, including those sworn in connection with the Kenny defendants' application which are the subject of my other judgment delivered today). They are also necessary for the fair disposal of the case. Therefore, Mr. Kenny must make discovery of the documents sought in this category.

**Category 9**

43. Category 9 is headed "Misrepresentations" and seeks the following documents:-

*"All documents relating to the representations made by Paul Kenny and/or on his behalf concerning:*

- (i) the plaintiffs' and/or the Oaklands Property Trust in connection with Dildar IOM and/or the Nemo property;*
- (ii) any efforts to disguise or provide a false account of the Kenny involvement in the Nemo property and/or Dildar IOM;*
- (iii) to the extent not otherwise discovered) attempts to correct or change the corporate records or ownership record of Dildar IOM;*
- (iv) the plaintiffs' personal data including any use thereof."*

44. The plaintiffs claim that these documents are relevant and necessary having regard to the claim pleaded against Mr. Kenny. They have pleaded that Mr. Kenny acted with, or in concert with, Mr. Millett in endeavouring to misrepresent the ownership position concerning Dildar IOM to its directors and to its corporate service provider (Mann Made in the Isle of Man), endeavoured retrospectively to change the ownership record of Dildar IOM in order to disguise the fact that the plaintiffs had been recorded as its beneficial owners and procured the submission of backdated correspondence with the intent of misrepresenting the historical account which had previously been provided to Mann Made regarding the ownership of Dildar IOM. The plaintiffs also rely on the plea that Mr. Kenny acted in concert with Mr. Millett in facilitating Mr. Millett to breach his fiduciary and other duties to the plaintiffs. The reasons given by the plaintiffs then refer to the pleas and counterclaim advanced by the Kenny defendants to the effect that Dildar IOM was incorporated for the Kenny defendants, and that, contrary to the position asserted in the amended statement of claim, they are the beneficial owners of Dildar IOM. The plaintiffs also refer to the amended reply and defence to counterclaim disputing those assertions. The plaintiffs developed these grounds in submissions at the hearing, but they are the essential points made.

45. In response, Mr. Kenny disputes the plaintiffs' entitlement to discovery of the documents in this category. He maintains that the category is too broad and seeks documents which stray beyond the matters at issue in the proceedings. Mr. Kenny offered to make discovery of a more limited form of documents in place of the documents sought in this category. The documents offered were documents evidencing or recording (a) any representation made by or on behalf of Paul Kenny concerning the ownership of Dildar IOM or the Nemo lands by the plaintiffs or the OPT and (b) any effort made by or on behalf of Paul Kenny to disguise or provide a false account of the involvement of Dillon Kenny, Darren Kenny or Paul Kenny in the Nemo lands or Dildar IOM. It was said on behalf of Paul Kenny that that offer squarely addressed the discovery which should properly be made by him in respect of the issues covered by this category, rather than the broader discovery sought. The offer was rejected on the basis that it did not cover the full extent of the documents which the plaintiffs claim are relevant, having regard to the pleaded claim against Paul Kenny and others.
46. I am satisfied that the plaintiffs are entitled to discovery of the documents sought in this category. In my view, they fall squarely within the case pleaded by the plaintiffs against Mr. Kenny. At para. 50 of the amended statement of claim, the plaintiffs make a series of allegations against Paul Kenny to the effect that he acted together with, and in concert with, Mr. Millett in various respects. The allegations include allegations that he endeavoured to misrepresent the ownership position concerning Dildar IOM, endeavoured retrospectively to change the ownership record of Dildar IOM so as to disguise the fact that the plaintiffs had been recorded as its beneficial owners, endeavoured retrospectively to change the ownership record of Dildar IOM to disguise the fact that the plaintiffs funds had been used to acquire property on its behalf, endeavoured retrospectively to change records held by Mann Made, procuring the submission of backdated correspondence, provided a false account to Mann Made at meetings in September, 2015 and September, 2016, endorsed Mr. Millett's false account to Mann Made at meetings in September, 2015 and September, 2016, assisting Mr. Millett in breaching his fiduciary and other duties and continuing to conceal the true position. Those allegations are all denied by the Kenny defendants and by Mr. Kenny, in particular, at para. 27 of the amended defence.
47. Further allegations are also made against Mr. Kenny in relation to the alleged misuse of the plaintiffs' personal data at paras. 55 and 56 of the amended statement of claim. Those allegations are denied at para. 32 of the amended defence. It is also fair to record that Mr. Kenny swore an affidavit in response to the discovery application in which he denied the accuracy of minutes of meetings in September, 2015 and September, 2016 on which the plaintiffs relied. He described those minutes as being "*purported minutes*" and referred to them as being "*highly contested records*". It seems to me that this only serves to highlight the relevance of the documents sought in this category, all of which are directed to issues pleaded against Paul Kenny which he disputes on the pleadings and vigorously contests on affidavit.
48. In my view, the documents sought in this category are clearly relevant on the basis of the claim pleaded as against Paul Kenny. He did not suggest that the documents were not

necessary or that there was some difficulty with him in making discovery of the documents, if ordered. Therefore, Mr. Kenny must make discovery of the documents sought in this category.

**Category 10**

49. This category is headed "*Awareness of plaintiffs – use of personal data, fiduciary duty and ownership claims*". The documents sought in this category are as follows:-

*"All documents relating to the awareness of the eleventh defendant of:*

- (i) the existence of a fiduciary relationship between the plaintiffs and the second and/or fifth defendant;*
- (ii) the use and/or misuse of the plaintiffs' personal data (or any third party's data in lieu of the Kennys' data) in connection with ownership of Dildar IOM and/or the Nemo property;*
- (iii) the claims of the plaintiffs to an interest in Dildar IOM;*
- (iv) the claims of the plaintiffs to an interest in the Nemo property."*

50. The reasons given on behalf of the plaintiffs in support of the request for discovery of the documents sought in this category are as follows. They say that the plaintiffs have pleaded that Paul Kenny was aware that the plaintiffs were clients of Mr. Millett (the fifth defendant) and was aware that Mr. Millett owed fiduciary duties to them. They further contend that Paul Kenny was aware that other parties' data was being "*misused so as to disguise Kenny involvement in Dildar IOM and the Nemo property*" (the plaintiffs' letter for voluntary discovery dated 20th September, 2019 and para. 7 of Ms. Darcy's affidavit). The plaintiffs assert that Paul Kenny acted in concert with Mr. Millett in the perpetration of alleged unlawful acts by Mr. Millett, such that Paul Kenny is a joint tortfeasor. In addition, the plaintiffs state that the documents sought in this category including documentation concerning the alleged awareness of Mr. Kenny of a fiduciary relationship between the plaintiffs and Mr. Desmond is relevant to an estoppel by conduct plea in the reply delivered by the plaintiffs to the amended defence of the Kenny defendants. The plaintiffs further refer to the fact that the Kenny defendants have counterclaimed that Dildar IOM was incorporated for them and that they are the beneficial owners of the entire issued share capital of Dildar IOM. They contend that Paul Kenny has been aware, since at least 2015, of the plaintiffs' ownership claims over Dildar IOM and Mann Made's records in relation to its ownership.

51. In response, a number of points are advanced on behalf of Mr. Kenny. It is said that the offer to discover a revised category of documents under category 9 addresses the only relevant claims that the plaintiffs make against Paul Kenny, namely, that he conspired to conceal the Kenny defendants' involvement in the Nemo lands and in Dildar IOM and represented that the plaintiffs and the OPT were actually the owners. Mr. Kenny maintains that the documents offered in respect of the revised category 9 would be sufficient to cover relevant documents directed to these issues. He maintains that the balance of the

documents sought in this category are directed to issues which do not arise on the pleadings referable to the plaintiffs' case against Mr. Kenny. Documents relating to Mr. Kenny's awareness of the plaintiffs' claims to an interest in Dildar IOM and in the Nemo lands are not relevant, in Mr. Kenny's submission. This is because the plaintiffs' case is that they never made a claim to Dildar IOM or to the Nemo lands and that, insofar as their funds were used (as they allege) to fund the acquisition of the Nemo lands or the incorporation of Dildar IOM, that occurred without the knowledge of the plaintiffs.

52. In submissions, further points were made on behalf of Mr. Kenny. Insofar as para. (i) of category 10 seeks discovery of documents relating to Mr. Kenny's awareness of the existence of fiduciary relationship between the plaintiffs and Mr. Desmond, it was submitted that no such case is pleaded by the plaintiffs. It was further pointed out that Mr. Kenny agreed to make discovery of documents in category 4 which covers documents relating to or recording communications with and/or instructions to Mr. Millett and/or Mr. Desmond regarding the ownership of Dillon Kenny and Darren Kenny and/or of other Kenny family members of the shares in Dildar IOM and/or of the Nemo lands, as well as such documents concerning the plaintiffs' ownership claims over Dildar IOM and the Nemo lands.
53. In my view, some valid objections have been advanced on behalf of Mr. Kenny to the terms of the discovery sought in category 10. However, I am satisfied that the plaintiffs are entitled to discovery of documents in this category on a revised basis.
54. I accept the submission advanced on behalf of Mr. Kenny that the plaintiffs have not alleged in the pleadings that Paul Kenny was aware of the existence of a fiduciary relationship between the plaintiffs and Mr. Desmond. The plaintiffs have pleaded (at para. 51 of the amended statement of claim) that Mr. Kenny was aware that the plaintiffs were clients of Mr. Millett and of the existence of a fiduciary relationship between Mr. Millett and the plaintiffs. There is no similar plea concerning the alleged awareness of Mr. Kenny of a fiduciary relationship between the plaintiffs and Mr. Desmond. I note that the plaintiffs have pleaded the existence of a fiduciary relationship with Mr. Desmond (at para. 3 of the amended statement of claim) and that this was not admitted by the Kenny defendants at para. 4 of their amended defence. However, those pleas do not amount to an express plea that Mr. Kenny was aware of a fiduciary relationship between the plaintiffs and Mr. Desmond. The plaintiffs have made such an express plea in the case of Mr. Millett.
55. While the plaintiffs seek to rely on the plea contained at para. 15 of the amended reply (in response to the Kenny defendants' amended defence) which seeks to set up a plea of estoppel by conduct, there is no reference to Mr. Desmond in that paragraph of the amended reply and it does not, in my view, address the gap in the pleadings, at least insofar as para. (i) of category 10 is concerned.
56. I am satisfied that the plaintiffs are entitled to discovery of the documents sought in category (i) concerning Mr. Kenny's alleged awareness of the existence of a fiduciary

relationship between the plaintiffs and Mr. Millett, but not between the plaintiffs and Mr. Desmond.

57. It seems to me that the documents sought in para. (ii) of category 10 are too wide and include documents which go beyond the pleaded case against Mr. Kenny and against the other defendants in the proceedings. The plaintiffs plead various claims against Mr. Kenny at para. 50 of the amended statement of claim, including claims concerning the submission of material in connection with the ownership of Dildar IOM and the Nemo lands. The plaintiffs also plead wrongful acts against Mr. Kenny at paras. 54, 55, 56 and 57 of the amended statement of claim. They plead that Mr. Kenny acted together with, and in concert with, Mr. Millett in relation to the misuse of the plaintiffs' personal data in connection with the incorporation of Dildar IOM (and consequentially in connection with the beneficial ownership of the Nemo lands). Those claims are all denied in the amended defence (at paras. 27 to 32). There is an express denial that Mr. Kenny misused the plaintiffs' personal data at para. 32 of the amended defence. I am satisfied that documents relating to the awareness of Mr. Kenny of the use and/or misuse of the plaintiffs' personal data in connection with the ownership of Dildar IOM and of the Nemo lands are relevant and necessary for the purpose of discovery and that Mr. Kenny should make discovery of them. However, para. (ii) goes too far in seeking discovery relating to "*any third party's data in lieu of the Kenny's data*". The plaintiffs' claim is directed to the use of their personal data and not the personal data of any third party. Insofar as I can see, the plaintiffs have not alleged the misuse of any third party's data in lieu of the Kennys' data. Therefore, I refuse that part of the discovery sought in para. (ii) which concerns the alleged use of third party data, on the grounds of lack of relevance.
58. As regards paras. (iii) and (iv) of category 10, I accept that the objections advanced on behalf of Paul Kenny are well founded insofar as the discovery sought in these paragraphs refers to the claims made by the plaintiffs to an interest in Dildar IOM and the Nemo lands. The plaintiffs' pleaded case is that their funds were taken from an account in the name of CVSSA in EFG Bank in Zurich without their knowledge or consent and used to finance the purchase by Dildar IOM of the Nemo lands (paras. 26, 37 and 38 of the amended statement of claim). The plaintiffs' pleaded claim, therefore, is that their monies were used without their knowledge or consent to fund the purchase of the Nemo lands by Dildar IOM. They also rely on the representations made to Mann Made concerning the beneficial owners of the company to be incorporated and the source of funds (for example, at paras. 33, 34 and 35 of the amended statement of claim). That is the basis for the plaintiffs' claims of beneficial ownership of the nemo lands and of Dildar IOM.
59. The Kenny defendants maintain in the amended defence that they are strangers to whatever representations may have been made by Mr. Millett as to the origin of the funds for the acquisition of the Nemo lands and as to the identity of the beneficial owners of Dildar IOM and they make no admission in relation to those matters (see paras. 14-17 of the amended defence).

60. More specific allegations are made by the plaintiffs against Mr. Kenny at paras. 50 and 55 of the amended statement of claim which are specifically denied at paras. 27 and 32 of the amended defence. The plaintiffs do, therefore, plead that representations were made that they were to have an interest in Dildar IOM and in the Nemo lands and that is in issue in the proceedings. While Mr. Kenny says that such documents are covered by other categories of documents which they have agreed to discover (such as category 4), it is not clear to me that those other categories would necessarily cover documents relating to Mr. Kenny's awareness of those representations. Even if they did, I do not see how Mr. Kenny would be prejudiced in the event that the documentation sought fell under more than one category. Such documents are, in my view, relevant and necessary for the purpose of discovery and should be discovered by Mr. Kenny.
61. I would revise paras. (iii) and (iv) of category 10 to refer to documents relating to the awareness of Mr. Kenny, prior to the commencement of the proceedings, of:-
- (iii) Representations made by the fifth named defendant, his servants or agents, to Mann Made that the plaintiffs had, or were to have, an interest in Dildar IOM;
  - (iv) Representations made by the fifth named defendant, his servants or agents, to Mann Made that the plaintiffs were to have an interest in the Nemo lands.
62. It seems to me that the relevant point in time at which to consider Mr. Kenny's alleged awareness, for the purpose of the documents sought in category 10 (as revised by me), is prior to the commencement of the proceedings in July 2017.
63. I will, therefore, direct Paul Kenny to make discovery of the documents sought in category 10, as revised in the manner outlined above.

**Category 12**

64. The documents sought in this category are as follows:-

*"All communications between the eleventh named defendant or on his behalf with any of the third party defendants (in particular Mr. Murphy, Mr. McMahon, Mr. Lynch and Allied Finance) in relation to the Nemo Rangers transaction (its purchase and/or funding) and/or any investments through Clear Vision entities."*

65. This was a late addition to the categories of documents sought by the plaintiffs. The plaintiffs have advanced a similar justification for seeking documents in this category as with category 7. They rely on the fact that the Kenny defendants plead that Mr. Desmond and Mr. Millett were advisors to the Kenny family which had placed substantial monies under their care and management. They refer to the affidavits in the proceedings to the effect that some of the monies may have been invested through the "Clear Vision structure" (in fact, at para. 13 of the amended defence, the Kenny defendants expressly refer to CVSH, the BVI company, being the company initially intended to be the purchaser of the Nemo lands, and refer again to that company at para. 33(c) where they seek to distinguish CVSH from CVSSA). The plaintiffs also seek to rely on communications from Mr. Desmond to the third parties in June, 2013 to the effect that Nolan family funds and

Kenny family funds may have been part of similar or the same investment structures (those communications were exhibited to the affidavit sworn in connection with the plaintiffs' application for interlocutory injunctive relief in July, 2017).

66. The plaintiffs contend that the documents sought in this category are relevant and necessary to understand the "*advisory structure*" through which the Kenny defendants claim to have invested monies and to understand the "*modus operandi*" of Mr. Desmond and Mr. Millett in circumstances where the plaintiffs' funds appear to have passed through similar structures to those of the Kenny defendants. They also maintain that the documents are necessary to understand to what extent Paul Kenny acted in concert with Mr. Desmond and/or Mr. Millett and/or the third parties (although I observe that it does appear from the amended statement of claim that no plea is made to the effect that Mr. Kenny acted in concert with Mr. Desmond, unlike the pleas made in relation to Mr. Millett). Reference is also made to a document obtained by the plaintiffs on discovery demonstrating an alleged connection between the funds to the purchase of the Nemo lands and various of the third parties. Reliance is also placed on certain text messages alleged between Mr. Kenny and Mr. Desmond in October, 2014 which allegedly make reference to two of the third parties, Mr. McMahon and Mr. Lynch.
67. In response, it is contended on behalf of Mr. Kenny that the plaintiffs have failed to tie the documents sought in this category with any issue raised in the pleadings. Mr. Kenny contends that the plaintiffs have never alleged any dealings between him and the third parties or any of them and that the plaintiffs have not pleaded that Mr. Kenny or the other Kenny defendants had any involvement in the wider fraud alleged by the plaintiffs against Mr. Desmond and Mr. Millett. Mr. Kenny contends that the documents are, therefore, not relevant.
68. I am not satisfied that the plaintiffs have established an entitlement to discovery of the documents sought in this category. Insofar as the plaintiffs seek documents comprising communications between Mr. Kenny and the third parties in relation to the transaction for the purchase of the Nemo lands or in relation to investments through "Clear Vision entities", I agree with Mr. Kenny that the documents sought are not tied to any issue in the pleadings, as they stand. In my view, they are not relevant, therefore, by reference to the pleadings. The plaintiffs do not allege in the amended statement of claim that Paul Kenny had any involvement with any of the third parties such as Mr. Murphy, Mr. McMahon and Mr. Lynch whether in relation to the Nemo lands or in relation to investments through Clear Vision entities. While I accept that there are several common features between the case made by the plaintiffs in relation to the Nemo lands and Dildar IOM and the wider case they make against Mr. Desmond and Mr. Millett (for reasons explained in greater detail in the other judgment delivered by me today), it does not seem to me that that in itself is sufficient to get the plaintiffs over the hurdle of having to establish relevance for the purposes of discovery.
69. The authorities make clear that relevance must be determined by reference to the pleadings. The plaintiffs make no allegation in the pleadings against Mr. Kenny to the

effect that he had any involvement with the third parties, including those specifically mentioned, in respect of the Nemo lands or in respect of investments through Clear Vision entities. I must judge the application on the basis of the pleadings as they stand and not on the basis of new information which may have emerged in the discovery made by other parties, but which has not resulted in any amendment of the pleadings. The plaintiffs make no case on the pleadings against any of the third parties at all. The third parties were joined by Mr. Desmond. Nor, it should be said, does the amended statement of claim plead that Paul Kenny acted in concert with Mr. Desmond or with the third parties. The plaintiffs do plead that Mr. Kenny acted in concert with Mr. Millett in relation to Dildar IOM and the Nemo lands, but not in relation to Mr. Desmond or any of the third parties.

70. Since I must determine the question of relevance by reference to the pleadings, and since no claim is made against Paul Kenny (or against the other Kenny defendants) that he acted in concert with the third parties in relation to the Nemo lands transaction or in relation to other investments, it is difficult to see how it could be said that the documents sought in this category are relevant as that term is properly understood. I did not fully understand the basis on which the plaintiffs sought to get around the problem of relevance. The plaintiffs sought primarily to rely on documents obtained from other parties on discovery which may suggest a connection between Mr. Kenny and the third parties. However, no such alleged connection is pleaded. The plaintiffs then sought to rely on a more general claim of relevance by suggesting that insofar as Mr. Kenny denies that he is aware of any action which damaged the plaintiffs' interests, then the documents sought in the category must be relevant and necessary. I do not agree. The application must be grounded on relevance by reference to the pleadings. In my view, this category is not tied to the pleadings in the sense required.
71. I have considered whether cases such as *National Education Welfare Board*, *Hartside* and *Red Flag* might be of assistance in respect of this category. However, those cases demonstrate that in proceedings alleging fraud or conspiracy or some other form of clandestine activity, a balancing exercise must be carried out when considering a discovery application. However, that balancing exercise does require the party seeking discovery to pass a threshold (albeit a "*limited threshold*") which requires it at the very least to plead its claim in general terms by reference to the alleged fraud, conspiracy or clandestine activity. In this case, the plaintiffs have not made reference anywhere in their pleadings to the involvement of the third parties or to any connection between Mr. Kenny and them. That at least would have to be done before consideration could be given as to whether discovery should be ordered in accordance with the balancing exercise referred to in those cases. The balancing exercise simply does not arise on the basis of the pleadings as they stand.
72. In those circumstances, I refuse the plaintiffs' request for discovery in respect of the documents sought in category 12.

### **Summary of Conclusions**

73. In summary, I have concluded that the plaintiffs are entitled to succeed in part in their application for discovery against Paul Kenny. In particular, I have concluded that the

plaintiffs are entitled to an order requiring Paul Kenny to make discovery of the documents sought in categories 7, 9 and 10 (as revised). I have refused the plaintiffs' application for discovery in respect of the documents sought in category 12.

74. In addition to the documents sought in the disputed categories dealt with in this judgment, I note that agreement has been reached between the parties in respect of the other categories requested. It is not clear whether an order is required in respect of those agreed categories.
75. I would invite the parties to liaise with a view to agreeing the precise terms of the order to be made to give effect to this judgment to include the question of costs. In the event that the parties are unable to reach agreement as to the terms of the order to be made and as to the appropriate order for costs to be made, then the plaintiffs should prepare a short written submission setting out the terms of the orders they propose within seven days of the date of delivery of this judgment. Mr. Kenny should respond within four days of receipt of that submission. Both sets of submissions should be filed electronically in the Central Office of the High Court and sent by email to the Registrar. I will then decide whether it is necessary to have a further hearing to finalise the orders to be made. There is liberty to apply by email in relation to these time limits.