THE HIGH COURT

[2023] IEHC 131

2021 No. 3794P

BETWEEN

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

VINCENT KAVANAGH and MADELEINE (OTHERWISE MADELINE) KAVANAGH

DEFENDANTS

JUDGMENT of Ms. Justice Roberts delivered on 14 March 2023

Introduction

1. This judgment deals with three separate motions issued by the defendants as follows:

(a) A motion dated 19 October 2022 requiring the plaintiff pursuant to Order 31 rule 11 of the Rules of the Superior Courts ('**RSC'**) to answer each of the interrogatories of the first named defendant delivered on 7 September 2022. That motion also seeks a declaration pursuant to Order 31 rule 1 RSC that the first named defendant had lawfully accrued the right to deliver these interrogatories without requiring court leave to have done so (the '**Interrogatories Motion**').

(b) A motion dated 5 January 2023 seeking to join the Property Registration Authority (the '**PRA**') and Mr Damian Cleary as defendants to these proceedings (the '**Joinder Motion**').

(c) A motion dated 30 August 2022 seeking to restrain the PRA from registering any new full owners of the lands comprising Folio 9004F Co Carlow pending the determination of these proceedings or an Order reversing any such registration in the PRA if the same was effected prior to the determination of the motion (the '**PRA Motion**').

2. The Interrogatories Motion was heard by this court on 14 February 2023.

3. The Joinder Motion and the PRA Motion were heard together by this court on 28 February 2023. While there was some argument as to whether the PRA Motion was properly before the court on that occasion, I allowed the matter to proceed and this judgment will therefore deal with the PRA Motion.

4. While the motions deal with different issues, all arise in the context of the same proceedings. I intend therefore in this judgment to set out a general summary of the background to these proceedings and to consider the relevant pleadings, as this is the context in which all motions before this court arise and will have to be determined. I will then deal with the motions in turn.

The background to this dispute and the litigation between the parties to date

5. The defendants are a married couple. By loan offer dated 13 June 2007, Bank of Scotland (Ireland) Limited, then trading as Halifax, ('**BOSI**') agreed to provide the defendants with a loan facility for €110,000 to purchase the property the subject of these proceedings being the property comprised in Folio 9004F of the register of

freeholders Co Carlow (the '**Property**'), which was to be their home. The defendants entered into a deed of mortgage with BOSI on 6 July 2007.

6. The defendants executed a first legal charge over the Property in favour of BOSI which secured the loan on the Property in compliance with the deed of mortgage. This charge was registered as a burden on the Property by BOSI on 21 September 2007.

7. BOSI transferred all its assets and liabilities (including the charge on the Property) to its parent company, Bank of Scotland plc ('**BOS**') by operation of law with effect from 23:59 hours on 31 December 2010. This transfer was effected by cross-border merger pursuant to European Communities (Cross Border Mergers) Regulations 2008 of Ireland and the Companies (Cross Border Mergers) Regulation 2007 of the United Kingdom approved by the High Court of Ireland on 22 October 2010 and by the Scottish Court of Session on 10 December 2010.

8. On 11 October 2014, BOS sold its loan portfolio and related securities, including the security on the Property, to LSF IX Paris Investments Limited ('**LSF**') by way of purchase deed.

9. On 14 January 2015 LSF exercised its entitlement under the purchase deed to nominate the plaintiff to purchase what are described as the purchased assets.

10. On 3 February 2015 an accession deed was entered into between BOS and the plaintiff pursuant to which the plaintiff assumed certain of LSF's obligations under the purchase deed and became entitled to acquire the purchased assets. Accordingly, the plaintiff became the legal assignee of the defendants' mortgage and security on the Property in February 2015.

11. The plaintiff became the registered owner of the former BOSI charge on the Property on 10 April 2015.

12. On 28 May 2015 the plaintiff was substituted for BOS in Circuit Court proceedings which BOS had issued against the defendants on 21 October 2013 seeking possession of the Property arising from the defendants' default under their loan secured on the Property.

13. On 14 June 2016 the Circuit Court granted an Order for possession of the Property to the plaintiff.

14. The defendants did not appeal the Circuit Court Order within the time limited by the RSC and, in December 2016, they issued a motion seeking an extension of time to appeal. That extension of time was granted by the Master of the High Court.

15. The appeal to the High Court was heard by Noonan J (under proceedings 2016/279 CA in the matter of *Start Mortgages Limited v Kavanagh* [2017] IEHC 433) who delivered judgment on 4 July 2017 dismissing the appeal. At para 26 of his judgment Noonan J stated: "*I am satisfied therefore that the plaintiff's proofs are now, and were at the time the matter was before the Circuit Court, perfectly in order and the plaintiff is entitled to judgment for possession accordingly*".

16. An Execution Order issued from the Circuit Court office on 14 March 2019 in respect of the Property.

17. The plaintiff's evidence is that its first attempt to execute the Order on 18 November 2019 was opposed and abandoned. The plaintiff successfully effected possession of the Property on 17 February 2020 but later that day the defendants and/or persons acting on their instructions forced entry into the Property and regained physical possession.

18. This situation gave rise to the current proceedings which commenced by plenary summons on 19 May 2021 in which an application was made by the plaintiff for an

interlocutory injunction restraining the defendants, their servants or agents, from trespassing upon or otherwise entering the Property.

19. The application for injunctive relief was heard by Mr Justice Allen who delivered his judgment on 3 March 2022 (in *Start Mortgages DAC v Kavanagh* [2022] IEHC 114). At paragraphs 2 and 3 of his judgment Allen J stated: "*Start is plainly entitled to the order which it seeks.… In truth it is a perfectly simple case. Mr and Mrs Kavanagh have defied the process of the law*".

20. Allen J sets out in some detail the defence offered by the defendants and the arguments advanced (at paras 22-56 of his judgment). At paragraph 56 of his judgment Allen J states

> "*This is not a case of a mortgagee or receiver seeking to take the law into his own hands but of a mortgagee who was put into possession of the mortgaged property in accordance with law by an officer of the Circuit Court duly authorised by law. The force which was used – and which Mr. Kavanagh does not suggest was not entirely necessary – was lawfully used.*"

21. Allen J granted interlocutory relief to the plaintiff to which he stated (at para 57) the plaintiff was "*entitled as a matter of right*". The interlocutory Order made in terms restraining the defendants from trespassing upon or entering the Property remains in place pending the trial of these proceedings.

22. A further application was made by the plaintiff to the High Court on 31 May 2022 seeking an Order pursuant to Order 44, RSC for the attachment and committal of the first named defendant and three other named individuals for their alleged failure to comply with the Order of the High Court (Allen J) made on 3 March 2022.

23. That application was heard by Ms Justice Egan who delivered her judgment on 2 June 2022 (*Start Mortgages DAC v Kavanagh* [2022] IEHC 348). In para 23 of her judgment she states:

> "*In this case I find that, in continuing to trespass upon the property, the first named defendant wilfully disobeyed the order of 3rd March 2022. Further, I am satisfied, beyond a reasonable doubt, that the first named defendant was fully aware of the order and of the consequences of breaching it. I am further satisfied that the first named defendant has been afforded abundant opportunity to comply with the order of 3rd March, 2022, up to and including immediately before I delivered judgment, but has repeatedly and steadfastly refused to do so. I am therefore satisfied beyond reasonable doubt that the first named defendant is in breach of paragraph 1 of the order of Allen J. of 3rd March, 2022 and in contempt of court by trespassing upon or otherwise entering the property*."

24. There is no direct evidence before this court regarding what occurred after the Order of Ms Justice Egan was made although it appears that the first defendant was imprisoned for a period of time for contempt of court.

25. In his affidavit sworn 23 August 2022, the first named defendant confirms at para 9 that "*over this past weekend it has come to my attention that an application is pending in the PRA against the family dwelling*." This is the affidavit grounding the PRA Motion to which I will return.

26. At the hearing of this matter on 28 February 2023, counsel for the plaintiff confirmed to the court that the Property has been sold to a third-party purchaser, Mr Damien Cleary, and that the defendants are no longer in possession of the Property. In those circumstances it appears that the plaintiff's claim in these proceedings is now a claim

for damages for a period of approximately 18 months during which the defendants are alleged to have trespassed on the Property.

27. The defendants have delivered a detailed defence and counterclaim. Given the relevance of this to all the motions before this court, I now propose to consider this pleading in some detail.

The defendants' Defence and Counterclaim

28. The defence and counterclaim is dated 26 May 2022. It purports to be delivered only on behalf of the first named defendant and confirms that the second named defendant has left the Property. The document suffers from confusing and unusual drafting common to many cases in which parties are advised by persons who are not legally qualified. However, I have reviewed it in detail and the following is a summary of the general arguments and statements advanced by way of defence:

(1) The plaintiffs have not lawfully sued the defendants. This argument appears to relate to a claim that there is no evidence as to the terms on which the plaintiff resolved on a corporate level to sue the defendants and no evidence of the basis on which the plaintiff instructed its own solicitors or authorised them to swear affidavits on behalf of the plaintiff.

(2) The property is a constitutionally protected family dwelling and is inviolable under the Constitution.

(3) The plaintiff has no direct knowledge of the loan offer, mortgage or registration which occurred in 2007 and possesses no originating paperwork. The plaintiff therefore cannot rely on or give evidence on these matters. Any evidence the plaintiff gives of matters prior to February 2015 is hearsay and inadmissible.

(4) The transfer/assignment of the defendants' loans and security to the plaintiff was unlawful. The BOSI burden on the folio was cancelled on 9 April 2015 and the plaintiff did not register any charge on 10 April 2015, as alleged.

(5) There were never Circuit Court possession proceedings issued on 21 October 2013 as BOS were not registered as owners of any burden on that date. The instrument being relied upon was not revenue stamped and does not legally exist and this defect can never be cured. The claim that the plaintiff was "*substituted*" in the proceedings *"is the first admission of deception and dishonesty before the Courts*".

(6) There was no Order of the Circuit Court on 14 June 2016 as there was no civil bill for possession.

(7) The fact that the High Court on 4 July 2017 failed to set aside the "*instrument of 14 June 2016"* is immaterial and moot as there was never a Circuit Court Order for possession.

(8) The production of two different instruments in the High Court was fraudulent and neither one lawfully issued from the Carlow Circuit Court office. There was never a lawful Order of possession. The County Registrar for the County of Carlow never put the plaintiff in lawful possession of the Property.

(9) The plaintiff unlawfully gained possession of the Property on 17 February 2020 and used force to do so. It was the plaintiff who was the trespasser on the Property when it sought to unlawfully enter it.

(10) The defendants are entitled not to hand over possession of the Property "*to false claimants relying on false claims to deceive them and the Courts in Ireland*".

(11) The defendants are not indebted to the plaintiff. The plaintiff is not a bona fide lender or mortgagee.

(12) Even if the plaintiff was a lawful mortgagee in possession it would "*be legally obliged to not sell the family dwelling for the currency of 12 years pursuant to the provisions of s. 54 Statute of Limitations 1957; such lawful provision for any mortgagor's right to redeem a mortgage.*". The plaintiffs are wilfully ignoring a mortgage redemption demand of 22 October 2021 pursuant to s. 121 of the Consumer Credit Act 1995.

29. The counterclaim is lengthy. However, most paragraphs simply repeat or expand on what is proffered by way of defence, for example in relation to the appointment of the plaintiff's solicitors and the allegations that the plaintiff has ignored the statutory demand for redemption and that the burdens have not been registered or the documents stamped. The defendants allege that they are not in breach of the Order of Allen J dated 3 March 2022 because they have not received a "*judicially signed and approved judgment*" or a perfected High Court Order. It is alleged that the plaintiff "*in a consistent pattern of acting dishonestly*" purported to issue a notice of motion for attachment and committal. This is stated to be an instrument of no legal standing as the purported penal endorsement was not signed or dated. It is alleged that the plaintiff is attempting to "*steal private property contrary to Criminal Justice Acts*." Para 43 of the Counterclaim states that

> "*If the Plaintiff ..proceeds to unlawfully sell the family dwelling, by any means, then any person(s) purporting to purchase same shall be satisfied to have been made a party to those claimed criminal actions, especially whereby a defaulted Demand to Redeem is in place from the Defendants prior to any such unlawful sale*".

30. Twenty-nine separate reliefs are sought by the first named defendant. These include:

(1) Declarations that the pleaded registrations or court Orders did not or could not issue and, to the extent that they did, they are of no legal effect or force. A declaration is sought that the plaintiff is trespassing on the Property;

(2) Various Orders including:

(i) an Order for An Garda Síochána to undertake certain investigations;

(ii) an Order to strike off the plaintiff's solicitors;

(iii) an Order compelling the plaintiff to produce receipts and loan documentation;

(iv) an Order cancelling the registered burdens;

(v) an Order declaring any sale of the defendants' lands unlawful and, if sold, an Order to declare such sale void and that it be reversed, including any registrations made in the PRA;

(vi) an Order compelling the plaintiff to "*facilitate Statutory Mortgage Redemption*", and, if they fail to do so, an Order that the first named defendant be at liberty to issue a motion for attachment and committal against the directors of the plaintiff;

(vii) an Order for damages under various headings including aggravated and exemplary damages, "*summary compensation in lieu of costs*", interest and consequential Orders.

31. The general approach of the defendants in this case is to argue that the Orders already made by the courts in these and related proceedings are invalid and that the defendants are not obliged to comply with them. This is, unfortunately, a common theme that arises where litigants, having exhausted the formal court appeals process without success, then argue that the Orders themselves are invalid and/or seek to re-litigate issues which are *res judicata*. Both of these approaches are taken by the first named

defendant in his defence and counterclaim. He also seeks Orders which it would be simply impossible for him to obtain in these proceedings such as those sought against the Gardaí or the plaintiff's solicitors. All of these matters will be for the trial judge to ultimately determine. I intend however to deal with the motions before me on the basis that the court Orders made to date are valid and binding on the parties, and that the evidence of registrations and other matters relied on in those court hearings have already been properly determined as a matter of fact.

32. I will now consider in turn the three motions before this court in light of the above background.

The Interrogatories Motion

33. The first named defendant's motion is dated 19 October 2022. It seeks a declaration pursuant to O31 rule 1, RSC that the first named defendant had lawfully accrued the right to deliver his interrogatories dated 7 September 2022 for examination of the plaintiff without requiring court leave to have done so. It further requests an Order pursuant to O32 rule 11 compelling the plaintiff to answer each of the interrogatories which have been delivered.

34. There are therefore two matters to consider in relation to the Interrogatories Motion. The first is whether the Mr Kavanagh was entitled to serve his interrogatories without leave of the court (which is it is accepted he did not seek). If he did not require leave or if this court now considers this hearing as an application for leave to issue the interrogatories, the second issue to be determined is whether this court should Order the plaintiff to respond to the interrogatories as served.

<u>Was leave of the court required to issue the interrogatories?</u>

35. The answer to the question as to whether leave was required will depend on whether the first named defendant can bring his claim within the scope of O31 rule 1 as being a matter where he seeks relief by way of damages or otherwise on the ground of fraud or breach of trust. In all other cases, save where proceedings are brought in the Commercial Court, a party requires the leave of the court to deliver interrogatories.

36. Mr Kavanagh says that he has pleaded fraud in his counterclaim. In that regard it is worth setting out the relevant provisions of the counterclaim which reference fraud or express dishonesty:

(a) Para 21 states - "*The Plaintiff then in a consistent pattern of acting dishonestly has purported to issue a Notice of Motion for Attachment and Committal… All of these defective actions as to paperwork are knowingly, willingly and intentionally happening contrary to law and the Court rules, all to dishonestly deceive and defraud the Defendants of their family dwelling, to mislead the Courts and to now attempt to falsely imprison the First Named Defendant*";

(b) Para 22 states – "*The First Named Defendant refused to be made a party to the dishonesty and fraud of bringing that void motion before the High Court and advised the solicitors as to same prior to 25th May 2022, which once was again not disclosed to the Court, thus further dishonesty*";

(c) Para 23 states-"*The Plaintiff in having brought that further fraud and deception into the High Court generated another Ultra Vires instrument purporting to be a High Court order of 25th May 2022 to Attach the First Named Defendant.… Said dishonesty, fraud and deception in turn then extending to engaging the Governor of Mountjoy Prison, or the Governor of any other prison, to falsely imprison the*

first named Defendant thus compelling the Irish State at multiple levels to cover up the unlawful claims to possession…".

37. Insofar as claims of fraud appear in Mr Kavanagh's defence the following references are made:

(1) Para 7 - Mr Kavanagh appears to complain that the High Court Order dated 4 July 2017 affirming the Circuit Court Orders for possession was "*both void and fraud*".

(2) Para 8 - Mr Kavanagh complains that the plaintiff produced "*different instruments*" in the High Court and that this is "*a further admission of fraudulent actions*" by the plaintiff.

(3) Para 11 - Mr Kavanagh characterises the plaintiff as "*false claimants relying on false claims*".

(4) Para 15 - Mr Kavanagh states that all of the plaintiff's attempts to gain possession to the Property since 2015 were "*fraudulent*".

38. While it is clear that the word "*fraud*" appears in the first named defendant's defence and counterclaim, I am of the view that there is in fact no plea of fraud in the proper sense as envisaged by Order 31 rule 1. Mr Kavanagh's counterclaim does not seek damages on the grounds of fraud nor does he seek a declaration in relation to fraudulent activity nor is his claim grounded in fraud in any proper sense. The fact that a party decides to use the word "*fraud*" in a pleading, does not of itself convert his claim into one grounded on fraud. He must also seek relief by way of damages or otherwise on the grounds of fraud. None of the 29 reliefs sought by Mr Kavanagh includes relief grounded on fraud.

39. I am satisfied therefore that Mr Kavanagh ought to have sought the leave of the court prior to issuing the interrogatories. Despite his not having sought this leave, I will nevertheless, treat the hearing of the motion as a *de facto* leave application. In those circumstances I will now consider the interrogatories to determine if they are appropriate to issue and whether, if so, the plaintiff should be compelled to respond to some or all of them.

Should the plaintiff be compelled to respond to the interrogatories served?

40. Order 31 rule 2 confirms that in deciding upon an application of this nature, the court shall grant leave to issue proposed interrogatories "*as to such only of the interrogatories as shall be considered necessary either for disposing fairly of the cause or matter or for saving costs*". Order 31 rule 7 confirms that any interrogatories may be struck out for being "*prolix, oppressive, unnecessary, or scandalous*". Order 31 rule 6 refers to interrogatories which are unnecessary or not bona fide for the purpose of the cause or matter or where the matters enquired into are not sufficiently material at that stage. The court therefore has a wide discretion to deal with interrogatories served or in respect of which leave is sought for them to be served. The overall test is a requirement that the interrogatories be necessary either for disposing fairly of the cause or matter or for saving costs.

41. The principles to be applied in deciding whether to grant leave to deliver interrogatories have been considered in a number of cases and *Delaney and McGrath 4th Ed. 2018* (at para 12-23) usefully summarise the following criteria which are necessary to establish before leave will be given by the court as follows:

"*(a) the information sought is relevant to the facts in issue in the proceedings;*

(b) the interrogatories are necessary either for disposing fairly of the cause or matter or for saving costs; and

(c) the interrogatories are not vexatious or oppressive and it would not be unfair to require a party to answer them."

42. The test of relevance must be by reference to the case as pleaded – not merely general questions that the party delivering the interrogatories would like to know. However, interrogatories need not be confined to the facts directly in issue but may extend to any fact, the existence or nonexistence of which is relevant to the existence or nonexistence of facts directly in issue. As stated by Walsh J in *J & L.S. Goodbody Ltd v Clyde Shipping Co. Ltd.* (Unreported, Supreme Court, 9 May 1967):

"*Furthermore the interrogatories sought need not be shown to be conclusive on the questions in issue but it is sufficient if the interrogatories sought should have some bearing on the question and that the interrogatory might form a step in establishing liability*".

43. A most useful summary of the core principles that may be gleaned from the case law is set out at para 24 of the recent judgment in *Secansky v The Commissioner of an Garda Siochána* [2021] IEHC 731 where, at para 24, Hyland J confirmed as follows: –

"• *The delivery of interrogatories has obvious efficiencies. It can obviate the necessity for expensive and time-consuming discovery, can dispose of issues prior to trial and can lessen the number of witnesses, resulting in an overall shortening of trials. However, the efficient conduct of litigation is one, but only one, factor to be taken into account by the court;*

• *Interrogatories must not be used to prejudice a fair hearing of the issues between the parties;*

- *Interrogatories should not be used in respect of matters more akin to opinions or meanings, the effect or the factual context of which may not admit a clear answer;*
- *In considering the fair disposal of an action commenced by plenary summons the court must bear in mind that such actions are in principle to be heard on oral evidence, and that certain issues are more properly answered where the parties can contextualise the answer, rather than being confined to the narrow parameters of an interrogatory;*
- *Where only one party has knowledge and the ability to conveniently prove facts which are important to be established in aid of the opposing party's case, the purpose of interrogatories is to avoid injustice.*"

44. In the present case Mr Kavanagh has submitted 138 interrogatories. Mr Kavanagh says that the interrogatories are simple and straightforward. He says it should only take a matter of two hours for the plaintiff to respond to his interrogatories and that doing so will fine tune the process of voluntary discovery. He says each one is relevant and that the interrogatories have been formulated correctly requiring simply a yes/no answer and that they do not refer to opinions or matters of law or the meaning or effect of documents or statements of conduct. He relies on the decision in *Defender Limited v HSBC Institutional Trust Services (Ireland) DAC* [2018] IEHC 322 which related to 650 interrogatories, many of which were ordered to be responded to by the court. Mr Kavanagh also relies on the comments of Kelly J in *McCabe v Irish life Assurance* [2015] IECA 239, [2015] IR 346 at page 348 where he provided judicial encouragement for the greater use of interrogatories since they "*can dispose of issues prior to trial, can lessen the number of witnesses and result in an overall shortening of trials*" and in that case "*save significant costs and shorten the trial*" (at page 356).

45. The plaintiff argues generally that the interrogatories which Mr Kavanagh seeks to compel the plaintiff to reply to serve no clear litigious purpose, will save no costs nor promote fair and efficient conduct of the action. The plaintiff says the interrogatories are irrelevant, unnecessary and oppressive. The following specific objections are raised. First, the plaintiff says that the proposed interrogatories are vexatious because, using the counterclaim as their springboard, they seek to make enquiries about matters which are *res judicata*, as if they were as yet undecided. Second, the plaintiff argues that many of the interrogatories are entirely irrelevant to the pleaded case. Third, the plaintiff argues that the interrogatories should be refused as they are oppressive. In that regard the plaintiff relies on the decision of *Bula Ltd v Tara Mines Ltd* [1995] 1ILRM 401 where Lynch J approved the approach of Myers J in the Australian decision of American Flange Manufacturing Co. Inc. v Rheem (Australia) Pty (No.2) [1965] NSWLR 193 to the effect that

> "*interrogatories which were prolix and oppressive or unnecessary could be disallowed as a whole, even though some of them were proper, and that the court was not required to go through interrogatories of that kind and ascertain which were admissible and which were not*".

The plaintiff says the court should not have to go through voluminous improper interrogatories to try to pick out from amongst them any comparative few that might be allowable.

46. In this case Mr Kavanagh bears the burden of demonstrating to this court that the interrogatories as drafted are necessary for disposing fairly of the proceedings or for saving costs.

47. While I believe that it is not necessary in the case of a voluminous notice of interrogatories that the court examine each one individually, I propose nevertheless to consider the interrogatories in groups where a common heading has been applied by Mr Kavanagh and a common objection has been made by the plaintiff.

48. Questions 1 to 14 are set out under the heading "*Matters as to appointment of solicitor(s)*". It seeks information regarding the internal arrangements by the plaintiff to appoint its own solicitors and information regarding the solicitors on record for the plaintiff. These matters are entirely irrelevant to anything pleaded by the plaintiff in its statement of claim. The counterclaim at paragraph 17 claims that "*no lawful instrument of appointment of solicitors to sue for Start can be produced*". Paras 67, 68 and 69 seek to make a claim for aggravated and exemplary damages on this matter. The manner in which the plaintiff has instructed its own solicitors, and their internal governance and status under the Solicitors Act 1954 or otherwise is not relevant to the claim against the defendants and Mr Kavanagh cannot make it thus by including it in his counterclaim. Accordingly, I refuse leave for questions 1 to 14 on the basis of irrelevance and hold that same are not necessary for the fair disposal of any matter at issue in these proceedings or for saving costs.

49. Questions 15 to 29 are listed under the heading "S*ecuritisation Details*". These questions seek information regarding the transfer of loans from BOSI to BOS. While this transfer is pleaded in the statement of claim to establish the plaintiff's title to the defendants' loan and locus standi to bring these proceedings, the Circuit Court and High Court on appeal have already determined the validity of that transfer by making the Order for possession of the Property as previously set out in this judgment. In those circumstances, this matter is *res judicata* and cannot now be re-litigated by Mr Kavanagh in these proceedings by including same in his counterclaim. These questions

will not save costs nor are they necessary for the fair disposal of these proceedings. Accordingly, I refuse leave for questions 15 to 29.

50. Questions 30 to 51 are grouped together under the heading "*Start Mortgages DAC claimed interest*". They relate to the acquisition of the defendants' loan by the plaintiff from BOS. This issue is also *res judicata* for the same reasons as questions 15 to 29. Furthermore, this particular section contains a number of questions which seek an interpretation or opinion on legislation and would be disallowed for that reason even if not dealing with a matter which was *res judicata*. In that regard questions 33,34,40, 41,48 and 49 fall into that category. I refuse leave to issue questions 30 to 51.

51. Questions 52 to 82 are grouped together under the heading "*Instrument of 14th March 2019, Events of 18th November 2019 & Events of 17th February 2020*". These matters were raised previously in court and are addressed in the Order of Mr Justice Allen delivered on 3 March 2022. While that Order is an interlocutory Order and not a final one, the court addressed each of the matters pleaded by Mr Kavanagh. Mr Kavanagh will be free to adduce whatever evidence he wishes at the trial of this action regarding these matters. Furthermore, certain questions are not properly framed as interrogatories and/or seek opinions as to the interpretation of identified legislation including "*the Forcible Entry Act 1381*" and "*the Evictions (Ireland) Act 1848*". I am satisfied that the interrogatories requested are unnecessary for the fair disposal of these proceedings and will not result in the saving of any legal costs. I refuse leave to issue questions 52 to 82.

52. Questions 83 to 87 are listed under the heading "*Events after 17th February 2020 leading to issuance of proceedings*". These questions are not properly drafted as interrogatories. I therefore refuse leave to issue them.

53. Questions 88 to 100 are grouped together under the heading entitled "*Events leading to, and imprisonment of, First Named Defendant*". I fail to see the relevance of these questions to the current proceedings in circumstances where there was no appeal by the first named defendant against the Order of Mr Justice Allen and where an Order for committal was made by Ms Justice Egan, as previously set out in this judgment. I refuse leave to issue these questions.

54. Questions 101 to 134 are grouped under the heading "*Purported sale of 36 Beechwood Park, Carlow, Co Carlow*". Insofar as the plaintiff alleges it has been unable to bring the Property to market (although it now appears it has done so), this is an issue that is in general terms relevant to these proceedings. Some of these interrogatories deal with historic title queries aimed at challenging the transfer of the loan and security from BOSI to BOS and from BOS to the plaintiff. This matter has already been accepted by the courts and I will not give leave to issue interrogatories dealing with these *res judicata* matters. That excludes questions 101- 107 and 117-119. Some interrogatories seek opinion on the applicability of legislation or legal concepts and I refuse leave for those (being questions 111-113 and 125). Some interrogatories appear irrelevant to anything pleaded and I refuse leave for questions 114, 128 and 129 on that basis.

55. I grant leave for the first named defendant to issue the following interrogatories :

Questions 108-110 inclusive;

Questions 115 and 116;

Questions 120-124 inclusive;

Questions 126 and 127; and

Questions 130-134 inclusive.

56. The final set of questions 135 – 138 are grouped together under the heading "*Generally*". I will give leave for questions 135 and 136 to issue. I refuse leave for questions 137 and 138 as they are not relevant to any of the matters pleaded.

The Joinder Motion

57. On 5 January 2023 the first named defendant issued a motion seeking to join two parties, the PRA and Mr Damien Cleary, as defendants to these proceedings pursuant to Order 15 RSC or the inherent jurisdiction of this court. Both parties resist being joined as defendants.

58. Order 15, rule 4 provides that all persons may be joined as defendants against whom the right to any relief is alleged to exist whether jointly, severally, or in the alternative. The causes of action do not have to be the same against every defendant nor is it necessary that each defendant should be interested in the entire relief sought.

59. I will consider each proposed co-defendant separately.

Mr Damien Cleary

60. Mr Damien Cleary is the third-party purchaser of the Property. He purchased the Property from the plaintiff for value following the Orders for possession granted by the courts to the plaintiff and executed in respect of the Property.

61. Mr Kavanagh argues that Mr Cleary is a trespasser on the Property and is in breach of the Order of Allen J made on 3 March 2022 as he was on notice of the making of that Order. This argument is clearly misconceived. The Order in question restrains the defendants "*their servants or agents and any persons acting in concert with them or any person with knowledge of the injunction from trespassing upon or otherwise*

entering the property". The Order is clearly directed to the defendants and not to the plaintiff, its servants or agents. Mr Cleary is the party who purchased the Property from the plaintiff and he is not in breach of the Order of Allen J simply because he was on notice of that Order.

62. The Order for possession made in favour of the plaintiff by the Circuit Court, and affirmed on appeal by the High Court, is the basis for the plaintiff's entitlement to possession of the Property. The Order of Allen J prevents the defendants or their agents from trespassing on the Property pending the hearing of these proceedings. The plaintiff's case is that it is entitled to exercise its power of sale of the Property as mortgagee in possession and that in July 2022 it sold the Property to Mr Cleary in fee simple for valuable consideration.

63. There is no relief sought in the first named defendant's counterclaim against Mr Cleary. The closest the first named defendant comes to advancing such a claim is in paragraph 64 where he claims that "*If any unlawful sale of the Defendants lands effect (sic) then an Order is made to declare the same void and is to be reversed in full inclusive of any unlawful registration(s) made in the Property Registration Authority*".

64. The first named defendant was unable at the hearing of this action to articulate what his claim was against Mr Cleary. He has not produced any draft pleadings to identify the basis of his proposed claim or how he would plead it. The first named defendant argues that he needs to obtain voluntary discovery of documents from Mr Cleary before he can set out a rationale for pursuing him as a co-defendant. The first named defendant says in a letter to Mr Cleary's solicitors dated 1 February 2023 that he needs to first be provided by Mr Cleary with "*the entire suite of application papers, inclusive of executed <u>purported</u> contract for sale to make certain determination as to cause of action…*". There is no evidence before me on which I can conclude that the first named

defendant has a right of action against Mr Cleary. Nor is there any basis on which I would order Mr Cleary to hand over documents to the first named defendant simply to provide the first named defendant with an opportunity to formulate a possible claim against Mr Cleary. The purchaser from a mortgagee is under no duty to enquire into the exercise by the mortgagee of his power of sale. The first named defendant's remedy, if it is indeed the case that the power of sale was improperly exercised, is against the plaintiff. Therefore, if it ultimately transpires that the plaintiff was not entitled to sell the Property to Mr Cleary that will be a matter for which the plaintiff will have to account to the defendants. I will not make an Order in those circumstances joining Mr Cleary as a co-defendant.

The PRA

65. The Joinder Motion also seeks to join the PRA as a co-defendant to the proceedings. No draft pleadings have been provided to this court setting out the proposed claim to be advanced against the PRA.

66. Counsel for the PRA in resisting the motion relied on the decision of *Kennedy v Casey* [2015] IEHC 690 where Kearns P held that the court will generally refuse to add a party as a co-defendant where there is no direct cause of action against the proposed defendant. In the present case paras 62-65 of the first named defendant's defence and counterclaim seek various Orders purporting to cancel or declare void burdens on folio 9004F. However, no reliefs are specifically sought as against the PRA. Insofar as there is a related motion seeking injunctive relief against the PRA, I do not believe for the reasons set out below, that this would justify the joinder of the PRA as I would not be prepared to grant such injunctive relief. Furthermore, I do not believe that the joinder of the PRA is "*necessary in order to enable the Court effectually and completely to*

adjudicate upon and settle all the questions involved in the cause or matter" within the meaning of Order 15 rule 13.

67. In his letter dated 4 January 2023 to the PRA, the first named defendant stated in relation to this Joinder Motion that "*to successfully ground such motion I shall require all papers comprising application number D2022LR111237H,… and so herein I make lawful request for the PRA to voluntarily disclose and deliver said papers to me*".

68. The PRA argue that no application has been made by the first named defendant to the PRA pursuant to rule 159 of the Land Registration Rules and there is no application accordingly before this court for an Order appealing any decision of the Registrar pursuant to section 19 of the Registration of Title Act 1964. It is also the case that the Joinder Motion does not in fact seek any documents to be provided by the PRA.

69. I have no evidence of any basis to justify the joinder of the PRA as a co-defendant to these proceedings and so I refuse this Order. Insofar as there was a suggestion that the PRA might instead be added as a notice party to these proceedings (against whom no relief could be sought) I would only make such an Order had it been on consent of the PRA. No consent was provided and so I do not make an Order joining the PRA as a notice party. Nor do I believe there is any requirement to join the PRA as an *Amicus Curiae* or in any other capacity to assist the court in this matter.

The PRA Motion

70. The third motion before the court is the first named defendant's motion dated 30 August 2022 in which he seeks an Order restraining the PRA from registering any new full owner of the Property pending the determination of these proceedings as well as an Order reversing any registration already made. The Orders sought are stated to be

grounded in the jurisdiction of section 31 of the Registration of Title Act 1964 or this court's inherent jurisdiction.

71. Although I have already determined that I will not order the joinder of the PRA as a co-defendant, I will nevertheless deal with the PRA Motion so that all issues raised by the first named defendant have been considered by this court.

72. The first named defendant's affidavit grounding this motion sworn 23 August 2022 states that the PRA should be restrained from registering a pending application that had come to his attention for the following general reasons:

(1) Litigation is pending as to the validity of all court Orders;

(2) A 28-day warning notice as to default judgment is about to expire;

(3) "*Right of housing loan redemption cannot be removed in Ireland*";

(4) The court Order and judgment obtained are only valid pending trial; and

(5) Any third party making the application for registration is either fully aware of all failings of the plaintiff or is completely uninformed as to them and if the latter, that party "*needs to be protected on an immediate basis by restraining the PRA which in turn shall not allow any such innocent party to revert themselves to the criminal authorities*".

73. Dealing briefly with those reasons advanced in the first named defendant's affidavit it is my view as follows: –

(1) The court Orders already obtained in relation to the plaintiff's entitlement to possession of the Property are final Orders and the validity of those court Orders cannot be further challenged in these proceedings.

(2) A warning letter would not appear to be a relevant consideration for injunctive relief against the PRA. In any event the defence has now been delivered.

(3) The right of housing loan redemption is not understood in the context in which the first named defendant appears to refer to it. In any event this is a matter that was already pleaded by the first named defendant in earlier proceedings. It does not appear relevant to the question as to whether injunctive relief should be granted against the PRA.

(4) The Order of Allen J granting interlocutory relief is certainly an Order that exists pending trial. The Orders for possession are however now final Orders.

(5) Mr Cleary as the third party purchaser is, on the evidence before this court, fully aware of the basis on which the plaintiff has sold the Property to him and he is the applicant before the PRA. There is therefore no requirement that he be "*protected*" by restraining the PRA from dealing with this application.

74. The PRA points out that it is a creature of statute (as created by the Registration of Deeds and Title Act 2006) with the primary duty to ensure the maintenance of the registers established under section 8 of the Registration of Title Act 1964. In Order that it carries out this duty, the PRA must ensure that applications for registration are in accordance with the 1964 Act and in compliance with the Land Registration Rules. It submits that the PRA should not be impeded in carrying out its statutory functions by reference to separate litigation.

75. The PRA also submits that the defendants are well protected by statute in the event that they are successful in their proceedings against the plaintiff. Section 21(1) of the Registration of Title Act 1964 provides a statutory obligation that the PRA shall obey the Order of a court in relation to registered land. Section 32(1)(c) as substituted by

section 55 of the Registration of Deeds and Title Act 2006 empowers the court to direct rectification of the register or a registry map if such can be effected without injustice to any party.

76. The recent decision in *Farrell v Everyday Finance Designated Activity Company* [2022] IEHC 698 was relied on by the PRA. The PRA was a defendant in those proceedings and an injunction was sought to restrain it from taking any steps in respect of the registration of the purported sale of the property the subject of those proceedings. Stack J refused all relief. In relation to the PRA, she stated at paragraph 16:

> "*Insofar as the PRAI were concerned, I indicated that I was refusing relief because it was not necessary to grant injunctive relief against the PRAI as they had not yet processed the application for registration which had been lodged by the Purchasers. If and when that is done, and if the PRAI proceeds to register the Purchasers as full owners of the Property, the plaintiff may appeal that registration to the Circuit Court pursuant to s.19 of the Registration of Title Act, 1964, as amended. Accordingly, no injunction against the PRAI was necessary, and I expressed a doubt as to why the PRAI had been joined at all*".

77. Stack J at para 117 of her judgment in *Farrell* stated that:

> "*I accept the submission of counsel for the defendants that a public authority should not, in general, be restrained from exercising its statutory authority (see Okunade v Minister for Justice [2012] 3 IR 152 and Campus Oil v Minister for Industry and Energy (No 2) [1983] IR). There is nothing to suggest that the PRAI will not exercise its functions lawfully. Furthermore, the PRAI will abide by any order that is made as between the plaintiff and any of the other defendants…. It is accordingly not necessary to grant any injunctive relief against it.*"

78. Similarly, in the present case, I am of the view that no injunctive relief should be granted against the PRA, even if I had determined that the PRA be joined as a co-defendant. The evidence from the PRA at the hearing of this matter is that they will abide by any Order that is made as between the plaintiff and the defendants following the trial. The PRA must be allowed to carry out its statutory functions without becoming embroiled in the wide range of litigation which exists between parties regarding the registration of property interests. I therefore refuse the motion to grant injunctive relief against the PRA.

Conclusion

79. In relation to the Interrogatories Motion I find that the first named defendant ought to have obtained leave of the court to serve his interrogatories as his claim is not grounded in fraud or breach of trust.

80. I elected to treat the hearing of the interrogatories motion as an application for leave and, for the reasons set out, grant leave to the first named defendant to issue a limited number of interrogatories as set out at paragraphs 55 and 56 of this judgment.

81. I refuse the first named defendant's motion to join Mr Cleary and/or the PRA as co-defendants to these proceedings.

82. I refuse the plaintiff's motion for injunctive relief against the PRA to restrain registration of the pending dealing regarding the Property.

83. I will list this matter for mention at 10.30am on Tuesday 28 March when all interested parties can address me in relation to the form of Order required in respect of the interrogatories, costs and any other issues arising including any required further directions.