

THE HIGH COURT

[2022] IEHC 644

2021 No. 1580P

BETWEEN

KEEGAN QUARRIES LIMITED AND JOHN KEEGAN

PLAINTIFFS

AND

KIERAN CUMMINS

DEFENDANT

Judgment of Ms. Justice Eileen Roberts delivered on 18 November 2022

Introduction

- 1.** This judgment relates to an application by the plaintiff seeking discovery to be made by the defendant.
- 2.** The plaintiff's motion sought discovery of six separate categories of documents which had been the subject of a request for voluntary discovery dated 23 February 2022. In circumstances where there was no engagement by the defendant with that request for voluntary discovery the motion before this court issued on 26 April 2022.
- 3.** Prior to the hearing of this application on 15 November 2022 the parties had reached agreement in relation to five of those six categories. This court was required therefore to deal only with one category of discovery which remained in dispute between the parties,

namely category '5' of the plaintiff's notice of motion. This judgment addresses that disputed category.

The pleaded case by reference to which discovery is sought

4. These proceedings issued on 11 March 2021. An application for interlocutory relief was issued contemporaneously and, by order dated 13 April 2021, the plaintiffs obtained an interlocutory injunction that, pending the hearing of this action, the defendant would not (i) enter onto remain upon or interfere with the first named plaintiff's property at Trammon, Rathmoylan, County Meath or any other of the plaintiffs' properties as described in the schedule to the plenary summons (together the **Properties**) or (ii) fly, control, direct and/or operate a drone above and/or in the airspace of the Properties.
5. The plenary summons, in addition to seeking injunctive relief in the above terms also seeks an injunction restraining the defendant from directly or indirectly interfering with the plaintiffs' business. It seeks damages for trespass and damages for interference with the plaintiffs' business and economic interests.
6. The statement of claim delivered on 22 April 2021 sets out the substance of the plaintiffs' claim in more detail. The plaintiffs confirm that they are the legal and beneficial owners and entitled to possession of the Properties which include active quarries and areas from which the public are excluded from entry.
7. It is pleaded that on 16 January 2021 the defendant wrongfully entered upon part of the Properties (being the lands at Trammon) and that, while there, he "*made a digital/video recording*" of the property and the plaintiff's employees working there. The statement of claim also pleads that the defendant has wrongfully flown and/or controlled or operated a drone "*over the quarry at Trammon*" and the Properties, without the plaintiffs' permission. It is alleged that in June 2020 an employee of the first-named plaintiff

observed a drone operating “*above the lands at Trammon*” (paragraph 13) and that on 18 February 2021 a drone was observed operating “*directly above lands*” at Ballyonan, Clonard, Co Kildare (being part of the Properties) (paragraph 14 of the statement of claim). The plaintiffs also plead in paragraph 15 of the statement of claim that, on 24 February 2021, aerial photographs were taken by drone “*directly over*” the lands at Trammon in both daylight and at night. These photographs were sent to Meath County Council in relation to a complaint about activity on the Properties. It is pleaded that these acts of “*unlawful drone overflight*” amount to a trespass by the defendant and a breach by the defendant of the provisions of Commission Implementing Regulation (EU) 2019/947 of 24 May 2019 on the rules and procedures for the operation of unmanned aircraft. It is also alleged that the defendant’s trespass constitutes a significant danger to persons working at the quarries and also thereby exposes the plaintiffs to significant financial risk in respect of their quarry operations.

8. The defence delivered 26 May 2021 denies that the defendant has ever entered any of the Properties at any time. The defendant denies that he has ever unlawfully flown, controlled, directed and operated a drone above and/or in the airspace of the plaintiffs’ properties in June 2024, February 2021 or at any time (paragraph 19). The defendant says he did not engage in any acts of unlawful drone overflight which amounted to trespass on the plaintiffs’ lands. The plaintiffs point to the use of the word “*unlawfully*” in this averment as limiting what it in fact says. The defendant also pleads at paragraph 21 of his defence that he has never been the operator of a drone which engaged in acts of trespass in February 2021 as alleged.
9. The affidavit of the second-named plaintiff sworn on 10 March 2021 in the context of the interlocutory application refers to the difficulty with drones flying “*overhead*” or “*over*” or “*above*” the Properties. Letters from the plaintiffs’ solicitors to the defendant

exhibited at JK3 and 2-JK3 to Mr Keegan’s affidavits confirm that “*the act of overflying amounts to both trespass and nuisance*” and “*the over flying of our clients property amounts to a deliberate trespass...*”. There is a broader averment at paragraph 18 of Mr Keegan’s affidavit where he states: “*Furthermore, it is very concerning to have operators of specialist equipment within the quarry distracted by a drone operating in their vicinity. In addition, workers have a right to privacy as they go about their normal work at the quarry*”. However, the case as pleaded is a case involving trespass and not a case concerning privacy. This point is of some importance in the context of the disputed category of discovery to which I now refer.

The disputed category of discovery

- 10.** There is one category of discovery in dispute between the parties, namely category ‘5’ of the plaintiffs’ notice of motion.
- 11.** Under that category, the plaintiffs seek the following:

“All documents that record or evidence the use of a drone owned and/or operated by the defendant in the following locations and on the following dates:

- (a) In the month of June 2020 at, over or in the vicinity of the plaintiff’s lands at Trammon;*
- (b) On 18 February 2021 at, over or in the vicinity of lands on which the first named plaintiff operates a quarry at Ballyonan, Clonard Co Kildare which said lands are comprised in Folio 29356F Co Kildare;*
- (c) In the period between (and including) 24 February 2021 and 26 February 2021 at, over or in the vicinity of the plaintiff’s lands at Trammon.*

Which said documents are to include, but not limited to, any flight data or gps data relating to any such drone and any video footage or photographs taken by a drone owned or operated by the defendant on the above specified dates”.

- 12.** The reasons given in the voluntary discovery request dated 23 February 2022 for discovery of this particular category include the plaintiffs’ assertion that

“there is therefore a dispute of fact between the parties as to whether a drone owned or operated by the defendant did in fact fly over the plaintiff’s lands in the manner particularised in the statement of claim. That dispute will require to be determined at the trial of the action prior to this court determining whether or not the defendant did in fact trespass upon the plaintiff’s lands by reason of a drone owned or operated by the defendant flying at, over or in the vicinity of the plaintiff’s lands.”

- 13.** I confess that I find this reasoning somewhat confusing. While I agree with the first sentence quoted above, the second sentence does not seem to follow logically from the first. The dispute on this issue which the trial judge will have to determine (and in respect of which discovery should relate) is whether a drone owned or operated by the defendant trespassed on the plaintiffs’ lands by flying over those lands as pleaded in the statement of claim. There is no claim in the proceedings for a breach of privacy rights by, for example, drones taking photographs from areas outside lands owned by the plaintiffs. The claim is for trespass which, of necessity, requires there to be an incursion onto the property owned by the plaintiffs. I do not have to determine for the purposes of this application how far into the airspace the plaintiffs’ property rights extend. What is clear is that there are no ownership rights held by the plaintiffs in lands that they do not own and by extension in the airspace over such lands. There can be no trespass to the plaintiffs’ lands unless there is an unauthorised entry onto those lands. Activity on

property owned by another party “*in the vicinity of*” the plaintiffs’ land would not constitute trespass to the plaintiffs’ lands. Such activity might be relevant for other purposes but not for the claim of trespass which is the subject of these proceedings.

14. The defendant has agreed to make discovery of the documents requested limited to those relating to drone flights “*on, or over*” the Properties but he is not willing to make discovery of those documents relating to drone flights “*at, over or in the vicinity of*” the Properties.

15. Thus the issue in dispute is the use of the words “*or in the vicinity of*”. That difference in phraseology is the sole point in dispute between the parties.

16. This may at first glance appear to be a dispute without any particular substance.

However, there is a practical difference in the position of both parties. The plaintiffs state that they are not agreeable to the defendant’s suggested wording as they say this would entitle the defendant to determine where the vertical barrier is for the purposes of trespass and that this is a matter for the trial judge. The plaintiffs also say that they should be entitled to the discovery they have sought in light of the test outlined in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano* (1882) 11 Q.B.D 55. According to this test, a document is relevant where it is reasonable to suppose that it contains information which may either directly or indirectly enable the party seeking discovery either to advance his case or to damage the case of his adversary. The plaintiffs say that discovery of the documents regarding the use of a drone “*in the vicinity of*” the Properties will enable them to damage the defendant’s case that he has not trespassed on the relevant dates. I do not agree with this proposition for the reasons outlined above.

17. The defendant says that the Properties have been clearly identified and that trespass only occurs where there is an incursion onto those properties or into the airspace above those properties. They point to the pleadings in this case which refer, as I have previously outlined, to a complaint of drones flying “*over*” or “*above*” the Properties.
18. The defendant’s mother lives within 400m of the boundary to the property at Trammon and the defendant resides with her. It is clear to me that the defendant could have lawfully used his drone in his mother’s garden during the relevant time periods and this could be deemed to be “*in the vicinity of*” the plaintiff’s lands and so be captured by this category of discovery albeit that this information would have nothing whatsoever to do with the subject matter of these proceedings.
19. When questioned, counsel for the plaintiffs acknowledged that the phrase “*in the vicinity of*” was somewhat vague and that he could see some basis on which the defendant might object to it. He suggested that another phrase might be substituted by this Court including words such as “adjacent to”, “next to”, “adjoining” or “proximate”. He also suggested that perhaps a particular measurement such as 50m or 100m from the land boundaries might be considered.
20. Parties should ensure insofar as possible that categories of discovery requested are not only necessary but are also clear and concise. The objective is to ensure that there should be no difficulty in ascertaining precisely what is and what is not in scope and, accordingly, whether a party has met their relevant discovery obligation. Too often there are agreements made by parties to discover documents which, in practical terms, are simply impossible to interpret with accuracy. This issue is at the heart of most discovery challenges and a key reason why unnecessary costs are incurred in completing and challenging discovery before the courts.

21. The phraseology suggested by the plaintiffs is, in my view, too vague and appears to be impossible to interpret with accuracy. I believe that the boundaries of the Properties are the relevant criteria for a trespass claim and this is covered by the phrase “*on or over*”. The wider suggested category “*in the vicinity of*” would capture documents that are entirely irrelevant to the plaintiffs’ pleaded case of trespass. I am not satisfied that there is any necessity for discovery of the documents sought by the plaintiffs nor do I believe that such discovery would lead to any costs savings at trial – indeed the opposite is the case.
22. For those reasons, I will not order discovery in the terms sought by the plaintiffs. Noting that the defendant has agreed to make discovery of the relevant material relating to drone flights “*on or over*” the Properties, I will order that the discovery of category 5 should be on the basis suggested by the defendant.

Order of this Court

23. The defendant should make discovery in the following terms within 12 weeks from the date of perfection of the Order. The deponent will be the defendant Mr Kieran Cummins.
24. The discovery to be made should be in the following terms - to reflect the categories and the terms agreed between the parties and this Court’s decision in relation to category 5:

“ Category 1

Any video footage or photographs taken by, or on behalf of, the Defendant on 16 January 2021 of the lands owned and operated by the plaintiffs at Trammon (as defined in the statement of claim), or of any persons on the said lands at Trammon, and any documents recording or evidencing the fact and/or content of such video footage or photographs.

Category 2

All documents that record or evidence the whereabouts of the Defendant on the morning of 16 January 2021.

Category 3

In lieu of making discovery of this category the Defendant will include an averment in his Affidavit of Discovery that he owned and operated a drone in the period between 1 June 2020 to 28 February 2021

Category 4

All documents that record or evidence any application made by, or on behalf of, the Defendant:

- (a) for a Specific Operating Permission from the Irish Aviation Authority; and
- (b) to register a drone owned or operated by the defendant with the Irish Aviation Authority.

Category 5

All documents that record or evidence the use of the drone owned and/or operated by the Defendant in the following locations and on the following dates:

- (a) In the month of June 2020 on or over the plaintiff's lands at Trammon;
- (b) On 18 February 2021 on or over the lands on which the first named plaintiff operates a quarry at Ballyonan, Clonard County Kildare which said lands are comprised in Folio 29356F Co Kildare;
- (c) In the period between (and including) 24 February 2021 and 26 February 2021, on or over, the plaintiffs' lands at Trammon.

Which said documents are to include, but not limited to, any flight data or gps data relating to any such drone and any video footage or photographs taken by a drone owned or operated by the defendant on the above specified dates.

Category 6

All documents that record or evidence:

- (a) any agreement between the Defendant and the Kilsaran Group of companies, or any person associated with the Kilsaran Group of companies, whereupon the Defendant agreed to take any steps to frustrate the business operations of the plaintiffs (including, but not limited to) objecting to applications for planning or making complaints in respect of any Works or Use (as those terms are defined in the Planning and Development Act 2000) on the plaintiff's lands or, alternatively, agreeing not to take such steps against the Kilsaran Group of companies; and
- (b) the receipt of any money or benefit in kind by the defendant from the Kilsaran Group of companies or any person associated with the Kilsaran Group of companies".

25. I also order, as agreed by the parties, that the costs of this motion be awarded in favour of the plaintiffs, to be adjudicated in default of agreement and with a stay thereon pending determination of these proceedings.