

THE HIGH COURT

[2014 No. 7728 P.]

[2014 No. 139 COM]

BETWEEN

BRENDAN McCLEARY AND BRENDAN HAMILTON

PLAINTIFFS

AND

ALLIED IRISH BANK PLC

AND

MARCUS PURCELL AND LUKE CHARLETON

DEFENDANTS

JUDGMENT of Ms. Justice Creedon delivered on the 15 day of November, 2017

Background

1. There are three discovery motions before the court for determination. Two motions taken by the plaintiffs against the first named defendant and one motion taken by the first named defendant against the plaintiffs. These motions arise from High Court plenary proceedings initiated by the plaintiffs against the first, second and third named defendants seeking damages and other reliefs. The proceedings concern a number of loans extended by the first named defendant to the plaintiffs both severely and jointly which the first named defendant has sought to recover. The plaintiffs contend that a number of the facility letters are forged rendering all of the mortgages unenforceable and the subsequent appointment of receivers invalid. The plaintiffs are seeking damages, exemplary damages and punitive damages against all defendants and other ancillary orders. The defendants have lodged a defence and counterclaim.

Legal context

2. The law on inter parties discovery is well settled. The relevant provision of the Superior Courts rules is Order 31, Rule 12, which dictates that the court must be satisfied that the documents sought are relevant to the issues in the proceedings and that discovery is necessary for disposing fairly of the matter or for saving costs. In *Anglo Irish Bank Corporation Ltd v. Flanagan* [2011] IEHC 114 . Geoghegan J's states at p. 5, par.10:

"In accordance with the well established principles, the first named defendant must satisfy this Court for the purposes of O. 31, r. 12 that the documents in respect of which he seeks discovery are documents within the possession, power or procurement of the plaintiff and are:

- (i) relevant to the issues in the proceedings, and
- (ii) necessary for disposing fairly of the matter or for saving costs."

3. The burden of satisfying the court with regard to these requirements lies with the applicant.

Relevance

4. The documents sought to be discovered by the applicant have to be relevant to the matter in issue. The case of *Compagnie Financière Commerciale Pacifique v. Peruvian Guano Company* (1882) 11 Q.B.D. 55, in particular the judgment of Brett L.J., sets out the test in this regard. It is worth setting out the relevant passage at p.63, which has been repeatedly approved and applied in subsequent cases:

"It seems to me that every document relates to the matters in question in the action which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may*-not which *must*-directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either or these two consequences."

5. The test in *Compagnie Financière Commerciale du Pacifique v. Peruvian Guano Company* has been approved and applied in this jurisdiction in numerous cases, including *Ryanair p.l.c. v. Aer Rianta c.p.t.* [2003] 4 IR 264. In this case, Fennelly J stated at p. 275, that the definition by Brett LJ:

"Remains the universally accepted test of what is the primary requirement for discovery, namely the relevance of the documents sought."

It is further well established that relevance must be tested by the pleadings and particulars (*Hannon v. Commissioners of Public Works* [2001] IEHC 59, p. 3171 par.2).

Necessity

6. Order 31, Rule. 12(5) provides that an order for discovery shall not be made if the court is of the opinion that it is not necessary either for disposing fairly of the case or for saving costs. The burden of establishing necessity also lies with the applicant. In the case of *Miggin (A Minor) v. Heath Service Executive* [2010] 4 IR 338, Hanna J. expressed the view at p. 346, that:

"The guiding consideration in evaluating the necessity for discovery is the overriding interest in the administration of justice."

and that, in his opinion, the term "necessary" does not connote absolute necessity in this context.

Proportionality

7. While there is no specific reference in Order 31, rule 12 to proportionality, it has

been repeatedly noted in case law as a relevant consideration in assessing whether the requirement of necessity has been satisfied. In *Ryanair p.l.c. v. Aer Rianta c.p.t.* [2003] 4 IR 264, Fennelly J, at p. 277, opined that:

"The court, in exercising the broad discretion conferred upon it by O. 31, r. 12(2) and (3), must have regard to the issues in the action as they appear from the pleadings and the reasons furnished by the applicant to show that the specified categories of documents are required. It should also 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."

8. Murray J expanded on this in his judgment in *Framus Ltd v. CRH p.l.c.* [2004] 2 IR 20, at p. 38, of his judgment, he held:

"I think it follows that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial. That is not to gainsay in any sense that the primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues."

9. The Supreme Court in *Dome Telecom Ltd v Eircom Ltd.* [2008] 2 IR 726 is also instructive here. Geoghegan J's acknowledges at p. 739 of his judgment:

"But discovery may be 'necessary' and yet so disproportionate as to render it unreasonable for a court to benefit the party seeking such discovery by making the order. For example, one could conceive of cases where the expense of what might otherwise be "necessary" discovery would put the party out of business. That might not necessarily prevent the order being made but a court would have to weigh up that factor quite heavily in considering whether it should make the order."

Motions before the court

10. The court is aware that a considerable amount of discovery has been agreed between the parties. At the outset of this hearing the court was also informed that the motion between the plaintiffs and the second and third named defendants had been agreed and was struck out as between the parties. What remains to be considered by the court are two motions brought by the plaintiffs against the first named defendant, Allied Irish Bank and a third motion brought by the first named defendant against the first named plaintiff, Mr. Brendan McCleary. Before considering these motions separately and in detail, the court considers it useful to address in general terms the arguments made by counsel. It is not for this court, of course, to consider the merits or demerits of the plenary proceedings but the court must consider them only insofar as it is necessary in order to determine whether the tests of relevance and necessity have been met.

11. The essence of the plaintiffs' substantive case is that a number of facility letters, on which the first named defendant seeks to rely, are forgeries. Arising from this, is the plaintiffs' assertion that the mortgages grounded on these facility letters are unenforceable and that the first named defendant is not entitled to make demands or appoint receivers on foot of this alleged forgery. It is also alleged that the first named defendant deliberately engineered a series of defaults on the part of the plaintiffs, which served as the basis for the issuance of demand letters and the appointment of receivers.

12. While the substantive case will be determined by the trial court, discovery is a critically important part of the litigation process as it allows the parties to seek to examine material relevant to the issues between the parties including material, which may, not which must, directly or indirectly enable the applicant either to advance his own case or to damage the case of his adversary. The jurisprudence allows for a robust approach to be taken by the court while carefully balancing the need to ensure that the procedure is not used by either side as a wasteful fishing exercise, causing unnecessary delay or expense.

Specific motions

13. The court will now turn to the motions and will deal with them in the order in which they were dealt with before the court. In the first instance the court turns to the first motion of the first named plaintiff as presented by counsel for the plaintiffs before the court. Paragraph 1 of that motion has nine sub-categories and the court will now deal with those in order.

First Motion taken by the Plaintiffs

Category 1

14. Category 1 includes the following:

"An Order pursuant to Order 31, rule 12 RSC directing the First named Defendant ('The Bank') to make discovery on oath in the prescribed form of the following categories of documents which are, or have been, in the Bank's possession, power, or procurement:

1. All documents created in the period of 1 January, 2005 to 21 February, 2005 evidencing negotiation, approval, offer and acceptance of loan facilities entered into between Mr. McCleary and the Bank, or in which reference is made to Mr McCleary's loans with other financial institutions, including but not limited to those loans secured on the following properties:

- a) 4 Belvedere Square, Dublin 1;
- b) 3 New Terrace, Monaghan;
- c) 80L Lanesborough Court, Dublin 11;
- d) 30 Ollerton Green, London;
- e) 89 Wayman Court, London."

With regard to this category, the court is informed that the defence have made an offer of discovery in terms more limited than those requested by the first named plaintiff. This category relates to the facility letter dated 21st February, 2005. There is a dispute between the parties as to the agreed duration of the term of that loan. The Bank is offering to discover:

"All documents created in the period from the 1st January 2005 to the 21st February 2005 evidencing negotiation, approval, offer and acceptance of loan facilities entered into between Mr. McCleary and the Bank."

What the first named defendant is resisting is the latter part of the plaintiff's request which covers material which may reference Mr. McCleary's extant loans with other financial institutions, including but not limited to those loans secured on the properties outlined.

15. What is at issue between the parties here, as pleaded at para 9 of the Statement of Claim, is the duration of the loan. The first named plaintiff contends that as he already enjoyed the benefit of other long term loans with other lenders, this supports his case that he would not have agreed the much shorter term of 5 years when consolidating his loans with the first named defendant. Counsel for the plaintiff has argued what is being offered by the first named defendant does not include documents which will demonstrate its existing knowledge of Mr. McCleary's extant loans at the time of the negotiation. The first named plaintiff argues that disclosure of such documents is relevant and necessary to determine the issue of the duration of the loan. The court considers that what is requested by the plaintiff in this category is both relevant and necessary and orders that the defendant disclose these documents in compliance with the full terms of the plaintiff's request in this category.

Category 2

16. Category 2 includes the following:

"An Order pursuant to Order 31, rule 12 RSC directing the First named Defendant ('The Bank') to make discovery on oath in the prescribed form of the following categories of documents which are, or have been, in the Bank's possession, power, or procurement:

2. All documents in which reference is made to the negotiation of the 13 November 2009 Facility Letter."

This category covers one facility letter dated 13 November, 2009 and the issue between the parties here is whether this was a ten year loan or a loan repayable on demand. The term of the loan is at issue between the parties and the documents as requested by the first named plaintiff are relevant and necessary to resolve this dispute. As such, the court doth order for discovery be made in terms as requested by the plaintiff.

Categories 3, 4, 5, 6 and 7

17. These categories were all taken together by counsel for the plaintiff. They include

the following:

"An Order pursuant to Order 31, rule 12 RSC directing the First named Defendant ('The Bank') to make discovery on oath in the prescribed form of the following categories of documents which are, or have been, in the Bank's possession, power, or procurement:

3. All documents evidencing or detailing the Bank's decision to establish an investigation into the forgery of the First Named Plaintiff's signatures;

4. All documents evidencing or detailing the investigation's terms of reference, including any documents evidencing or detailing any discussion in relation to such terms of reference;

5. All documents reviewed in the course of the investigation;

6. All correspondence exchanged within the Bank, or by the Bank, its servants or agents, with third parties, regarding or in which reference is made to the investigation or any aspect thereof;

7. All documents evidencing, detailing or in which reference is made to the conclusions reached on foot of the investigation."

18. Categories 3, 4, 5, 6 and 7 all relate to the investigation carried out by Allied Irish

Banks Plc., the first named defendant. A central plank of the plaintiffs' claim is that a number of the facility letters were forged by the Bank. The plaintiffs were informed by the Bank that they were going to establish an investigation into the alleged forgeries. The plaintiffs argue in the substantive plenary proceedings that these forgeries render the mortgages on foot of these facility letters and all mortgages as part of the larger agreement between the parties illegal and unenforceable and the appointment of the receivers invalid. The fact of and the circumstances surrounding these forgeries is at the heart of the plaintiffs claim. The first named plaintiff was told by the first named defendant that it would investigate the signing of the forged facility letters. To date, it has not informed the plaintiffs of the date, terms of reference or outcome of the investigation. The first named defendant contends that this material is not relevant to any outstanding issue between the parties, as it informed Mr. McCleary that it would investigate the alleged forgery and admits that it did not inform him of the terms, date or outcome of the internal inquiry. In addition, Allied Irish Bank Plc. has argued that insofar as Mr. McCleary seeks to challenge its enforcement of facilities and in particular, the circumstances in which demand letters were issued calling in the facilities, this is adequately covered in categories 36, 38 and 40 of the request, which have been agreed.

19. It is the opinion of this court, that these categories do not address the question of

the nature and extent of the first named defendant's knowledge and involvement in the alleged fraud and the nature and quality of said acts of fraud. The court is of the view that the request set out by the plaintiffs for full details in respect of that investigation meet the tests of relevance and necessity and the court doth so order.

Categories 8 and 9

20. Categories 8 and 9 are again taken together and deal with the appointment of the

receivers by Allied Irish Bank Plc. They include the following:

"An Order pursuant to Order 31, rule 12 RSC directing the First named Defendant ('The Bank') to make discovery on oath in the prescribed form of the following categories of documents which are, or have been, in the Bank's possession, power, or procurement:

8. All documents evidencing, detailing or in which reference is made to the purported appointment of the Second and Third Named Defendants as receivers over the following properties of the First Named Plaintiff:

- a) 4, Tirkeenan, Monaghan, County Monaghan;
- b) Lands at Annacramp, Castlelane, County Monaghan;
- c) 80, The Court, Lanesborough, Dublin;
- d) 4 Belvedere Square Dublin
- e) 3 New Terrace, Monaghan.

9. All documents in which reference is made to the Bank's power to appoint a receiver over the following properties of the First Named Plaintiff:

- a) 4, Tirkeenan, Monaghan, County Monaghan;
- b) Lands at Annacramp, Castlelane, County Monaghan;
- c) 80, The Court, Lanesborough, Dublin;
- d) 4 Belvedere Square Dublin
- e) 3 New Terrace, Monaghan."

21. The court accepts the point made by counsel for the first named plaintiff that this category relates to the power of the bank to appoint receivers and the subsequent appointment of receivers. The court is of the view that adequate discovery is not met by the categories agreed between the parties and in those circumstances order that discovery be made in the terms requested by the plaintiff in this category.

Second Motion taken by the Plaintiff

Categories 1, 2 and 3

22. Categories 1, 2 and 3 are to be considered together. They include the following:

"An Order pursuant to Order 31, rule 12 RSC directing the First Named Defendant ("the Bank") to make discovery on oath in the prescribed form of the following categories of documents which are, or have been, in the Bank's possession, power or procurement:

- 1. All documents in which reference is made to the issue and acceptance of the 21 February, 2007 Facility Letter to the Second Named Plaintiff;
- 2. All documents in which reference is made to the issue and acceptance of the 19 June, 2008 Facility Letter to the Second Named Plaintiff;
- 3. All documents in which reference is made to the issue and acceptance of the 7 February, 2009 Facility Letter to the Second Named Plaintiff."

23. The first named defendant has argued that discovery is not required in these categories because the existence of these documents is admitted. However, the court favours the arguments set out by counsel for the plaintiffs, that the second named plaintiff is entitled to these documents and that they are relevant and necessary to establish the Bank's state of knowledge and involvement in the alleged fraud at issue. For those reasons, the court grants discovery of categories 1, 2 and 3.

Category 4

24. This category includes the following:

"An Order pursuant to Order 31, rule 12 RSC directing the First Named Defendant ("the Bank") to make discovery on oath in the prescribed form of the following categories of documents which are, or have been, in the Bank's possession, power or procurement:

- 4. All documents referring to or examined in the course of the Bank's investigation into the forgery of the Second Named Plaintiff's signature on the 21 February, 2007 and 7 February, 2009 Facility Letters."

It relates to the first named defendant's investigation into the alleged forgery, and for reasons set out in relation to the previous motion, the court is of the view that the documents requested by the plaintiff under this category meet both the tests of relevance and necessity and therefore, should be furnished by the first named defendant.

Category 5, 6, 7

25. The categories 5, 6 and 7 include the following:

"An Order pursuant to Order 31, rule 12 RSC directing the First Named Defendant ("the Bank") to make discovery on oath in the prescribed form of the following categories of documents which are, or have been, in the Bank's possession, power or procurement:

- 5. All documents in which reference is made to the issue of demand letters to the Second Named Plaintiff in respect

of his sole accounts, and to the Plaintiffs in relation to their joint accounts;

6. All documents evidencing the issue to and acceptance of the 7 February, 2009 Facility Letter by the Plaintiffs;

7. All documents evidencing the issue and acceptance of the 19 September 2008 Facility Letter relating to purported loan facilities advanced to the Plaintiffs."

With regards to category 5, the court is convinced that the first named defendant's basis for issuing these demand letters is at issue. The plaintiffs argue that they did not have authority to issue same and the defendant argues that it was entitled to do so. Discovery of this category is therefore relevant to the substantive proceedings. The court is not convinced of the first named defendant's contention that this category is too general and broad to be necessary. There are a limited number of demand letters at issue in proceedings and it is the court's view that discovery of these documents are necessary to the administration of justice.

26. The court is also convinced of the relevance and necessity of category 6 and 7 to the substantive claim. These categories relate to joint facilities that the plaintiffs allege were forged by the first named defendant. The defendant denies the signatures are forgeries and further denies the terms are invalid or unenforceable. This represents a clear issue between the parties and the court is convinced of the relevance of this category to same. The court is also persuaded that these documents are necessary to dispose of matters especially the question of whether the Bank is entitled to rely on the terms of these facility letters against the plaintiff. The court hereby grants discovery of the documents in these categories.

Category 8

27. Category 8 includes the following:

"An Order pursuant to Order 31, rule 12 RSC directing the First Named Defendant ("the Bank") to make discovery on oath in the prescribed form of the following categories of documents which are, or have been, in the Bank's possession, power or procurement:

8. All documents and communications passing between the Bank, its servants or agents, and the Second or Third named Defendants, including their staff and agents, up to and including 12 March, 2015 via any means including phone and text concerning their appointments as receivers over the properties of the Plaintiffs at Tinavera, Glaslough, Co. Monaghan and Glenmount, Glen Road, Monaghan."

28. The first named defendant has conceded to a very similar category that differs only in respect of the cut-off date. The defendant agrees to furnish the plaintiffs with all documents and communications passing between it and the receivers prior to the 1 August, 2014 and the plaintiffs seek all such documents and communications up to and including 12 March, 2015. It has been argued that the latter is the date to which the receivers continued to act in respect of one of the two properties listed above. The court, therefore orders for discovery of this category up to and including the 12 March, 2015.

Third motion taken by the First Named Defendant

29. There is just one category to be decided under this notice of motion taken by Allied Irish Banks Plc. against the first named plaintiff, Brendan McCleary:

"An Order pursuant to Order 32, rule 12(1) of the Rules of this Honourable Court, directing the First Named Plaintiff herein to make discovery on oath of the documents specified herein which are or have been in the First Named Plaintiff's possession, power or procurement relating to matters in question in these proceedings:

A. All documents evidencing communications between Mr. McCleary and any solicitor, estate agent or other adviser, financial or otherwise relating to the acquisition by Mr McCleary of, and/or the execution by Mr McCleary of mortgages or charges over, the following properties:

- (a) 39 Tinsley Road, Bethnal Green, London E1 3DA
- (b) 89 Wayman Court, Eleanor Road, London E8 3NL
- (c) 30 Ollerton Green, Bow, London E3 2LG
- (d) Unit 1 and Unit 2, The Diamond, Monaghan
- (e) Unit 3A and Unit 3B, Milltown Business park, Monaghan
- (f) Flat 13, Merino Court, 154 Lever Street, London EC1V 8BG
- (g) 18 Barnabus House, Central Street, London EC1V 8BY
- (h) 17 Charlton Court, 75 Brecknock Road, London N7 OBU
- (i) 14 Paterson Court, St. Luke's Estate, London EC1V 9EX
- (j) 16 Gibson Close, London E1 4JT
- (k) 80 The Court, Lanesborough, Dublin 11
- (l) 3 New Terrace, Belgium Square, Co. Monaghan
- (m) 4 Tirkeenan, Co. Monaghan
- (n) Annacramp, Co. Monaghan.

30. The first named defendant asserts that what is being sought are documents evidencing communications between Mr. McCleary and his professional advisers pertaining to the circumstances surrounding the acquisition of the properties and execution of the

security documents. The Bank argues that Mr. McCleary has put in issue, through his replies to interrogatories, dated 8 May, 2017:

- i) Whether he signed certain facility letters (see for example, reply 1.3 in relation to facility letter dated 21 February, 2005);
- ii) Whether he instructed the drawdown of certain sums of money on foot of facility letters (see for example, reply 1.7 in relation to facility letter dated 21 February, 2005); and
- iii) Whether, in relation to the properties listed at a) to n) in the disputed category above, he signed mortgages over said properties at all (see replies 1.13, 1.35, 1.38, 1.54, 2.14, 4.11, 5.7, 6.8, 8.1, 9.1, 10.1, 11.1, 12.1, and 13.1, respectively). 31. The documents sought under this category are therefore highly probative of the issues arising in this dispute, most notably the first named defendant's entitlement to rely on the facility letters in question and Mr McCleary's knowledge and understanding as to the basis on which he drew down the facilities. As such, the court considers the category to have met the standard for relevance and necessity.

32. The plaintiffs assert that the breath of discovery sought by the first named defendant in this category is oppressive and disproportionate.

33. The court, having considered the arguments made by both the plaintiff and the defendant in respect of this motion and having given due regard to the burden and scale of the discovery sought, is convinced that this category is necessary to advance the first named defendant's counter claim, and is not unduly burdensome so as to make the level of discovery sought disproportionate under the circumstances. The court orders for discovery of documents as set out in that category.

Conclusion

34. This deals with all categories before the court in both the plaintiffs' and first named defendant's motions.