THE HIGH COURT

THE COMMERCIAL COURT

[2018 No. 9736 P.]

BETWEEN

EILEEN COURTNEY

PLAINTIFF

AND

OCM EMRU DEBTCO DAC AND DAVID O'CONNOR

DEFENDANTS

JUDGMENT of Mr. Justice Robert Haughton delivered on 15th day of March, 2019

1. Since the establishment of the National Asset Management Agency ("NAMA") under the NAMA Act 2009, it has under its statutory remit acquired loan facilities and related security, and engaged in realising the sale of impaired debt and the related security at the best price that it can obtain.

2. The price paid by the private equity companies who have frequently acquired such debt/security is generally well below the par value i.e. the actual sums contractually due under the original facility and lending terms agreed between the bank and the borrower.

3. Typically, when NAMA (or its subsidiary National Asset Loan Management Limited ("NALM")) sells a loan book, it does so by way of a competitive sales process resulting in a loan sale agreement with the successful bidder, with completion by way of a transfer or loan sale deed whereby the debt and related security are assigned/transferred to the buyer. One or both of these documents set out in schedules details of the loans and security relating to a borrower or co-borrowers and guarantors, collectively often described as 'connections'. The definitions in the loan sale agreement, and other elements, are often incorporated by reference into the transfer deed.

4. When it comes to court proceedings involving debt recovery or repossession proceedings taken by the acquiring entity, or by debtors seeking injunctions or declarations against them or their receivers, invariably there is extensive redaction by the deponent on behalf of the acquiring entity of copies of the loan sale agreement and loan sale deed exhibited on affidavit, by electronically blacking out all text including definitions in any way related to price, and blacking out, or omitting in their entirety, one or more of the schedules save only in so far as they list the connection the subject of the proceedings. In my experience such redaction is never preceded by any court application seeking leave to redact, and the redaction not infrequently gives rise to suspicion, resentment, and contention.

5. This application pursuant to O. 31 r.15 of the Rules of the Superior Courts raises the question as to whether the plaintiff borrower, whose debt and security are the subject of an (alleged) sale and transfer by NALM to the first named defendant ("OCM") should, *prior to the close of pleadings/discovery and on foot of Notices to Produce for inspection*, be entitled to inspect un-redacted copies of the relevant loan sale agreement and loan sale deed, and in particular those redacted or omitted parts of the documents that bear on the price allocated to the plaintiff's connection, and the price paid generally.

6. The defendant in opposing the application seeks to justify the redaction on the basis of commercial sensitivity, confidentiality and lack of relevance, and on the basis that these are documents of title which are excluded from inspection under Order 31 rule 15 of the Rules of the Superior Courts ("O.31 r.15").

Background

7. By facility dated February 2007, Anglo Irish Bank Corporation plc ("Anglo") agreed to lend to the plaintiff and her late husband David Courtney €1,493,000 for the purpose of funding the purchase of a chalet in France for €1,650,000, repayable on demand, but without prejudice repayable on or before 31st January, 2009, or such later date as Anglo might determine in its absolute discretion. This "Chalet Facility" was secured by a first ranking legal charge over the chalet. The loan monies were drawn down but not repaid and OCM claims that there is €1,609,668.48 due on foot of this facility as of 27th November, 2018.

8. By letter of offer dated 11th January, 2008, Anglo agreed to make four further facilities available to the plaintiff and David Courtney, Facilities A, B, C and D, for maximum amounts of approximately €355,190, €250, €4,000 and €1,270,000 respectively. The purpose was to renew existing facilities granted in February 2006. Security included a first legal charge over commercial units 3, 4, 5 and 9 at Killarney Town Centre, Co. Kerry and the first legal charge over town house numbers 4, 5, 18, 23 and 24, at Killarney Town Centre.

9. Facilities A, B, C and D were expressed to be repayable on demand at Anglo's sole discretion, but without prejudice to this were to be repaid by 30th September, 2008. By certificate dated 31st January, 2008, the borrowers certified that they were not acting as "consumers" in respect of these facilities. The monies had been drawn down on foot of these facilities. They were not repaid and on 9th March, 2018 OCM demanded repayment of €2,160,447.97.

10. These loan facilities and all the related securities were acquired by NAMA/NALM pursuant to the NAMA Act 2009.

11. By arbitration determination and award dated 29th November, 2012, a former judge of the Supreme Court, Finnegan J., made a final and binding determination that the plaintiff was liable to NALM on foot of facility D in the amount of €1,267,129.77 as of 25th September, 2012.

12. On 19th April, 2013, NAMA (including NALM), the plaintiff and the late David Courtney executed an agreement – the "Forbearance Agreement" - under which the plaintiff and David Courtney agreed, acknowledged and undertook that they were jointly and severally liable to NAMA for the several loan facilities, and that they were in default, a specific indebtedness as of 15th March, 2013 was agreed, and they further agreed all amounts due would be repaid in full on or before 5pm on 31st December, 2015.

13. Clause 8 of the Forbearance Agreement provided that it would run until 31st December, 2015 and that, upon termination of the

Forbearance Agreement, the loan facilities would immediately become repayable on demand and NAMA would be entitled to enforce its security. The amounts due were not repaid in full before 5pm on 31st December, 2015. This Forbearance Agreement is relied upon by OCM in these proceedings as an acknowledgment for the purposes of the Statute of Limitations 1957 (as amended).

14. In 2016 NAMA/NALM purported to sell the facilities and the related security as part of the "Project Emerald and Ruby Portfolio" to OCM. Of importance in the present case, and as pleaded in the Statement of Claim delivered on 15th January, 2019, is that in advance of the sale NAMA wrote to the plaintiff on 15th December, 2015 indicating that it was considering selling her loans as part of a portfolio and inviting her representations. On 4th March, 2016 NAMA wrote notifying the plaintiff of its decision to include her loan facilities and related security in the portfolio sale.

15. On 21st March, 2016 the plaintiff sent an email to NAMA attaching her "loan offer letter" offering to purchase her and her late husband's loans for €2 million, commenting and stating:

> "I appreciate that this proposal is below par debt repayment but I feel substantially ahead of the market value and so would warrant consideration as the offer delivers the best possible return for NAMA and the State in a way that minimises risk."

Following further correspondence concerning breakdown of the €2 million by reference to the value placed by the plaintiff on secured assets, NAMA sent a letter dated 31 March 2016 to the plaintiff notifying her of its decision to decline her offer of €2 million.

16. OCM asserts that it was the successful bidder for the portfolio and acquired, *inter alia*, the plaintiff's facilities and related security by virtue of a Loan Sale Deed dated 17th June, 2016, and a Deed of Transfer dated 21st July, 2016. These are the redacted documents in issue on this application.

17. Following this, the plaintiff was notified of the purchase, and between August and November 2016, OCM's agent engaged with accountants retained by the plaintiff. The plaintiff was then classified as a "not co-operating borrower", and an appeal by the plaintiff to OCM against that designation was dismissed. Between November 2017 and September 2018, there was further engagement between OCM's agents and new agents authorised to act on behalf of the plaintiff. During this period formal letters were sent in March 2018 in which the first named defendant demanded repayment of the sums then claimed to be due in respect of all the loan facilities. Then by Deed of Appointment dated 12th March, 2018, OCM purported to appoint the second named defendant as receiver and manager over all the secured properties.

18. Thereafter there appears from correspondence to have been a measure of engagement and cooperation between the plaintiff, OCM's agents and the receiver in relation to the sale or management of certain of the properties in Killarney. This did not last, and by email to Mr. O'Connor dated 9 October, 2018 the plaintiff disputed that she had any liability; the validity of demands made; the validity of the assignment/transfer of the loans and security; and the validity of the appointment of Mr. O'Connor as receiver. Further by letter dated 24 October 2018 the plaintiff's solicitors Harry McCullagh disputed the validity of the appointment of Mr. O'Connor as receiver and requested the return of possession of properties occupied by the receiver/his agents.

19. The plaintiff commenced these proceedings by Plenary Summons issued on 8th November, 2018. In the General Indorsement of Claim, she seeks injunctions prohibiting OCM from appointing a receiver over the scheduled property, assets and undertakings of the plaintiff, and prohibiting the second named defendant from acting as receiver, and declarations that the second named defendant was not validly appointed, that the loan/debt is statute barred, and that the loans and mortgage/charges between the plaintiff and Anglo/NAMA have not been validly assigned to the first named defendant, and damages.

20. In a Notice of Motion issued on 13th November, 2018, grounded on her affidavit sworn on the same day, the plaintiff seeks interlocutory relief in line with the Plenary Summons effectively preventing the second named defendant acting as receiver or manager over the scheduled properties. She avers that the secured properties are currently advertised for sale and that if the second named defendant "will attempt to take possession of and sell the same" and deprive her "of performing assets" this would cause her "irreparable harm". This application for interlocutory relief is pending.

21. On 28th November, 2018 OCM issued a Summary Summons (High Court record no. 2018/1547S) in which it seeks judgment in respect of the loan facilities from the plaintiff in the sum of €3,746,951.79. This is not before the court on the present application.

22. By Notice of Motion issued on 4th December, 2018 and returnable to 10th December, 2018, OCM applied to have the present proceedings admitted to the Commercial List, and the case was admitted by my Order dated 17th December 2018. By a further Notice of Motion issued 4th December, 2018 returnable to this court on 21st January, 2019, Mr. O'Connor sought interlocutory injunctions restraining the plaintiff, her servants or agents from interfering or obstructing Mr. O'Connor from carrying out his functions as receiver, restraining trespass, and ancillary interlocutory orders.

23. In his first grounding affidavit sworn on 4th December, 2018 Mr. Eoin Donnellan, Company Director of OCM, on 4th December, 2018, in support of both the defendants' application to admit these proceedings to the Commercial List and Mr. O'Connor's application for injunctive relief, avers:-

> "34. OCM acquired all of NALM's interest, rights and obligations (including additional rights and claims as defined) in loan assets as defined, which loan assets included Schedule Facilities in Schedule 1, including the Chalet Facility (Connection ID 23, Loan Pack ID LP 1004) and Facilities A, B, C and D (Connection ID 23, Loan Pack ID LP 1003) and the securities relating thereto. NALM certified its interest in the Loan Facilities and the Securities relating thereto pursuant to s. 108 of the NAMA Act. I beg to refer to a true copy of the said Loan Sale Deed dated 17 June 2016 upon which marked with the letters and number "*ED 10*" I have signed my name prior to the swearing hereof. I beg to refer to a true copy of the said Deed of Transfer dated 21 July 2016 upon which marked with the letters and number "*ED 11*" I have signed my name prior to the swearing hereof.
>
> 35. I say and am advised that, pursuant to the Loan Sale Deed dated 17 June 2016 and the Deed of Transfer dated 21 July 2016, OCM acquired NAMA and NALM's interest in both the Arbitration Award and the Forbearance Agreement, which were included in Ancillary Rights and Claims (as defined) and, therefore, in Loan Assets (as defined)."

24. These two exhibits were heavily redacted copies. No leave of the court to exhibit such redacted copies was sought in advance of swearing the affidavit. No explanation is given in this first affidavit for the redaction. There is no indication in this or later affidavits that the defendants sought or relied upon any legal advice prior to exhibiting the redacted copies. Indeed, on considering counsel's submissions and the papers as a whole, I find that it is likely that such redaction occurred on the initiative of OCM without obtaining

prior legal advice.

25. Mr O'Connor also swore an affidavit on 4th December, 2018 in support of the application for interlocutory reliefs. His affidavit does not refer to or explain the redactions of the documents exhibited by Mr. Donnellan, but he does exhibit a copy of the Deed of Appointment of Receiver dated 12th March, 2018 which recites the security documents entered into by the plaintiff and the late David Courtney as well as "the relevant secured obligations" acquired by OCM "pursuant to, *inter alia*, a Loan Sale Deed dated 17 June 2016 between [NALM] and [OCM]". He also exhibits a Deed of Appointment dated 19th November, 2018 supplemental to the Deed of Appointment dated 12th March, 2018 whose stated purpose –

> "…is to confirm, for the avoidance of doubt, that the expression "Receiver" is as defined as a term in clause 1.1 and clause 9.1 of the Security Documents. In all other respects the Original Appointment is hereby confirmed."

This also recites and relies on the Loan Sale Deed dated 17 June, 2016.

26. By Notice to Produce Documents dated 7th December, 2018 served by the plaintiff's solicitors on Beauchamps solicitors for the defendants given pursuant to O. 31 r. 15, the defendants were required within two days to produce for inspection the Loan Sale Deed dated 17th June, 2016, in default of which an application for inspection would be made pursuant to O. 31 r. 18. In an affidavit sworn by the plaintiff on 12th December, 2018, in response to the affidavits of Mr. Donnellan to Mr. O'Connor of 4th December, 2018, the plaintiff referred to the redacted exhibits: -

> *"10. Secondly, the affidavits of Mr. O'Connor and Mr. Donnellan referred to and exhibited redacted documentation. I say this is a matter for legal submission and I am advised that fundamental to scrutiny of the validity of transmission of the original mortgagee's interest to the First Named Defendant and the subsequent appointment of a receiver and whether there is a power of sale is an informed understanding of the First Named Defendant's documents of title. I cannot say what is concealed by the redacted documents now before the Court. I do not know who has effected the concealment or on what purported basis. It may be that it bears on the price at which the loans and security could have been bought out by a third party and whether I should have been allowed to buy out at that price. It may be that it may bear on any number of other issues. I say that it is a fundamentally unfair procedure which should halt the Defendants' application until it is remedied. I have been requesting information since 2016. I am advised that a party should not redact exhibited title documents without a Court Order and in addition that I should be in a fully informed position even for the purpose of considering my response to the Defendants' application for entry."*

The reference to "requesting information since 2016" is a reference to data information requests made by the plaintiff to OCM following notification of the sale/transfer of the loans and securities.

27. A further Notice to Produce Documents dated 17th December, 2018 requiring production for inspection of the Deed of Transfer dated 21st July, 2016, but otherwise in similar terms to the first Notice, was sent by the plaintiff's solicitors to the defendant's solicitors.

28. In his second affidavit sworn on 14th December, 2018 Mr. Donnellan addressed the redaction of these documents: -

> *"5. In para. 10, Ms. Courtney queries the redaction of certain documentation exhibited to my First Affidavit. I say and believe that the redactions contained in the Loan Sale Deed dated 17th June, 2016 and the Deed of Transfer dated 21st July, 2016 were undertaken for reasons of (1) commercial sensitivity (e.g. disclosure of the confidential terms on which the loan sale was completed could adversely impact OCM's ability to "work out" the loans acquired, OCM's ability to negotiate and complete the acquisition of future loan books and NALM's (as the seller) ability to negotiate and complete possible future loan book sales, (2) Bank and/or client confidentiality (e.g. restrictions imposed by data protection legislation requiring the redaction of all personal information relating to other borrowers which do not relate to the within proceedings) and (3) On the basis of irrelevance (e.g. matters which are not relevant to the Plaintiff or the subject matter of the within proceedings). I say, believe and am advised that the said redactions are not relevant to whether the proceedings should be entered [in] the Commercial List of the High Court".*

It is on these grounds that the defendant asserts it is entitled to maintain the redactions/omissions.

29. Following this the plaintiff issued a Notice of Motion dated 18th December 2018, seeking the following reliefs: -

> (1) An Order pursuant to Order 31, rule 18 of the Rules of the Superior Courts that the Defendants, or either of them, allow the Plaintiff's solicitor inspect the Loan Sale Deed dated 17th day of June, 2016 as referred to in the Affidavit of Eoin Donnellan sworn on the 4th day of December 2018 in such place and in such manner as the Court may direct.
>
> (2) If appropriate, an Order pursuant to Order 21, rule 15 of the Rules of the Superior Courts that the Defendants, or either of them, not complying with a notice of inspection issued on the 7th day of December 2018, shall not be at liberty to put any such documents in evidence on their behalf in the proceedings, namely the Loan Sale Deed dated 17th day of June 2016 as referred to in the Affidavit of Eoin Donnellan sworn on the 4th day of December 2018.
>
> (3) If appropriate, an Order pursuant to Order 31, rule 19 of the Rules of the Superior Courts that the issue or question in dispute, namely the Defendants' entitlement to redact certain information from the Loan Sale Deed dated 17th day of June 2016 as referred to in the Affidavit of Eoin Donnellan sworn on the 4th day of December 2018, should be determined before deciding upon the right to inspection.
>
> (4) An order pursuant to Order 40, rule 12 of the Rules of the Superior Courts striking out that part or parts of the Affidavit of David O'Connor sworn on 4th day of December 2018 and the affidavit of Eoin Donnellan sworn on 4th day of December 2018 which refer to "without prejudice" communications.

The issue raised in the fourth claimed relief does not require to be determined as it was not pursued at hearing.

30. In the affidavit sworn by the plaintiff on 18th December, 2018 in support of the application she avers at paragraph 2::-

> *"2. I say that certain loans and securities between your deponent and Anglo-Irish Bank have been allegedly transferred to the First Named Defendant. I say that I never consented to the transfer of my loans being transferred in this way to an unregulated entity. I say that I was told the transfers would carry with them all of my rights. I say that I contend*

that the alleged transfer of loans to the First Named Defendant is unlawful. I say that if they are lawful the alleged rights asserted against me are unenforceable in contract and equity given the contract of the defendant its servants agents and alleged predecessors in title, in breach of fiduciary duty including preventing me from exercising my equity of redemption and/or right to buy out my own loans at a market rate or to compete with others to buy out my own loans. I apprehend my loans and security was used to cross subsidise less marketable loans and security and if that is so and transfers are valid I nevertheless have equitable rights including specific performance to buy out at the price paid by the defendant".

31. The plaintiff's affidavit then refers to the notices to produce and to a letter from the defendant's solicitors of 14th December, 2018 objecting to inspection of the Loan Sale Deed on the grounds that it contains "*commercially sensitive information and/or confidential information which is not necessary for disposing fairly of the cause or matter or for the saving of costs"*. At para.13 the plaintiff avers: -

> *"13. I say and believe, and I am advised that the Defendants cannot unilaterally redact information from a crucial document which they have exhibited in the Affidavit of Mr. Donnellan. The Defendants have not sought a Court Order to the effect.*
>
> *14. I say that the Loan Sale Deed [is] crucial to the First Named Defendant's alleged entitlement to demand repayment of the loans allegedly transferred to it from NAMA and its alleged entitlement to appoint a receiver. I say in the circumstances I am entitled to inspect the Loan Sale Deed.*
>
> *15…*
>
> *16. If this Honourable Court deems fit to allow my solicitor to inspect the said Loan Sale Deed, I undertake to respect the confidentiality of any information relating to any third party named in the document who is not a party to these proceedings. I undertake not to disclose such information."*

Although these averments are specific to the Loan Sale Deed, the Notice to Produce the Deed of Transfer dated 21st July, 2016 is also referred to at para. 12 of the affidavit and it was not disputed that her affidavit and application for inspection applied to both documents. There are in fact two formal Notices of Objection from Beauchamps Solicitors, both dated 18th December, 2018, objecting to a production for inspection on the grounds that "*the redacted portions of [these] and document[s] contain commercially sensitive information and/or confidential information which is not necessary either for disposing fairly of the cause or matter or for the saving of costs*."

32. In response a further affidavit was sworn by Mr. Donnellan on 11th January, 2019, contesting, *inter alia*, the application for inspection. In para. 3 Mr. Donnellan contests the plaintiff's suggestion that her consent was required to validate the transfer of relevant bank assets, and he relies on s.139 of the National Asset Management Agency Act 2009. He contests her averments that the loans are unenforceable against her on the grounds that she was prevented from exercising an equity of redemption or that she was not given the opportunity to buy her own loans. He states:-

> *"I say and believe, that Ms. Courtney was never prevented from exercising her equity of redemption in circumstances where she was never prevented from redeeming her loans at par value. Further, I say that when formal demands were served on Ms. Courtney to repay the sums due and owing by her on foot of the loans the subject of these proceedings, she failed to do so. I say, believe and am advised that Ms. Courtney does not have an entitlement to purchase her loans at a price below par value."*

33. In para. 4 of his affidavit Mr. Donnellan then repeats the basis upon which redaction was undertaken – " (1) commercial sensitivity (2) bank and/or client confidentiality, and (3) irrelevance". At para. 5 he asserts OCM's entitlement to redact the Loan Sale Documents on the basis of established jurisprudence demonstrating that redaction is permissible and does not require a Court Order in advance. In para. 6 he contends that:-

> *"6. In the present context, I say that the Loan Sale Deed and Deed of Transfer as exhibited, contain in un-redacted form all the relevant operative provisions in respect of the transfer of the loans and securities the subject of these proceedings from NALM to OCM and in particular, contain all provisions specifically relevant to the transfer of the indebtedness of Ms. Courtney from NALM to OCM and the proceedings herein. The redacted portions of the Loan Sale Documents contain commercially sensitive information as between NALM and OCM and confidential information relating to third parties, neither of which is necessary to evidence the transfer of the loans the subject of these proceedings. The provision of this information to Ms. Courtney would breach data protection obligations of OCM and NALM and other third party borrowers whose loans are also the subject of the Loan Sale Deed and Deed of Transfer."*

34. Mr. Donnellan then sets out a list of the provisions which have been redacted or excluded, and the basis upon which this has been undertaken. So, for example, in respect of Clause 1.1 he states that:-

> • *"Clause 1.1 – definition of 'Allocated Purchase Price'. This information is commercially sensitive as between the Buyer and Seller and is irrelevant to both Ms. Courtney and the proceedings therein."*

35. In similar fashion he goes through each of the clauses or parts of Schedules that are redacted or excluded, which, as can be seen from the two exhibits are extensive. Thus in the Loan Sale Deed exclusions cover six of the definitions in Clause 1.1, including definitions of "*Administration Fee", "Confidentiality Agreement, and "Deposit*", all said to be commercially sensitive or irrelevant. There are redactions in respect of Clause 6.2 and 6.3 relating to "*the Long Stop Date*" Clause 7, Clause 11.1.3 (2), Clause 11.3.3, Clause 12.5 - Clause 12.12 inclusive, Clause 13.3 and 13.4, Clause 15.3 and 15.4.

36. With regard to redactions in the schedules, Schedule 1 is headed "*List of Connections*" which has 6 columns, the first numbering the entries 1, 2 etc., then columns headed "*Loan Pack ID", "Portfolio", "Connection ID", "Connection Name" and "Allocated Purchase Price (EUR)"*. Only the first page of this is apparent from exhibit "*ED 10*" and this is entirely redacted save for entries 13 and 14 which include reference to "*Connection ID no. 23*", and under "*Connection Name*" there appears "*David Courtney*". The "*Allocated Purchase Price (EUR)"* column entry connection 23 has been blacked out. Also on the basis of commercial sensitivity schedules 2-6 in their entirety have been left out, but Mr. Donnellan's affidavit sets out their headings as follows: -

> "*Schedule 2 'Consideration'*, Schedule 3, "*Wrong Pocket Amount*", Schedule 4 "*Form of Completion Statement*", Schedule 5 "*Completion Deliverables*", and Schedule 6 "*Solvency Certificate*".

Schedule 7 headed *Notice of Assignment* was included and consists of a form of notice sent by NALM to all "obligors". Schedule 10 "*Agreed Term Sales*" was left out because, Mr. Donnellan avers, it includes "*information relating to third party debtors not the subject of the proceedings herein, and the obligation to protect their confidentiality*." Similarly, not included was Schedule 11 "*Contracted Sales*". Schedule 12 "*Connection Agreements"* was wholly redacted. Schedule 13 "*Deed Assignment of Connection Agreements"* was left out. Schedule 14 "*Disclosure Schedule*" was redacted in its entirety. Schedule 15 "*the Non-Transferring Assets*", was virtually redacted in its entirety. Schedule 16 "*NARPS Assets*" was left out. In Schedule 17 headed "*TV Originating Lender Loan Assets*", only disclosed are three Mortgages all dated 30th April 2013 made between the plaintiff and NAMA related to Connection 23.

37. In relation to the Deed of Transfer dated 21st July, 2016 it should be noted that Clause 1.1 provides "*unless otherwise defined herein capitalised terms used herein shall bear the meaning given to them in the Loan Sale Deed*." Schedule 1 headed "*Schedule Facilities"* contains one page, most of which contains redacted entries, leaving four entries related to Connection 23. The "*Document Name*" column describes these as "*Facility Letters*" relating to Anglo and David Courtney and Eileen Courtney, dating from 2007 and 2008. Mr. Donnellan avers that the redacted information relates to third party debtors, and is excluded to protect confidentiality. In Schedule Three, Part A "Irish Transfer Deeds" are listed by generic description, and in Part B "Non-Irish Transfer Deeds", all but two of which are redacted - Mr. Donnellan avers the documentation not relevant to the plaintiff or these proceedings has been redacted.

38. In para. 9 of his affidavit Mr. Donnellan says: -

> "Further, I say that OCM is satisfied for the presiding Judge to review the Loan Sale Documentation in an un-redacted form (save for (i) explicit references to third parties/information which if revealed may lead to the identification of third parties and (ii) the Allocated Purchase Price information in respect of each connection as detailed in Schedule 1 of the Loan Sale Deed) if the Court would be of the view that this would assist it in terms of corroborating my averments in relation to the validity of the transfer of the loans and security the subject of these proceedings and in particular to satisfy the Court that no provision that has been redacted negates or reverses the said transfer."

39. There is one further short replying affidavit sworn by the plaintiff's solicitor Harry McCullagh on 15th January, 2014. At para. 3 he comments on Mr. Donnellan's affidavit saying "*It has now emerged that the exhibits to the initial Affidavits of Mr. Donnellan and Mr. O'Connor were not just redacted but were incomplete*". This is correct, as identified above. He further points out that the decisions on redaction were taken without sight of a Statement of Claim, Defence or Counterclaim – which is also correct, given that the Statement of Claim was not delivered until 15th January 2019. At para. 5 he comments that there is no reference in the defendant's affidavits "*…to any solicitor, or counsel being involved in advising the defendants in deciding what was relevant*". At para. 7 he suggests that no indication has been given as to what is meant by "*Commercial Sensitivity*" in the context of the documents, but this is not in fact correct as Mr. Donnellan at para. 5 of the affidavit which he swore on 14th December 2018 does give two examples – firstly that the disclosure of confidential terms could adversely impact OCM's ability to "*work out*" the loans acquired, and secondly disclosure could affect OCM's ability to negotiate and complete the acquisition of future loan books or complete possible future loan book sales.

Statement of Claim

40. The statement of claim delivered on 15th January 2019 is a lengthy document, but it is necessary to point to certain pleas that arise from the plaintiff's attempt to purchase her loans from NAMA for €2m prior to the sale of the loans and related security to OCM.

> *"24. In considering representations or offers from the Plaintiff NAMA assumed duties including fiduciary duties, duties of good faith, trust and confidence and had a special relationship with the Plaintiff in subsequently putting loans and security up for sale. In the event of breach of those duties the price obtained ameliorated any outstanding liability of the plaintiff in law or in the alternative in equity and informs the conditions which may be imposed by a Court to ensure conscionability and protect the Plaintiff's rights including the equity of redemption a body of equitable rights including but not limited to a right of redemption.*
>
> *25. In the premises, the mortgagee (NAMA and the First Named Defendant) was at all times subject to the following statutory duties, express or implied terms, terms incorporated by statute, duties and rights in equity (having regard to the principle that equity looks to the intent and not the form), pre-requisites to enforceability of loans required by law including equity and the law of maintenance and champerty, obligations not to derogate from grant, fiduciary duties, competition law requirements, duties of care, duties arising from representations and a special relationship, bearing on the enforceability of arrangements, loans and mortgages and the terms on which they may be enforced."*

- In sub-paras. 25.(a)-(ii) the plaintiff makes various sub pleas, including –

  "(g) That the mortgagee may not sell a loan and mortgage with other assets (for example as an inducement to the sale of those other assets or to get more for it than the write down value of those other assets which might otherwise be less saleable or unsaleable) so as to prevent the mortgagor from offering an equal or better price for the loan or mortgage.

  (h) that the mortgagee would not enter into a transaction which savoured of maintenance and champerty.

  (i) That the mortgagee might not sell a loan and mortgage with other assets (for example as an inducement to the sale of those other assets which might otherwise be less saleable or unsaleable) at less that the borrower's offer for the loan or mortgage so as to contract or farm out litigation and encourage litigation.

  (n) That the Plaintiff had an equitable right to redeem at any price or value offered by anyone else, or at least, at a better price or value and should be given an opportunity including relevant information to do so".

- Then, having pleaded fully the correspondence that led to OCM apparently acquiring the loans and related security, and notification of the plaintiff of such acquisition, it is pleaded: -

  "39. The Loans and the Mortgages the subject of these proceedings were allegedly transferred or assigned to the First Named Defendant pursuant to a Loan Sale Deed dated 17 June 2016 and a Deed of Transfer dated 21 July 2016. The Plaintiff is hampered in the preparation of her case and has sought disclosure from the First Named Defendant through various mechanisms. The Plaintiff has not been

furnished with full copies of these documents by the First Named Defendant. The First Named Defendant has engaged in blacking out and omitting portions of documents exhibited to an affidavit in these proceedings. The Plaintiff will as necessary invite adverse inferences from silence and rely upon the doctrine of omnia praesumuntur contra spoliatorem."

- At para. 46 it is pleaded: -

  "The First Named Defendant has thereby prevented the Plaintiff from exercising her contractual and legal rights, at Law or in Equity, including her Equity of Redemption and/or her right to buy out her loans at par from the First Named Defendant or on the same terms as the First Named Defendant has allegedly acquired the Loans and/or Mortgages from the National Assets Management Agency. The First Named defendant has thereby acted in breach of contract, in breach of fiduciary duty, in breach of duty and otherwise unlawfully."

41. Not surprisingly by the time the plaintiff's application for inspection was heard the defendants had not had time to raise particulars or plead to the Statement of Claim. The court has more recently been advised that particulars have been raised by the defendants and answered by the plaintiff, but the defendants now wish to bring an application to dismiss, and do not wish to deliver a defence/counterclaim in advance of such application. On 20th February, 2019 I suspended further directions, and the obligation to file further pleadings, pending the delivery of this ruling.

42. At the hearing of the inspection application the court had the benefit of written and oral legal submissions. At the end of the hearing it was agreed between the parties that I should have sight of un-redacted copies of the Loan Sale Deed and Deed of Transfer to assist in my determination. For this purpose, an affidavit was sworn by another OCM director, Mr. Tony Noonan, on 4th February, 2019, and he exhibited in a sealed envelope true copies of these two documents. He avers that-

> *"On 01 February 2019 I examined the original NAMA counterparts of the Loan Sale Deed and Deed of Transfer and I am satisfied that the copies herein are true copies of the said original documents, save for the fact that the NAMA original counterpart of the said Loan Sale Deed did not contain the OCM execution page."*

While welcoming this joint approach to the court inspecting the documents in their unredacted form, it is appropriate that the court should first address the principles that should be applied.

Order 31

43. O. 31 r.15 provides:-

> *"15. Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings, or affidavit or list of documents reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit copies thereof to be taken; and any party not complying with such notice shall not afterwards be at liberty to put any such documents in evidence on his behalf in such cause or matter, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice; in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit".*

44. It will be noted that O. 31 r. 15 applies not only to documents referenced in pleadings and affidavits, but also more generally to documents listed in affidavits of discovery. O.31 r.15 is the basis for the second order sought by the plaintiff in the Notice of Motion i.e. an order that the defendants not be at liberty to put the Loan Sale Documentation in evidence.

The first order, which seeks an order that the defendants "allow the Plaintiff's solicitor" to inspect the documents, cites O.31 r. 18 which applies to documents disclosed in pleadings or affidavits :-

> *"18.(1) If the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit; and, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit or list of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them and that they are in the possession or power of the other party.*
>
> *(2) An order shall not be made under this rule if and so far as the Court shall be of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs."*

45. The Notice of Motion at the third relief seeks "if appropriate" an order under O. 31 r. 19:-

> *"19. If a party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection."*

The defendants relied on this to support an argument that the court should determine certain issues in the proceedings – in particular the cross injunction applications – first, and await the closing of pleadings, before determining in the context of discovery whether to permit inspection.

46. For the sake of completeness, it should be mentioned that O. 31 r. 16 prescribes Form No. 11 in Appendix C as the appropriate notice seeking production of documents, and O.31 r.17 allows for two days for the recipient of a Form 11 Notice to set forth the requested documents on affidavit – or, if that has already been done, four days from receipt of the Notice for stating a time within the next three days for inspection at that party's office or that of his solicitor, or if objecting, to state the grounds for objection. Nothing turns on rules 16 or 17.

Case law

47. Both Counsel helpfully referred the court to a recent distillation of principles in the application of O.31 r.18 in the judgment of Kennedy J in *Maye v Byrne Wallace solicitors* [2015] IEHC 530. In that case the defendants sought production and inspection

pursuant to O.31 r.18 of a settlement agreement entered into by the plaintiff with NAMA on 2 October 2013. A redacted copy only had been provided. The defendants contended that the settlement agreement was a document by reference to which the plaintiff had grounded a substantial part of its claim, that inspection of the entire document was necessary for disposing fairly of the cause or matter, and that the redaction had been effected in a somewhat random manner and without justifying the confidentiality claimed. Kennedy J stated: –

> "13. It is undisputed that there is no requirement that pleadings must be closed before a notice to produce is served. It is also agreed that documents provided for inspection under Order 31 are subject to an implied undertaking that they will be used only for the purpose of those proceedings.
>
> 14. Order 31, rule 18 is clearly discretionary in its terms and the jurisprudence confirms that the court has a broad discretion, which [sic] such discretion being exercised on the facts of any given case. It is also clear, from an analysis of the jurisprudence, and, on reading Order 31, Rule 18(2), and that an order for inspection will not be made, unless the court is satisfied that it is necessary, either for disposing fairly of the cause or matter, or for saving costs. This was confirmed recently by Costello J in *Lowry v. Mr Justice Moriarty* [2014] IEHC 602. The courts may, and have taken, steps to address the loss of confidentiality by redacting portions of a document or restricting disclosure in an appropriate manner."

48. Kennedy J then recited principles adopted by Kelly J in *Cooper Flynn v. RTE* [2000] 3 IR 344 as enunciated by Browne LJ in *Wallace Smyth Trust Company v. Deloitte* [1997] 1 WLR 257, at page 352: –

> "2. The burden lies on the party seeking inspection to show that that is necessary for the fair disposal of the action. I need not refer further to the question of "saving cost", the other limb of rule 13(1), that not being relevant here.
>
> 3. If no element of confidentiality (or of course, public interest immunity – but that only becomes relevant on the cross-appeal) is asserted in the documents, routinely they will be produced for inspection without the need for a rule 13 hearing on the issue of necessity. As Lord Scarman said in *Air Canada v. Secretary of State for Trade* [1983] 2 AC 394 at page 444: –
>
> "It may well be that where there is no claim of confidentiality or public interest immunity or any objection on the ground privilege, the courts follow a relaxed practice, allowing production on the basis of relevance. This is sensible, bearing in mind the extended meaning given to relevance in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co.* (1882) 11 QBD 55."
>
> 4. If, however, confidentiality is asserted or any other ground of objection arises, rule 13 assumes relevance and it becomes necessary to decide whether inspection is necessary for the fair disposal of the action. As Lord Scarman had earlier said in *Science Research Council v. Nasse* [1980] AC 1028 at pg. 1089: –
>
> "The only complicating factor is the confidential nature of the relevant documents in the possession of the party from whom redress is sought. The production of some of these may be necessary for doing justice to the applicants' case. If production is necessary, they must be produced. The fact of confidence however militates against general orders for discovery and does impose upon the Tribunal the duty of satisfying itself, by inspection if need be, the justice requires disclosure."
>
> 5. Disclosure will be necessary if: (a) it will give "litigious advantage" to the party seeking inspection, *Taylor v Anderton* [1995] 1 WLR 447 at p. 462 and (b) the information sought is not otherwise available to that party by, for example, admissions, or some other form of proceeding (e.g. interrogatories) or from some other source (e.g. *Dolling-Baker v Merrett* [1990] 1 WLR 1205 at p.1214) and (c) such order for disclosure would not be oppressive, perhaps because of the sheer volume of the documents (*CEG Science Research Council v Nasse* [1980] AC 1028 at pg.1076 per Lord Edmond-Davies).
>
> 6. If a *prima facie* case is made out for disclosure, then as several of the speeches in *Science Research Council v. Nasse* make plain, the court will first inspect the documents: (a) to ensure that inspection is indeed necessary (that very safeguard of itself makes a court generally readier to accept the threshold test for disclosure is satisfied) and (b) assuming it is so, to see if the loss of confidentiality involved can be mitigated by: (i) blanking out parts of the documents and/or (ii) limiting the disclosure to legal advisers only… those basic principles I have sought to distil from all of the many authorities which are placed before us. Several passages in the various judgements are relevant; it would however, be wearisome and, I think ultimately unproductive to cite them…".

49. Kennedy J further addressed the issues of relevance and confidentiality at paras 17 and 18: –

> "17. In considering the circumstances in which disclosure is necessary, in terms of Order 31, Kelly J adopted the dicta of Lord Bingham, MR in *Taylor v Anderton* [1995] 1 WLR 447 at pg. 462: –
>
> > "The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and will gain no litigious advantage by seeing it. That, in my judgement, is the test."
>
> 18. It is clear from *Irish Press Publications Ltd v Minister for Enterprise and Employment* [2002] 4 IR 110, the documents may not be discovered due to irrelevance, as well as for reasons of confidentiality. It is also the position, according to *GE Capital Corporate Finance Ltd v. Bankers Trust Company* [1995] 1 WLR 172, that aspects of a sentence may be redacted as long as the general sense of the sentence remains. The real test for redaction, however, appears to be whether the information is relevant, rather than confidential, as observed by Carroll J in *Irish Press*. Clarke J. summarised the relevant principles applicable to discovery, or disclosure, in *Telefonica O2 Ireland Ltd v. Commission for Communications Regulation* [2011] IEHC 265 as follows, at para. 3.2 of the judgement: –
>
> "(1) in order for discovery or disclosure to be appropriate the documents or materials sought must be shown to be relevant.

(2) If the documents are relevant, then confidentiality (as opposed to privilege) does not, of itself, provide a barrier to their disclosure.

(3) The court is required to exercise some balance between the likely materiality of the documents concerned to the issues which are anticipated as being likely to arise in the proceedings, and the degree of confidentiality attaching to the relevant materials. In that context, the confidence of third parties may be given added weight…

(4) In attempting to balance those rights, the court can seek to fashion an appropriate order designed to meet the facts of the individual case so as to protect both the legitimate interests of the party seeking disclosure to ensure that all relevant materials potentially influential on the result of the case are before the court and, to the extent that it may be proportionate, the legitimate interests of confidence asserted…".

50. Kennedy J accepted that "the courts afford a lesser form of protection to assertions of confidentiality in contradistinction to privilege" (para 19). She accepted that the burden lay on Byrne Wallace to demonstrate that disclosure should be made. As to the test for relevance she observed (para 25) that: –

> "It is clear that in order to satisfy the test, the material must enable the person seeking the disclosure to advance his case or damage his opponent's case."

In the case before her the plaintiff had agreed to disclose the clauses in the settlement agreement relevant to her personal finances, but resisted disclosure in open court of information in relation to co-obligors. Rejecting this Kennedy J stated: –

> "21.… How can the defendant cross-examine in court at trial, if restrained in this fashion? This material, in my view, is relevant and is necessary in terms of Order 31, Rule 18 (2) and I do not accept, therefore, that the confidentiality outweighs the proper administration of justice. Whilst the plaintiff opposes the inspection on the basis of relevance, clearly the greater concern for the plaintiff is that of confidentiality. If the documents are relevant, confidentiality does not prevent their disclosure. Whilst it is the position that the court is required to exercise some balance between the materiality of the information and the degree of confidentiality attaching to the information, which is greater in the instance of third parties, it would appear to be too great a restraint on the plaintiff in cross-examination if the information were not to be disclosed in open court.
>
> 22. I will order the inspection of the information at clauses 8.9, 14.1, 14.2 and 15.3, with the condition that the names of the co—obligors should not be mentioned on the pleadings, or in open court, but may be referred to as 'AB' and so on, or in some other manner to be agreed between the parties."

51. Counsel for the defendants emphasised the rationale for permitting redaction by reference to the *GE Capital Corporate Finance Group Ltd v. Bankers Trust* [1995] 1 WLR 172, where Hoffman LJ at p.174 stated: –

> "It has long been the practice that a party is entitled to seal up or cover up parts of a document which he claims to be irrelevant. Bray's *Digest of the Law of Discovery*, 2nd ed. (1910), pp. 55 – 56 puts the matter succinctly:
>
> > "Generally speaking, any part of a document may be sealed up or otherwise concealed under the same conditions as a whole document may be withheld from production; the party's oath for this purpose is as valid in the one case as in the other. The practice is either to schedule to the affidavit of documents those parts only which are relevant, or to schedule the whole document and to seal up those parts which are sworn to be irrelevant;…"

In the same case Dillon LJ at p.177 stated: –

> "The history over the last 100 years of the practice of sealing up or covering over parts of documents which are disclosed on discovery on the ground that those parts are irrelevant is strongly against the other party having any automatic right to see the whole of the document in order to determine for himself whether the parts covered up are indeed irrelevant to the issues in the action. Indeed, the established practice of sealing up or covering over parts of documents would hardly have developed if the other party could immediately break the seal or tear away the cover to see the contents for himself."

52. *GE Capital* was cited with approval by Hedigan J *Irish Bank Resolution Corporation Ltd and Kenmare Property Finance Ltd v. Halpin (*Unreported High Court, 3 November 2015). There the second named plaintiff sought leave to issue execution based on an assignment to it by IBRC of a judgement obtained against a guarantor. The assignment was redacted, but Hedigan J agreed with the submission of the second named plaintiff that the relevant unredacted parts were clear and showed that the assignment of ancillary rights included rights against a guarantor such as the defendant. Hedigan J observed: –

> "6. It is well established that documents may be redacted on the grounds of confidentiality, privilege or relevance, see *GE Capital Corporate Finance Group Ltd v. Bankers Trust Co* [1995] one WLR 172.…
>
> 7. Thus, it is simply not enough for a party to say that he wishes to see the document unredacted since that would necktie the right to redact. He must present some concrete argument that can lead the court to order the un-redaction."

53. *Halpin* was followed in *Launceston Property Finance DAC v. Walls* [2018] IEHC 610 where Noonan J permitted the use by the plaintiff of a heavily redacted loan transfer deed in a summary judgment case. A similar view was taken by Barniville J in *Promontoria (Arrow) Ltd v. Burke* [2018] IEHC 773, where at para 66 he stated: –

> "… I am satisfied, therefore, that in principle it was open to Promontoria to exhibit a copy of the deed in redacted form and to rely on that document as *prima facie* evidence of the transfer of the defendants' loan to Promontoria."

54. The principles established by Browne LJ, as elaborated and applied by Kennedy J in Maye, inform the approach that this court should take. However there are some further factors that may be considered relevant where redaction is concerned.

55. First, while the burden lies on the party seeking inspection to show that it is necessary for the fair disposal of the action, when a *prima facie* case for disclosure is made out it is logical that the burden should then switch to the party seeking redaction to justify that on grounds of relevance, confidentiality, commercial sensitivity, privilege or otherwise. Very often this burden will be academic in

that once a reason for redaction is presented it will be for the court to inspect the document to determine what redaction, if any, may be justified, or what other limitation should be placed on the disclosure (in line with the sixth principle enunciated by Browne L.J.).

56. Secondly redaction can be problematic. Charles Hollander QC in his work on *Documentary Evidence* (13th Ed) highlights the practical difficulties that may be caused by making redactions, at para 10 – 16 [This passage was quoted by Snowden J in *WH Holding Ltd, West Ham United Football Club Ltd v. E20 Stadium LLP* [2018] EWHC 2578 (Ch)]: –

> "In substantial litigation, it is common for documents to be blanked out. However the trend is often to do so unthinkingly, without analysing properly the basis or justification for so doing. When the blanking out is challenged, and the redaction revealed, this can at the least make the lawyers look foolish for having sought to blank out without justification, and worse, can make the client look as though he is trying to hide something. Where material in the document is simply irrelevant, it is unlikely that there will be any point in blanking it out unless it is confidential. Blanking out part of a document always seems to excite interest in the document and the hidden contents for the other side.
>
> But lawyers are increasingly going beyond what is permissible. Large numbers of documents are disclosed with black lines through them in a way which makes it impossible to see what the basis of the redaction is or whether it is appropriate. On examination, too often these documents turn out to have been redacted based on an unjustifiably narrow definition of relevance. Passages redacted turn out to be material after all. Or the purported redaction on the grounds of privilege is made because an expert lawyer is referred to in the document even though there is no reference to legal advice. Sloppy and unjustified redactions seem to have become increasingly popular. Steps need to be taken to stop this. It will often be sensible to ask for the lawyers to ask to see the original unredacted document on terms that the contents are not communicated to the client. There can surely be no objection to this in any case where the redaction is not based on privilege. Where the redaction is based on privilege, then it will be inappropriate to have sight of the other side's document referring to privileged legal advice. But there is no reason why the other side should not be asked to identify with precision the basis of the redaction – not merely whether it is on grounds of privilege, but explaining whether it is referring to legal advice or some other basis.
>
> In *GE Capital* the Court of Appeal said that it was incumbent on the legal adviser to examine the communications in question critically to see whether there are any non—privileged parts which should be disclosed to the other side. At present, however, the right to redact is being regularly abused, and the courts should be vigilant to stop this."

57. These comments reflect this court's experience of being faced with heavily redacted loan sale documents in many cases in recent years. Almost invariably the redactions have not been reviewed by lawyers, but appear, as in the present case, to be client led. This is not as it should be. Such redactions frequently cause suspicion and resentment, and their justification has absorbed considerable court time – see for example decisions in *Promontoria (Aran) Ltd v. Wallace* [2016] IEHC 50 (McGovern J), *English v. Promontoria (Aran) Ltd (No.2)* [2017] IEHC 322 (Murphy J), and my own decision in *Vitgeson Limited & anor. v O'Brien And Promontoria (Arrow) Ltd* (Unreported, High Court, 7 November 2017) (transcript of judgment) where at full trial I permitted copies of loan sale deeds – with minimal redaction of third party information only - to be adduced in evidence as an exception to the so-called 'best evidence rule'.

58. Thirdly, one aspect that recent Irish case law does not address directly, and which arises centrally in the present case, is the particular wording of Order 31, r.15, which refers to production of documents referenced in "…pleadings, or affidavits", "…unless he shall satisfy the court that such document relates to his own title, he being a defendant to the cause or matter..".

59. This wording, with one difference which will be mentioned later, mirrors O.31 r. 15 in the Rules of the Supreme Court (Ireland) 1905. Counsel for the plaintiff referred the court to an old line of authorities mentioned in the commentary on rule 15 in Wylie "*The Judicature Acts*" (1905) that give some indication of the provenance of this exception. The relevant parts state :-

> *"The rule in Chancery was that a mere statement in the answer of a document which the party was not bound to produce: Glover v Hall, to Phil. 484; or a mere reference to a document relating exclusively to the defendant's title: Atkyns v Wright, 14 Ves. 211; would not entitle the applicant to its production; but when a party stated the effect of a document relating to his own title, which he had in his possession and craved leave to refer to it for greater certainty, it was held that he was bound to produce it: Hardman v Ellames, and 2M. & K. 745 …*
>
> *In such a case, however, the defendant should apply at once for inspection under. r.18, infra: Quilter v. Heatley, 23 Ch. D. 42. Inspection will be limited to what is referred to in the pleadings or affidavits.."*

60. Counsel relied on this extract to counter the defendants' argument that rule 15 did not apply to the loan sale documents because they were documents of title only referred to and exhibited by Mr. Donnellan to demonstrate OCM's entitlement to the loan facilities and related securities i.e. "that such document relates only to his own title, he being a defendant to the cause or matter".

61. *Hardman v. Ellames* (1834) 2 M&K 732 was opened to the court. There a claim that the plaintiff had acquired title by adverse possession was met by the defendant in an answer relying on his own title including deeds which for greater certainty he craved leave to refer to when produced. An application was brought for production, and an appeal from the Master of the Rolls was heard by the Lord Commissioners. Lord Commissioner Shadwell gave the judgment of the court. The first paragraph of the judgment reads:-

> *"The objective of the present application is to discharge an order made by the Master of the Rolls upon the defendant for the production of certain indentures admitted by the Defendant to be in his possession. The Defendant has by his answer in part set forth the deeds in question, which are comprised in a schedule next to the answer, as being documents in his possession, and he has for greater certainty craved leave to refer to the indentures themselves when produced. If by so doing the defendant has made the indentures part of his answer, it seems to follow as a necessary consequence that the plaintiff, having a right to read the whole of the Defendant's answer, has a right to read the documents so made a part of his answer".*

62. Shadwell LC. went on to distinguish between three situations – first where the documents may not be referred to but may be admitted to be in a defendant's possession, secondly, where they may be referred to and not admitted to be in his possession, and thirdly where they may be in part set forth and shortly stated in an answer, as in the case before the court. In the first situation the authorities supported the right not to produce them, and in the second situation if the instrument was not in the defendant's possession production would be refused. Turning then to the third situation, at p.758, Shadwell LJ stated:-

> "It appears, therefore, upon a review of the cases, to be perfectly settled that where a Defendant in his answer states a

> document shortly or partially, and for the sake of greater caution, refers to the document in order to shew that the effect of the document has been accurately stated, in such a case the Court will order the document to be produced. It was said, in the present case, that the document ought not to be produced, because it only manifests the Defendant's title; *but the answer to that is, in the first place, that it may by possibility do something more than merely manifest the Defendant's title*. It would be a strange thing to say that the Defendant should at the hearing have the advantage of other parts of the deed than those set forth in the answer, and that the Plaintiff who looks to the answer for information, should not be at liberty to avail himself of a knowledge of the deed. It seems to be consistent with justice, that if the Defendant makes a document a part of his answer, the Plaintiff is entitled to know what that document is, because he has a right, at the hearing, to read such parts of the Defendant's answer as he thinks fit".

Emphasis is added to the sentence particularly relied on by the Plaintiff. This seems to reflect the second and fourth principles as more recently stated by Browne LJ, namely that disclosure may be necessary for "the fair disposal of the action" and that disclosure will be necessary if the document "will give litigious advantage".

63. This was followed in *M'Intosh v. Great Western Ry Co (1849) 1 Mac & G 73* where Cottenham LC stated at p.[77]:

> "… if a party refers to a document and sets out a part of the document and then refers to it, he cannot afterwards tell the plaintiff that he shall not see the document, because the plaintiff is not bound to take the defendant's representation of the document. If the defendant uses it for any purpose, he must enable the plaintiff to see that it is used for a proper purpose, or whether it is not more beneficial to the plaintiff then the defendant thinks proper to admit."

64. Counsel for the plaintiff conceded in argument that the documents in question related to the defendant's title to the loans/security, but argued that they came within the third situation addressed by Shadwell L.C. in *Hardman v Ellames* and should be produced because they "may by possibility do something more than manifest the Defendant's title". His argument was in effect that the exception in relation to title documents in Rule 15 should be construed consistently with the jurisprudence that pre-dated its introduction, and be limited in its scope.

65. Counsel next referred the court to *Quilter v. Heatly* 23 Ch.D 42. It is important to note that this case was heard in 1882 and therefore postdates the introduction of Order 31 in 1875 and involved consideration of Rules 14-18 related to production and inspection. It related to entries in books and two letters referred to by the plaintiff in his statement of claim, production of which was sought by the defendant soon after delivery of same. Chitty J held that production should not be ordered until a defence had been delivered, but this was overturned on appeal. The Headnote records that the Court of Appeal held –

> "…that production must be ordered at once of documents referred to in the pleadings unless some special reason against it can be shewn, and that the plaintiff must produce his books, with the usual liberty to seal up the parts other than the entries, and must also produce the letters written to himself…".

66. Lindley LJ emphasised the distinction between discovery, and an application for production, and stated, at p.50:

> "… But as to documents referred to in the pleadings the case is different. The general rules as to discovery of documents are intended to give a party discovery of all documents relating to the case which are in his adversary's possession unless there is some sufficient ground for refusing production. Rules 14 – 17 of Order xxxi are very differently expressed, and are confined to documents mentioned in the pleadings or affidavits. *These rules were evidently intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings*."[Costello J drew the same distinction in *Lowry v. Mr. Justice Moriarty* [2014] 1 IR 820, at p. 824 (para.8-9) in respect of the present day Rules 15 and 18. However she does not address the possibility that the added reference to "list of documents" in the present Rule 15 includes discovery documents in the rules relating to production.]

[Emphasis added].

67. This points to a difference between the old Rule 15, which only applied to pleadings and affidavits, and the present Rule 15 which extends to a "pleadings, or affidavit or list of documents". "List of documents" would seem to refer to documents listed in the course of discovery. However in my view there remains a relevant distinction in that documents referred to in pleadings and affidavits are likely to occupy a more central role – at least from the pleader or deponent's perspective – than documents which a party is obliged to list after pleadings are closed. In some cases – such as Kennedy J found to be the case in respect of the settlement agreement in *Maye* – the document may be central to the claim and, by virtue of that fact alone, be one which the defence is entitled to inspect.

68. Counsel relied on this decision firstly to emphasise that O 31 r.15 applies to affidavits as well as to pleadings – something that is in fact expressly stated in the rule – and secondly to suggest that the burden is on the party refusing production to show some special reason against it. However counsel accepted that more recent authority in this jurisdiction – which I have referred to earlier in this judgment - places the onus on the party seeking production to satisfy the court of its entitlement, but argued that such cases were distinguishable as they related to summary judgment applications. I do not accept this latter argument. In particular it seems to me that the decisions in *Wallace* and *Maye*, where Kelly J and Kennedy J respectively fully accepted that the burden lay on the party seeking inspection. represent the current law, subject to the comments that I have made earlier about the burden switching to the party seeking redaction to justify it or give some reason that would lead the court to inspect the full document.

69. There is recent Irish authority to support Counsel's arguments. The dictum of Lindley LJ in Quilter as to "same advantage" was recently referred to with approval by Baker J in *Playboy Enterprises International Incorporated v. Entertainment Media Networks Ltd* [2015] IEHC 102 as an authority in favour of compelling production to the defendant under O. 31 r. 15, in response to a notice for particulars, of firstly, photographs of Kate Moss in respect of which the plaintiff claimed copyright, and secondly the "exclusive licence" under which it was pleaded such entitlement arose. Baker J stated: –

> "36. This case is between the most obvious one where the document is at the centre of a claim, and the other end of the spectrum where a document might be necessary to understand any frailty in the factual nexus or background facts, which might offer a full or partial defence or otherwise. What is sought is production of the documents, primarily photographs, which it is alleged were reproduced. These documents it seems to me do form the basis of, or more correctly the starting point for, the plea of various rights of the plaintiff on foot of which the claim is brought. The defendant is entitled to now know exactly what photographs are alleged to have been reproduced, and for example the defendant needs to know whether all or some of the photographs to which links were allegedly put on its website were the ones in issue or whether some differences can be gleaned in the photographs that were allegedly so reproduced and those in respect of which the plaintiff claims to have rights and which are asserted to have been infringed. My view is that the production of the

photographs is properly one that should be ordered at this stage, and that is because the photographs are central to the claim and how the claim is defended.

37. The other class of documents that is sought is the exclusive licence which the plaintiff pleads it has in the works. That licence is probably contained in or may be gleaned from a number of documents, but again it is breach of this licence and the rights arising from the exclusive nature of the licence that give rise to the claim. The document or documents are not sought in order to more properly understand the pleaded factual nexus, or in order to more properly understand an entire context in which the claim is made, including in particular the claim for losses which are alleged to be quantifiable, but is central to the plea, or some of the pleas, in the statement of claim. Again I consider that production of the documents showing the licence or licences the plaintiff claims to have in the works ought to be ordered at this stage.

38. My view is tempered to a large extent by the general proposition I outlined above, namely that complex commercial litigation ought not to be unduly cumbersome, and the parties ought to be forthright in the production of documents which will in due course be disclosed in the course of the litigation process, whether through discovery or cross examination or other investigations. To withhold the documents at this stage when these documents are not merely relevant but also central, and a foundation stone of the plea, is not in the interests of the parties, the proper conduct of litigation, or in the interest of the cost-effective processing of such litigation."

70. Another older Irish case relied upon by counsel for the plaintiff was the Court of Appeal decision in *Hunter v. Dublin, Wicklow and Wexford Railway Company* (1891) Vol. XXVIII L.R.I. 489. The plaintiff marked judgment by default in an action brought to recover damages for trespass to and flooding of the plaintiff's lands caused by the railway. The defendants applied to set aside the judgment. An affidavit was filed on behalf of the defendants by their solicitor Mr. Keogh, setting out their defence to the action – namely the Statute of Limitations, and that the property did not belong to the plaintiff. Mr. Keogh relied on a deed of the 15 February 1861, for the purchase of a tramway by the defendants from one Hodgson at the time they were extending their line to Gorey. As the original could not be found, a copy was exhibited. The judgment and interlocutory injunction was set aside on 11 July 1890, after which no further steps were taken in the action, owing to proposals for compromise being made. On 21 January 1891 the plaintiff applied to the defendants for inspection of the deed, a copy of which had been exhibited in the defendant solicitor's affidavit. The Court of Appeal unanimously reversed the decision of the Queen's Bench Division and held that the plaintiff was entitled to inspection under Order 31 of the rules of the Supreme Court, 1877 notwithstanding that a Statement of Claim had yet to be delivered.

71. Fitzgibbon LJ at page 495 referred to Order 31 and rules 13 – 17 (now largely replicated by Order 31 rules 14 – 18), and in particular former rule 17, now replicated by rule 18: –

"Rule 17 is most important: – "Except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, the application shall be founded upon an affidavit," etc. I can find no ground for limiting "affidavits" in that Rule to any one class of affidavits. If a party has referred to a document in any affidavit, and has thereby discovered its existence, and relied upon it, he thereby leaves himself open to have production of it ordered, unless he can prove special cause to the contrary. The document now sought was relied on by the defendants on their motion to set aside the judgment, and was referred to in an affidavit filed on their behalf to show that the lands were not the defendant's lands, but the plaintiff's. In other words the defendants wanted the judgment to be set aside, and the plaintiff to be allowed to go on to trial in order to find out that the land was his own. Why should they not now let him see the evidence on which they relied in support of that contention? I think the principle laid down by Coleridge J in *Tebbutt v Ambler* [7 Dowl.674] was a very good one, that if a party makes an exhibit of the document, he thereupon clogs it with the same conditions as if he had actually brought it into Court, and gives an implied undertaking to allow the opposite party to inspect and take a copy. I wish to guard myself from deciding that there are no cases in which a party may not be excused from producing a document which he has referred in an affidavit…."

72. While Counsel for the plaintiff relied on this line of authorities, counsel for OCM relied on the last part of this quote from Fitzgibbon LJ in arguing that there are cases in which a party may be excused from producing a document or a complete document, such as commercial sensitivity, confidentiality or irrelevance.

73. It is difficult to discern from the decisions referred to in Wylie precisely why the old Rule 15 was framed to except from production a defendant's documents which "relate only to his own title". It seems to have originated from old decisions in Chancery which favoured landowners and discouraged a challenge to the ownership where this involved any reliance on the landowner's own title documents. See for example the first case cited in Wylie, *Glover v.Hall* 2 Phil. 484, a title dispute in which Lord Chancellor Cottenham stated At p. 489:

"The Plaintiff's title, therefore, being founded upon the deed of 1804, no subsequent transactions in which Samuel Glover may have engaged can affect that title. But all the deeds the production of which is required, except the deed creating the term and the deed of 1810, are acts of owners of the estate subsequent to the creation of the term, and cannot, therefore, constitute any part of the Plaintiff's alleged title, and, therefore, according to the established rule, are not liable to be produced upon the plaintiff's application."

The other decisions referenced by Wylie also appear to relate to documents of title *to land*. It may be reasonable to suppose that the exception in Rule 15 was carried into the Rules of the Superior Courts 1986 unthinkingly and without any full understanding of its *raison d'être*. Whatever the reason for this, with the developments in jurisprudence in relation to the production, discovery and inspection of documents, it now seems something of an anachronism. It should also be noted that, not long after the introduction of Order 31 in 1875, the Conveyancing Act, 1881 introduced a new statutory right for a mortgagor to inspect, where none existed before [See Wylie 'The Land and Conveyancing Law Reform Act, 2009: Annotations and Commentary' (1 December 2009), p.263 fn.1.], as follows:-

"16. (1) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own expenses in this behalf, to inspect and make copies of abstracts or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee."

This entitlement of mortgagors, such as the plaintiff, is now re-enacted in section 91 of the Land and Conveyancing Law Reform Act, 2009.

74. Furthermore it may be questioned whether Rule 15, or the rule in Chancery that preceded it, were ever intended to apply to documents relating to the assignment of choses in action, such as debts due under facilities or other arrangements between bank and

borrower – particularly the large scale loan transfers in the State that are a feature of the last decade. Unlike a transfer of an interest in land, the assignment of a debt by A to B, of its nature involves a third party, the debtor, to whom notice of the assignment must be given, and whose former banking relationship is now with a different party.

75. For so long as the title documents exception in O.31 r.15 remains part of a statutory instrument it represents procedural law which this court is required to apply. However in the absence of any clear countervailing argument it may be reasonable to limit its scope to documents of title to land, or at any rate not to extend its application to loan sale documents which by their very nature relate not "only" to the assignees own title but also affect the title and legal obligations of the debtor.

76. Finally some reference should be made to the more general argument pursued by Counsel for the plaintiff to the effect that Article 34.1 militated against redaction: –

> "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

In *Re R. Limited* [1989] 1 IR 126 the Supreme Court (Walsh, Griffin and Hederman JJ; Finlay CJ and Hamilton P dissenting) overturned a decision of the High Court that oppression proceedings pursuant to section 205 of the Companies Act 1963 should be held in camera, something that could be permitted pursuant to subsection (7) when "the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company". The majority held that the specific exceptions to the administration of justice in public permitted them by Article 34 were limited to those cases which were "prescribed by law" and where it was shown that the publicity, by itself, would deny justice as between the parties. Walsh J at page 134 stated –

> "The issue before this Court touches a fundamental principle of the administration of justice in a democratic state, namely the administration of justice in public. Article 34 of the Constitution provides that justice shall be administered in courts established by law and shall be administered in public save in such special and limited circumstances as may be prescribed by law. The actual presence of the public is never necessary but the administration of justice in public does require that the doors of the courts must be open so that members of the general public may come and see for themselves that justice is done. It is in no way necessary that the members of the public to whom the courts are open should themselves have any particular interest in the cases or that they should have had any business in the courts. Justice is administered in public on behalf of all of the inhabitants of the State."

After expressing doubts as to the justification for section 205(7) "unless it involved the disclosure of a secret process", Walsh J stated, at page 137: –

> "However, be that as it may, it has been so enacted by the Oireachtas. But in my view that does not obviate the overriding consideration of doing justice. In seeking to avail of the protection apparently offered by the sub-section the party seeking it must be able to satisfy the court that not only would the disclosure of information be seriously prejudicial to the legitimate interests of the company, but it must be shown that a public hearing of the whole or of that part of the proceedings which it is sought to have heard other than in a public court would fall short of the doing of justice."

77. I do consider that the general thrust of Article 34.1 is something that the court should bear in mind when considering whether and to what extent redaction may be permitted. The foundation for redaction may be commercial sensitivity, privilege (which is regarded in EU law as a fundamental right, although it is not constitutionally protected) or irrelevance, but there is a competing constitutional right to have justice administered in public, and openness in the use and production of documents relied on by a litigant is part of that right. I agree with the sentiment expressed by Baker J in *Playboy* that in commercial cases, possibly all cases, the starting position is that the parties should be "forthright in the production of documents".

78. Counsel for the plaintiff also argued that the older decisions were consistent, by analogy, with the judgment of Hardiman J in the Supreme Court in *Hannigan v. D.P.P.* [2001] 1 IR 378, a decision on whether privilege had been waived over the entirety of a letter between the DPP and a Superintendent where a considerable proportion of the letter had been referred to and relied upon by the respondent in judicial review proceedings. At page 383, Hardiman J stated: –

> "Apart from these observations, the status of a document from the point of privilege or immunity from disclosure, changes once it has been referred to in pleadings or affidavit. Matthews and Malek's *Discovery* (London 1992) at para. 9.15 stated: –
>
> > "The general rule is that where privilege material is deployed in court in an interlocutory application, privilege in that and any associated material is waived…"
>
> The basis of this rule as discussed in *Nenea Karteria Maritime Company Ltd v. Atlantic and Great Lakes Steamships Corporation (No.2)* [1981] Com. L.R. 139 as follows: –
>
> > "… the opposite party…must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question."

Thus counsel argued that in exhibiting the loan sale deeds the defendants chose to 'deploy' them and cannot now seek to redact or omit parts.

79. While *Hannigan* and subsequent decisions on privilege favour disclosure they are distinguishable because they are authorities for the proposition that waiver in respect of part of a privileged document may be held to be implied waiver of the rest of that document. The present case does not involve non-disclosure based on privilege, but rather on the basis of commercial sensitivity/confidentiality/irrelevance, and it seems to me that the principles set out earlier are the ones that the court should apply.

Decision

80. I approach the application in the first instance without inspection of the Loan Sale Deed or Deed of Transfer by considering whether the plaintiff has made out a *prima facie* case for disclosure.

81. The two deeds are not merely documents of title. It is true that they are exhibited and relied upon by the defendants to prove the sale and transfer by NALM to OCM of the security/mortgages in respect of the plaintiff's indebtedness. However they are also relied upon to show the acquisition by OCM of the Anglo/NAMA/NALM interest in the facilities, the Arbitration Award, and the Forbearance Agreement. They are also relied upon in the Deeds of Appointment of Mr O'Connor as the basis for his appointment as

receiver.

In this sense, to adopt the words of Shadwell LC, the Loan Sale Deeds do "something more than merely manifest the Defendant's title".

82. Further they are complex multi-faceted documents, and even in their redacted form it is apparent that they include inter-dependent and related clauses. Definitions in the Loan Sale Deed are applied to the entire document, and are incorporated by reference into the Deed of Transfer. Clause 19.6 of the Loan Sale Deed is a 'Whole Agreement' clause that provides that, in combination with the Deed of Transfer and certain other specified 'Transfer Documents', they "set out the entire, complete and exclusive deed and understanding between the Parties". Clearly the two deeds themselves are interdependent. For the reasons given earlier in this judgment, I do not consider that these documents come within the scope of 'documents of title' as that term is to be narrowly construed for the purposes of O.31 r.15. They are more analogous to the licence that was considered by Baker J in *Playboy*, or the Settlement Agreement considered by Kennedy J in *Maye*.

83. Many of the redactions on their face also give rise to difficulty. For instance, clause 6 of the Loan Sale Deed headed 'Condition Precedent', has blanked out most of the material in sub-clause 6.2 under the heading "If Completion has not occurred by the Long Stop Date", but the reader has no means of establishing what those consequences might be or whether the Long Stop Date was extended, provision for which appears to be made in clause 6.3, the text of which is blanked out. Clause 7 headed "Removal of Assets from the Portfolio" is entirely blanked out, and the plaintiff might legitimately wonder whether her assets were "removed". Such is the difficulty that the redactions cause in understanding these documents that Mr. Donnellan in his Affidavit sworn on 11th January, 2019 was compelled to explain more fully the content of these and many other redacted clauses, 'without prejudice' to the claims of commercial sensitivity, confidentiality and irrelevance. Absent his explanations the reader is left without any proper understanding.

84. I am satisfied that understanding the Loan Sale Deeds as a whole is relevant to the plaintiff's pleaded claims, and this is unfairly impeded by the redactions. More specifically the redacted parts of the loan sale documents related to price, including any price attributable to the plaintiff's connection, are relevant to claims pleaded in the Statement of Claim. In particular, they have relevance to the pleas in paragraph 24 in relation to claims of breach of fiduciary duty in considering the plaintiff's offer to purchase her connection for €2 million, and the breaches of duty alleged in paragraph 25, including claims of maintenance and champerty, and sale at a price below which the plaintiff was prepared to buy or offer.

85. This is not to say that such claims, some of which may be novel, are stateable. That will be for another day if the defendants bring an application to dismiss in *limine*. It is a determination that as matters stand redacted parts of the loan sale deeds are fairly required to afford a proper understanding of these key documents, and clearly relevant to the case that the plaintiff seeks to make out.

86. Accordingly I am satisfied that disclosure of such redacted parts is necessary for doing justice to the plaintiff's case, and for fair disposal of the interlocutory applications that are pending before the court. The disclosure will give "litigious advantage" to the plaintiff, and it is information that is not otherwise available to her.

87. Counsel for the defendants suggested the court should avail of O.31 r.19 and defer making an order for production/inspection pending determination of the interlocutory applications, and cited in aid Clarke J in *Telefonica* where, at para.3.3 and 3.4 it is made clear that a postponement of the disclosure may be ordered if it is not clear at the time of the application that disclosure is necessary for the proper resolution of proceedings. He also relied on the judgment of McKechnie J in *Keating v RTE and the Commissioner of An Garda Siochana* [2013] IESC 22, a libel action in which the plaintiff sought non-party discovery from the Commissioner. Addressing the 'Purpose of Discovery' and what may amount to a 'mere fishing expedition', McKechnie J at para.62 states:-

> "…it seems clear, at least in principle, that a sharp distinction exists between situations where a party, be he plaintiff or defendant, seeks discovery to support or advance his particular viewpoint and where such is sought for the purposes of making or formulating a claim which otherwise does not exist. In other words, discovery is an aid to viable action or defence, or an issue in either, but not a means in itself to establish one."

88. Whilst not making any concessions Counsel argued that disclosure is not necessary for the plaintiff to argue, in support of her applications for interlocutory injunctions, that there is a fair question to be tried, and submitted that it was sought solely to establish a cause of action. I cannot agree, having regard to the fact, not disputed, that this plaintiff attempted to purchase her loan and security for €2 million shortly before the connection was sold by NALM to OCM. She is not casting in the dark, and has delivered a Statement of Claim setting out her stall – insofar as she can without seeing the two deeds. Leaving aside the possibility that the plaintiff might be faced with a higher onus of proof at the interlocutory hearing i.e. of satisfying the court that there is a serious question to be tried, it seems to me that if the plaintiff is left in the dark as to the provisions of the loan sale documents relating to price she is likely to be at litigious disadvantage in arguing that there are fair issues to be tried, albeit that some of them are, admittedly, novel, which she wishes to pursue, and in arguing for (or against, as far as the defendants motion is concerned) the grant of equitable relief.

89. I am also satisfied that disclosure will not be oppressive. This is not a case in which the sheer volume of documents might give rise to oppression.

90. As to confidentiality, the definition of Confidentiality Agreement is blanked out in the Loan Sale Deed! The separate Confidentiality Agreement has not been disclosed at all. Clause 19.1 of the Loan Sale Deed then provides for mutual confidentiality between NALM and OCM in respect of "Confidential Information [as defined in the Confidentiality Agreement] unless otherwise required by law or regulation" .

91. It is well established that the courts afford a lesser form of protection to confidentiality than it does to privilege or commercial sensitivity, and this is something that can be protected by suitable undertakings. In *Ambiorix Ltd v. Minister for the Environment (No.1)* [1992] 1 I.R. 277 the Supreme Court stated, per Finlay CJ at p. 286: –

> "As a matter of general principle, of course, a party obtaining the production of documents by discovery in an action is prohibited by law from making any use of any description of such documents or the information contained in them otherwise than for the purpose of the action. To go outside that prohibition is to commit contempt of court. Furthermore, the court has an inherent jurisdiction, I am satisfied, to take such steps as are necessary to regulate the production of documents so as to prohibit any infringement of this restriction."

I have quoted earlier from Clarke J in *Telefonica* in which he stated that in the balancing of rights the court can seek to fashion an

appropriate order designed to protect the legitimate interests of the party seeking disclosure and of the party asserting confidentiality. In balancing the competing rights in the present case I am satisfied that appropriate orders can be made that permit disclosure but should protect all relevant parties.

92. As to commercial sensitivity, I accept for the purposes of this application the evidence of Mr Donnellan in paragraph 5 of his affidavit sworn on 14th December, 2018 where he suggests this "could adversely impact….OCM's ability to negotiate and complete the acquisition of future loan books and NALM's (as the seller) ability to negotiate and complete possible future loan book sales". However the plaintiff is not a competitor, and in my view the court can adequately protect OCM's commercial interest by limiting the persons to whom disclosure may be made, and the purpose of that disclosure, and by providing that no wider disclosure or use can be made without further leave of the court.

93. Mr. Donnellan also asserts commercial sensitivity in that disclosure could adversely affect "…OCM's ability to 'work out' the loans acquired". Presumably he means that it may be more difficult to obtain payment, whether voluntarily or by enforcement process. Even if this is so, I am not satisfied that this in itself is a valid reason for permitting redaction of price sensitive provisions (other than those related specifically to third parties which should be redacted for reasons of privacy – an aspect that is addressed next). It is possible that it might be more difficult to negotiate asset recovery from a debtor having knowledge of such provisions, but the debtor is unlikely to have such knowledge in advance of court proceedings due to the policy of redaction that is usually adopted. When recourse to the court is required the party who has acquired the loan and security is in the same position as any other party entitled to enforce payment of a debt – they have available to them the full panoply of procedures and court powers provided for in the Rules of the Superior Courts, 1986, and the legislation and common law related to enforcement. It is the court's duty, where the entitlement to enforcement arises, to make appropriate orders, and it is the obligation of other arms of government, such as sheriffs and the Official Assignee, to aid execution, and this applies whether or not the debtor becomes aware of price sensitive information.

94. Insofar as the confidentiality applies to information in the loan sale documents concerning the loans and security of other connections, this is data personal to third parties who have no involvement in these proceedings, and is covered by data protection law. Clause 16.2 of the Loan Sale Deed provides that OCM "…shall become the data controller of the Transferring Personal Data…". Any order for further disclosure must therefore permit redaction from the documents of the names of these third parties and information that could lead to their identification. It would be wholly unacceptable if the court were to permit the plaintiff access to this information which could enable the plaintiff, for instance, to solicit evidence from such third parties in support of the case she seeks to make.

Post inspection by the court
95. Having inspected the unredacted Loan Sale Deed and Deed of Transfer I have found no reason to depart from the conclusions just stated. There is no question but that consideration of these documents with the Schedules in largely unredacted form is necessary to enable the reader to properly understand their operation. While it can be argued that many of the provisions are, taken in isolation, irrelevant to any case that the plaintiff wishes to make out, the deeds as a whole are clearly relevant, and the continued redaction of certain provisions/Schedules, or the omission of Schedules, is not necessary or warranted for the protection of confidentiality or the commercial interests of OCM *provided* due safeguards are put in place.

96. I will therefore order the disclosure of less redacted copies of the Loan Sale Deed and Deed of Transfer. *Subject to limited redactions hereinafter specified full copies of the Loan Sale Deed and Deed of Transfer must be disclosed.*

Loan Sale Deed
1) The clauses relating to price, and in particular related to the Allocated Purchase Price, are clearly relevant and must be disclosed.

2) The details given in Schedule 1 across 6 columns in respect of the plaintiff's Connection are clearly relevant, and must be disclosed. This includes the figure for Allocated Purchase Price in respect of "David Courtney", and the details of "Loan Pack ID given in lines 12-19 (some of which is currently redacted).

3) I will also direct disclosure of the last line of Schedule 1, which sets forth "TOTAL (Cut-Off Date Purchase Price)" in respect of all the connections combined Allocated Purchase Price. This information will enable the plaintiff's advisors to calculate, tentatively or approximately, the proportion of the Deposit or overall consideration that *it might* be suggested was paid in consideration of the acquisition of the Courtney connection, although clearly other factors may be in play. I am of the view that no further figures in Schedule 1 would advance this position.

4) When the plaintiff's advisors are provided with this level of information I cannot presently see any justification for it to be further disseminated to a personal insolvency practitioner or other expert, with the attendant greater risk of further use or dissemination of such commercially sensitive information for purposes not related to these proceedings.

5) The defendants are entitled to maintain the redaction of all other information in Schedule 1 (as at present in "ED 10") because this is private data referable to other named connections and refers to the Allocated Purchase Prices referable to their connections which is not relevant to any claim that the plaintiff may wish to pursue, and is data the disclosure of which is not necessary.

6) None of the 'Agreed Term Sales' details of which appear in Schedule 10 of the Loan Sale Deed relate to the Courtney connection, and the contents of Schedule 10 should be redacted in their entirety to protect data personal to other connections.

7) Precisely the same applies to Schedule 11 'Contracted Sales', and its contents should be redacted in their entirety.

8) 'Schedule 12-Connection Agreements' has one entry referable to connection 23 and that must be disclosed, but the rest of the contents of Schedule 12 must be redacted.

9) Schedule 14 must be disclosed in its entirety.

10) Schedule 15 'The Non-Transferring Assets', Part 1 'Excluded Charges' has one entry referable to connection 23, which must be disclosed, but otherwise should be redacted in its entirety as it relates only to other connections.

11) Schedule 15 Part 2 must be redacted as it is referable to other connections.

12) Schedule 16 must be disclosed.

13) Schedule 17 – 'The Originating Lender Loan Assets' must be disclosed as in "ED 10" i.e. entries 1,2 and 3 only, but all other

entries relate to other connections and must be redacted.

Deed of Transfer
14) The main text must be disclosed in its entirety.

15) 'Schedule One – Scheduled Facilities'. Currently this is redacted save in respect of four entries related to connection 23 and naming the Courtneys. The unredacted Schedule One by reference to connection 23 in the first column lists 9 other Facility letters but none of these bears the names of the plaintiff or David Courtney or either of them, and the Facility descriptions all give the names of other parties. *This needs to be explained to the court to enable it to determine whether the redaction should be maintained.*

16) Schedule Two is already fully disclosed.

17) I can see no valid reason for redactions appearing in Schedule Three, Part B, and it must be disclosed in its entirety.

Undertakings
97. Subject to hearing Counsel further in relation to the order and undertakings that must be given by the plaintiff and her legal team I would propose ordering the following:

> a) An order limited in time will be made for production by the defendants to the plaintiff's solicitors of copies of the Loan Sale Deed and Deed of Transfer redacted only to the extent permitted by this judgment.
>
> b) Inspection of such documents shall be limited to the plaintiff and her solicitor having conduct of the case and counsel only, without further leave of the court.
>
> c) This order will be made on the undertaking of the plaintiff to be given under oath in open court, and to be given by her Counsel and her solicitors –
>
> > (i) Not to use any of these documents or the information in them otherwise than for the purposes of this action.
> >
> > (ii) Not to use or mention the commercially sensitive information (as that is identified in Mr. Donnellan's affidavits), and in particular, but without prejudice to the generality of this undertaking, any price sensitive information, in these documents, in open court (by spoken word or otherwise) or in any documents or electronic transmissions (other than secure *inter partes* correspondence or correspondence between solicitor and Counsel) including further pleadings, requests for particulars and replies, or affidavits, save with redaction agreed *inter partes* or with leave of the court.
> >
> > (iii) That if there is any change of representation of the plaintiff undertakings in similar terms will be obtained by the plaintiff's solicitor having conduct of the case from the incoming solicitors/Counsel and will be copied by the outgoing solicitor to the defendants' solicitors and the Commercial List registrar.

98. It is not intended by such order to close off the plaintiff from relying at interlocutory hearings or at trial on any relevant information arising from the Loan Sale Deeds, even if it is commercially sensitive – far from it. However, the mode of reliance that best protects the commercially sensitive information will be the subject of further direction from the court as the need arises.

99. The Affidavit of Tony Noonan sworn on 4th February, 2019 exhibiting true copies of the original Loan Sale Deed and Deed of Transfer will be retained in court but the exhibits (which were in a sealed envelope only opened by and seen by the court) will be returned to the defendants' solicitors when this judgment is delivered.