THE HIGH COURT

COMMERCIAL

[2019/324 S]

BETWEEN

Everyday Finance Designated Activity Company

PLAINTIFFS

AND

Enda Woods and Ciaran McNamara

DEFENDANTS

EX-TEMPORE JUDGMENT of Mr. Justice Denis McDonald delivered on 19 July, 2019

1. This is an application in Summary Summons proceedings for an order pursuant to Order 31, Rule 18, that the Plaintiff produce certain documents which are referred to in the indorsement of claim on the Summary Summons. There are a number of documents identified in the Notice of Motion which I will consider individually in a moment. Before doing so, it is necessary to set out some of the relevant facts, the first being that this is a claim for payment of just over €4m alleged to be due on foot of a loan facility or a number of loan facilities advanced by Allied Irish Banks plc to the Defendants.

2. The Plaintiffs claim to be the successors in title to Allied Irish Banks by virtue of a Deed of Transfer dated 2nd August 2018, as amended and restated by a Deed of Amendment dated 22nd October 2018. Notice of the assignment was given to the debtors on the

8th August 2018, that is to say prior to the Deed of Amendment of 22nd October 2018. The Letters of Demand were subsequently issued by Link Asset Services on behalf of the Plaintiff on the 16th January 2019. The Defendants vehemently dispute the entitlement of the Plaintiff to make demand and say that the demand is contrary to an arrangement which they reached with Allied Irish Banks in 2010 as to how the loan accounts were to be conducted and which they contend they have honoured fully such that no entitlement to make a demand has accrued.

3. The Defendants also dispute the Plaintiffs title to sue them. On affidavit, it was said that this was because they claim that Allied Irish Banks had no entitlement under the contractual arrangements with them to assign the loans or the underlying security over Blackrock House. But this was expanded upon in submissions yesterday to say that title to sue was in issue more widely such that the Defendants do not accept that the Deed of Transfer and Amendment Deed were effective. In making that submission, the Defendants suggested that the very fact that the Deed of Amendment was required in October 2018 gives rise to a question as to the effectiveness of the transfer and they ask why was a second deed required. That is a very brief overview of the basic background to the application.

4. It is next necessary to consider very briefly the legal test that an applicant for an order under Order 31, Rule 18, must meet. The test is set out in sub rule 2:

> *"An order shall not be made under this rule if and insofar 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."*

The test essentially is: is the production of the document necessary to dispose fairly of the cause or matter. I am not sure that it is really necessary to put any gloss on those words but the case law suggests that disclosure will be necessary where

> (a) it will give litigious advantage to the party seeking inspection and
>
> (b) where the information is not available to the party seeking inspection by some other means.

The case law also shows very clearly that the party seeking inspection has the burden of satisfying the Court that inspection is in fact necessary in the sense described.

5. Bearing that test and bearing also that burden in mind, I now turn to the individual documents the subject matter of the present application. Paragraph 1(i) of the Notice of Motion seeks a copy of a mortgage dated 11th August 2005. A copy mortgage dated the 12th August 2005 has been provided but the date of the mortgage which is referred to in the indorsement of claim is stated to be the 11th August 2005. It may seem at first sight that, if a Plaintiff has chosen to refer to a document in the indorsement of claim, then the document must be relevant and should be produced, but that ignores the test that applies under Order 31, Rule 18(2) and the burden on the moving party which I have earlier described. These are Summary Summons proceedings to recover a debt. Although the mortgage is referred to in the indorsement of claim it is not in fact relevant to the debt claim and the Plaintiff has confirmed in the course of the hearing that it does not rely on it to advance its claim. In those circumstances, I cannot see any basis on which it could be said that the inspection of the mortgage is necessary in order to dispose of the application for summary judgment fairly. Yesterday, Mr. Howard suggested that the mortgage might possibly contain a term that, in some way, supports the case his clients seek to make about the arrangement entered into with Allied Irish Banks in 2010 but that seems to me to be pure speculation on his part. No reasoned argument was advanced to support the speculation and more importantly, as paragraph 6 of Mr. McNamara's affidavit makes clear, the basis of the Defendants' defence is an arrangement said to be arrived at in 2010, such that it is impossible to see how the provisions of the mortgage executed in 2005 can be said to be relevant to that arrangement. I therefore refuse the order sought at paragraph 1(i) of the Notice of Motion.

6. The second relief which is set out in paragraph 1(ii) of the Notice of Motion is described as "Terms and conditions dated 4th February 2008." And that refers to paragraph 10 of the indorsement of claim. But, in fact, what paragraph 10 of the indorsement of claim says is that the Defendants signed their acceptance of the terms and conditions dated 4th February 2008. That is borne out by the exhibit at page 61 of Book A, which shows that the acceptance form was signed by the Defendants and is dated 4th February 2008. The Defendants have been given the terms and conditions in question and therefore, no order is required in respect of paragraph 1(ii) of the Notice of Motion.

7. For completeness, a point was raised yesterday about the reference to 03/07 on page 65 of Book A, which is where the relevant copy of the terms and conditions are to be found. But, if that is relevant, it is a matter for the substantive hearing. The document is as it is and the key thing is that it has already been produced.

8. Paragraph 1(iii) deals with the guarantee of 2005 given by the Defendants' wives. Again, although the guarantee is mentioned in the indorsement of claim, it is not relied on in these proceedings and, therefore, for similar reasons as I set out in relation to the mortgage, I am of the view that the Defendants have not satisfied the test of necessity and accordingly the order sought at paragraph 1(iii) is refused.

9. The next matters to be dealt with can conveniently be dealt with together. They are the matters set out at (iv) and (v) of paragraph 1 and they relate to the Deed of Transfer and Amended Deed of Transfer. These documents are relied on in the indorsement of claim. Furthermore, as noted earlier, the Defendants contest the Plaintiff's title to sue. In circumstances where the Plaintiff moves for judgement as successor in title to Allied Irish Banks and where the Defendants contest their title, it seems to me that it is necessary in the interests of disposing fairly of that issue that the Defendants should see the relevant parts of those deeds which evidence the transfer of their loans and security from Allied Irish Banks to the Plaintiff. However, the cases show that the Courts have consistently taken the view that it is only those provisions evidencing the assignment of the relevant loans and the security which are relevant in this context and that it is reasonable for the balance of the documents to be redacted.

10. I do not propose to go through all of the decisions. Three of them will suffice for this purpose to show how the Court generally approaches the question of redaction of documents of this kind. The first decision is that of Noonan J in *Launceston Property Finance v Walls* [2018] IEHC 610 where, at paragraph 27, he said:

> *"It is by now well settled that in claims of this nature involving loan portfolio sales, it is established and accepted that plaintiffs are entitled to redact documents for reasons of commercial sensitivity and privacy rights of third parties."*

Noonan J. then goes on to refer to what was said by Hedigan J in *IBRC v Halpin* (High Court Unreported 3rd November 2015), who in turn had regard to what was said by Dillon LJ in the English Court of Appeal in *GE Capital Corporate Finance Group v Bankers Trust* [1995] 1 WLR 172 and among the passages from the judgment that Noonan J. quotes is that set out in paragraph 7, where Hedigan J. said:

> *"Thus, it is simply not enough for a party to say that he wishes to see the document redacted...."*

Now I think that word "redacted" should read "unredacted", but that's how it appears in the original text.

> *"... since that would negative the right to redact. He must present some concrete argument that can lead the Court to order the unredaction. In his argument today, the Defendant can only say that he does not know what is contained in the redaction but would like to see so as to consider whether it might be relevant or helpful. This, in my view, is not sufficient. In the context of discovery, it would classically be considered a 'fishing expedition'. In discovery procedures, this is never allowed. In these proceedings, it cannot be allowed either."*

That position as set out by Hedigan J. was followed by Noonan J.in the Walls case, who continued in paragraph 28 of his judgment to say:

> *"I am satisfied therefore that the plaintiff was entitled to exhibit the redacted loan sale agreement here and that such parts as remain unredacted establish the transfer of the defendant's loans to the plaintiff. It must also be said that the defendant has not identified any particular reason why the unredacted document should be made available to him but it can only be for the purpose of determining whether or not he might be in a position to mount some form of challenge to the transfer of his loan to the plaintiff."*

11. Now the second decision to which I wish to refer to is a decision of Barniville J in *Promontoria (Arrow) v Burke* [2018] IEHC 773 , where at paragraph 72, Barniville J. dealt with an argument about a redacted copy of a similar deed being provided as follows. He said:

> *"In light of the fact that it is open to Promontoria to rely on a redacted copy of a deed in order to provide prima facie evidence of the fact of transfer, having considered the unredacted parts of the copy of the Global Assignment Deed exhibited to Ms. Burns' affidavit of 7th December, 2017, it seems to me that Promontoria has provided sufficient proof of the transfer of the defendants' loan facility with EBS and of the mortgage from NALM to Promontoria. I acknowledge that the Global Assignment Deed does make reference on a number of occasions to the Loan Sale Deed and to the fact that in the event of any inconsistency between the terms of the Global Assignment Deed and the terms of the Loan Sale Deed, the terms of the latter deed shall prevail. However, it seems to me that the copy Global Assignment Deed exhibited by Ms. Burns does clearly demonstrate the transfer of the defendants' facility from NALM to Promontoria. The defendants have not been in a position to point to any actual or potential inconsistency between that deed and the Loan Sale Deed. While it is understandable that they cannot point to an actual inconsistency in circumstances where they have not had sight of the Loan Sale Deed, they have not been in a position to suggest even potential inconsistencies which might undermine the clear and unambiguous transfer provisions in relation to their loan contained in the Global Assignment Deed. In those circumstances, I do not believe that the failure to exhibit a copy of the Loan Sale Deed is fatal to Promontoria's ability to provide evidence of the transfer of the defendants' loan and related security from NALM to Promontoria by exhibiting the redacted copy of the Global Assignment Deed."*

It will be seen, therefore, that the judgment of Barniville J. is consistent with the approach taken by Noonan J. in the *Launceton v Walls* case and these decisions seem to me to show that what is considered by the Court to be necessary are the relevant parts of the deeds which evidence the assignment of the loans in issue. If a Defendant wishes to see more of the deed, the burden is on the Defendant to show why more is necessary, and as the next decision shows, if the Defendant does discharge that burden, then the burden shifts to the Plaintiff to justify the extent of the redaction made. The next decision is the decision of Haughton J in *Courtney v OCM EMRU Debtco* [2019] IEHC 160. At paragraph 55 of that judgment, Haughton J. deals with the burden which I have just identified, I do not think it is necessary tto quote from paragraph 55, but I think it is clear from that case that, while Haughton J. there ordered quite extensive un-redaction measures to be undertaken, it was only in the very particular circumstances of the case that he did so where very particular claims were made by the Plaintiff that went well beyond contesting the title of the assignee of the loans and I think that is very clear when one looks at paragraphs 84 and 85 of the judgment where he said in particular at paragraph 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."*

No such issues arise in the present proceedings.

12. Given the approach which the Courts have taken, it seems to me that the Defendants would be at a serious litigious disadvantage if they did not see the relevant parts of both deeds that evidence the assignment of their loans and security. Without sight of those parts, they will not be able to address the question, which is very much at issue in the application for summary judgment, of the Plaintiff's title to sue. On the face of what has been disclosed so far, it does seem to me that the relevant parts of the agreement dealing with assignment have been produced, but as I pointed out in the course of the argument yesterday, they cannot be understood without the relevant definitions of the defined words used in the unredacted provisions and it therefore seems to me to be necessary, in the interests of disposing of the matter fairly, that the definitions in question should be unredacted. Otherwise, the Defendants will remain at a litigious disadvantage.

13. Also the opening words of Clause 1 of the Deed of the 2nd August 2018 have been redacted and I do not have sufficient information at present to assess whether that redaction is justified, having regard to the burden which as Haughton J.identifies, falls on the Plaintiff where a Defendant has demonstrated that the Order 31, Rule 18(2) test has been surmounted.

14. However, in the course of the hearing yesterday, Mr. Fitzpatrick on behalf of the Plaintiff confirmed that his client will provide a further copy of the Deed and his solicitor will swear an affidavit confirming all the definitions in the Deed of Transfer by Friday of next week. Now, until that affidavit comes in and until the additional un-redactions are made, it is not possible to be certain that this will suffice but it has the potential to address the concerns which I have just outlined. In the meantime, I reiterate my view that the Defendants are entitled to have the definitions in unredacted form and, subject to any explanation on affidavit that may be given to justify the redaction of the opening words of Clause 1 of the Deed of Transfer, it seems to me that those words should also be unredacted. On the face of it, Clause 1 is the operative clause dealing with the transfer and, therefore, it seems to me that on a prima facie basis, it should be disclosed to the Defendants and the Plaintiffs thus have the burden of showing that the redactions are of material which are genuinely not relevant or which relate to matters such as the price which the Defendants do not seek. This will have to be addressed in the further affidavit to be filed next week.

15. Very similar considerations apply in relation to the Deed of Amendment. It seems to me to be impossible to understand the operative parts of Clause 2.1 of that deed unless the relevant definitions of the defined words used in that deed are unredacted. It seems appropriate in the circumstances to adjourn the reliefs sought at paragraph 1(iv) and (v) of the motion to 2 p.m. next Friday, or such other time as may be agreed, to allow the Plaintiffs to address the issue further. But I would propose to bring forward the time for delivery of the Plaintiffs' promised affidavit to 5:30 p.m. on the preceding day, i.e. Thursday next.

16. I should also make clear for the avoidance of doubt that any views that I have expressed in this ruling in relation to the Deeds of Transfer and Amendment are solely in the context of the present motion and are not intended to be of any relevance to the arguments that may be made on either side at the hearing of the application for summary judgment. Both parties are free, in my view, at that hearing to advance whatever arguments they wish in relation to the deeds. Nor is anything said here intended to affect the issue as to whether it might be either necessary or appropriate that the Judge hearing the motion for judgment should inspect a copy of the unredacted deeds.

17. Mr. Howard and Mr. Coughlan have pressed strongly that I should go further and direct that none of the redactions, other than those in relation to price and the names of other parties, should be allowed to stand. They have suggested that there may be something in the redacted portions of the deeds that undermines the Plaintiffs' title to sue. I cannot accept that argument, which seems to me to be based on the same level of speculation as that discussed in the case law cited by Noonan J. in *Launceston v Wall*. Speculation of that kind falls short of the test set out in Order 31, Rule 18(2). Again, I want to make it very clear that this is not to say that the Defendants are not free to raise questions of that kind at the hearing of the motion for judgment or to suggest to the Judge hearing that motion that something must have gone wrong with the assignment, or to argue that no appropriate notice was given for the purposes of the Judicature Ireland Act. All I am dealing with is the application for inspection and for reasons which I have sought to identify, I do not believe, on the basis of the case law, that the Defendants have demonstrated on this motion an entitlement to see the unredacted versions of the Deed, subject to the order that I proposed earlier.

18. The next documents are those set out at paragraphs 2(i), (ii) and (iii) of the motion and it seems to me to be convenient to deal with (i) and (iii) together, namely the paragraphs dealing with the Statements of Account. They were not sought in the Notice to Produce incorporated in the letter of the 11th April 2019 from Maples & Calder, but Statements of Account were nonetheless provided in the responding letter of the 15th April 2019 from OSM. The Statements of Account are not addressed in the grounding affidavit of

Mr. Heffernan, nor do they appear to be addressed in the Maples & Calder response of 18th April 2019. But at the hearing yesterday, Mr. Howard drew attention to the fact that the Statements of Account which have been provided are incomplete in that they start at page 19 and the first item on that page is an entry for the 4th January 2010. It therefore follows that the accounts for the previous five years are missing.

19. In circumstances where the missing pages have not been addressed in any notice served under Order 31, I do not believe that I can make any order under Order 31, Rule 18, but I do wish to make it clear that where a Defendant seeks a statement of account in debt collection proceedings, it seems to me as a matter of basic fairness that it should be provided. While no criticism can attach to the Plaintiff, for not realising until yesterday that the Defendants were seeking accounts for 2005 to 2009, now that this has become clear, I assume that the accounts will be provided. If there is any doubt about that, I would consider invoking the very broad powers the Court has under Order 63A, Rule 5, but it would be manifestly wrong to consider making such an order given the fact that it was only yesterday in the course of the hearing that the Statement of Account was identified as incomplete.

20. The final issue on this motion is in relation to the Power of Attorney which the Defendants suggest must exist given the way in which the Letters of Demand were signed. In my view, it is clear on the case law that one cannot use the Order 31, Rule 18 process to demand documents that are not themselves referred to in the indorsement of claim or affidavits, so I do not believe that I can make such an order.

21. That is not to say that the Defendants cannot raise an issue about the non production of the power at the hearing of the application for judgment. My personal view is that it is usually counterproductive for a Plaintiff to refuse to hand over copies of documents of this kind, but that will be a matter for the Judge hearing the application for judgment and I am not going to direct the Plaintiff's proofs.

22. The remaining issue relates to the cost of the mediation motion brought by the Defendants. That motion has now become moot in light of the fact that after the motion issued, the Plaintiffs agreed to go to mediation. The Defendants say that they should be entitled to their costs on the basis that they essentially got what they sought by bringing the motion and it was only after the motion was brought that the Plaintiff, they would say very reluctantly, agreed to mediation. On the other hand, the Plaintiff suggests that costs should be costs in the cause. In response to that argument, the Defendant says, with some justification, that this would be unfair to the Defendant because it would mean that if the Plaintiff ultimately succeeds in the proceedings, the Plaintiff will collect the costs of the motion which was necessitated by its own initial refusal to go to mediation.

23. On the other hand, if the Defendants are ultimately held to have no defence to the claim, it would be unjust that the Plaintiffs would have to bear the costs of a motion to mediate a dispute that has been found to have no substance. In these circumstances and in an attempt to balance these considerations, it seems to me that the appropriate order to make is to make the Defendants' costs, costs in the cause. That's the Defendants' cost of the motion to mediate. In other words, the Plaintiff will not be entitled to the costs of that motion irrespective of the outcome of the proceedings. So those are the views that I have reached on the matters that were debated at some length before me yesterday.