

## THE HIGH COURT

## COMMERCIAL

2018 890 S

BETWEEN

PROMONTORIA (ARAN) LIMITED

PLAINTIFF

AND

ANDREW SHEEHY

DEFENDANT

AND BY ORDER OF THE COURT DATED 4 MARCH 2019, NOEL TYNAN AND BRIAN MOLONEY

THIRD PARTIES

**JUDGMENT of Mr. Justice Quinn delivered on the 31st day of July 2019**

1. The plaintiff claims judgment against the defendant for the sum €4,127,785.48, being the balance it claims it is due pursuant to certain facilities advanced by Ulster Bank Ireland Limited ("Ulster Bank") to the defendant and the Third Parties in March 2005. The plaintiff purchased the relevant facilities from Ulster Bank in February 2015.

2. The plaintiff also claims interest and damages, and alternative equitable reliefs in the form of *"restitution of sums advanced to the defendant or provided for the benefit of the defendant, damages for unjust enrichment and a declaration that the plaintiff is entitled to an equitable lien over the commercial investment property in Romania known as "Neo City Tower I and II" located at 30 A Ermil Pangratti Street, Neocity, District I, Bucharest Romania, and any proceeds of sale of that property ("the Romanian Property")."*

3. The action was commenced by summary summons but has been remitted for plenary hearing. A Statement of Claim, Defence and Reply have been delivered, and pleadings exchanged between the Defendant and the Third Parties.

4. This judgment relates to the defendant's application for an order that the plaintiff makes discovery of four categories of documents. I shall return later to the four categories of documents which are in dispute. The category which is most vigorously opposed by the plaintiff is Category 4, being *"all documents relating to the amount paid by the plaintiff for the transfer of the loans allegedly entered into between Ulster Bank Ireland Limited and the defendant."* The first part of this judgment concerns this category.

**Pleadings**

5. The Statement of Claim refers to a Facility dated 21 February 2005 ("the 2005 Facility") for a sum of €3,000,000 offered to the defendant, together with the Third Parties (referred to collectively as the "borrowers") for the purpose of assisting with the purchase of the Romanian Property.

6. The 2005 Facility was stated to have been repayable on demand and that in the absence of a demand, interest was to be paid monthly and at the expiry of a two-year period the Facility was to be repaid over a ten-year period or to be renegotiated.

7. On 27 May 2009 the 2005 Facility was "replaced" by a loan offer referred to as the 2009 Facility. The 2009 Facility expressly referred to the 2005 Facility and provided that the Facility was renewable and was repayable on demand, but subject to review on or before 30 June 2009 and was to be reviewed thereafter on a yearly basis. By the 2009 Facility, the bank reserved the entitlement to seek full repayment on demand.

8. By a Global Deed of Transfer dated 12 February 2015 the plaintiff acquired the right title and interest of Ulster Bank under the Facility. It is said that the Global Deed of Transfer expressly refers to the 2009 Facility and not to the 2005 Facility which it replaced.

9. The defendant denies having signed the 2005 Facility. Insofar as his name appears on that Facility Letter it is said that it was signed in his name by Mr. Moloney. The defendant states that this was an act of forgery. The plaintiff states that the loan was being advanced to the borrowers as a partnership, that Mr. Moloney was duly authorised to sign for the defendant and accordingly that the defendant was a party to the 2005 Facility.

10. At some time between 2005 and 2009 certain disputes arose between the defendant and the Third Parties, and the defendant notified Ulster Bank that he did not regard himself as under any obligation in respect of the loan and would not be a party to any refinancing or additional Facility agreement. The 2009 Facility is not signed by or on behalf of the defendant.

11. The plaintiff maintains its contract claim for judgment against the defendant firstly pursuant to the terms of the Facilities. However, it makes alternative pleas for equitable remedies as follows in paras. 16, 17 and 18 respectively of the Statement of Claim:

*"16. In the alternative and without prejudice to the foregoing, to the extent that the defendant is not obliged pursuant to the 2005 Facility Letter and/or the 2009 Facility Letter, to repay the sums demanded, the plaintiff's claim is for restitution of the monies advanced to the defendant as monies had and received by the defendant, to the use of the plaintiff."*

*17. The defendant is not entitled to be unjustly enriched or otherwise benefit from monies advanced by the bank."*

*12. "18. The monies advanced by the bank were used, in whole or in part, to acquire the Romanian Property and the defendant (and the borrowers) continue to have the benefit of and an interest in the Romanian Property. In the premises the plaintiff is entitled to an equitable lien over the Romanian Property (and any proceeds of sale of that property) to the extent to which monies advanced to the borrowers were used to fund the purchase of that property and remain unpaid"*

13. The defendant puts the plaintiff on proof of all of the matters it pleads including the Facilities, the "underlying loan agreement"

and the Global Deed of Transfer. He pleads that the bank was aware when executing the 2009 Facility that he would not be a party to it, because prior to its execution he had so notified the bank. He also claims that by signing the 2009 Facility "the bank elected to release Mr. Sheehy from the borrowing".

14. The defendant denies having received the benefit of any of the facilities and pleads that the Bank advanced the monies to Mr. Tynan and Mr. Moloney alone and that they used some of the monies for their own purposes, which has given rise to separate proceedings as between him and the Third Parties and others.

15. In his Third Party Statement of Claim, the defendant alleges that the plaintiff settled its claim against the Third Parties and has declined to make a claim against them in these proceedings. He claims indemnity and contribution from the Third Parties if the plaintiff succeeds in obtaining a declaration that he is obliged pay to the plaintiff.

16. The defendant makes a number of particular allegations which in submissions it is said are directly relevant to the claim made in equity, i.e. the claims for restitution and/or unjust enrichment. In particular he pleads as follows: -

*"7. The plaintiff's claim is subject to the equities affecting Ulster Bank and the plaintiff is not entitled to make any claim as against the defendant and is estopped from so doing".*

17. In para. 15, he pleads: -

*"15. Insofar as the plaintiff makes an equitable claim for restitution of monies advanced, which it did not advance, and for which it made no payment of substance, the defendant will seek discovery of the amount paid for the loan by the plaintiff".*

18. In para. 16, he pleads: -

*"16. It is denied that the defendant has been unjustly enriched or otherwise benefitted from monies advanced by the Bank and it is further denied that the plaintiff is entitled to maintain such a claim. Without prejudice to the foregoing, the defendant has been caused significant loss by the actions of Ulster Bank including by their acting in concert with Mr. Tynan and Mr. Moloney, engaging in breaches of privacy and data protection laws, and causing money to be advanced solely to the use of Mr. Tynan and Mr. Moloney such as to prejudice the defendant herein".*

19. In para. 17, he pleads: -

*"18. The plaintiff is bound by the equities affecting Ulster Bank insofar as it claims equitable relief and is estopped from making such a claim, Ulster Bank having released the defendant.*

20. In para 18, he pleads: -

*"18. Without prejudice to the generality of what is pleaded above the plaintiff is not entitled to seek equitable relief as assignee of contractual rights only, but insofar as it seeks to exercise equitable rights on the basis that they accrued to Ulster Bank (which are denied), it does not seek such relief with "clean hands" having regard to the conduct of Ulster Bank".*

21. It is common case that no new money was advanced pursuant to the 2009 Facility, which was a replacement of the 2005 Facility. However, the defendant submits that because he had communicated that he would not be a party to that Facility, he was in effect released from the 2005 Facility.

22. The plaintiff says that the defendant was a shareholder in the company which acquired the Romanian Property with the benefit of the advances made and accordingly that it is not open to him to deny having received the benefit of the loan.

### **Submissions**

23. The defendant says that the plaintiff's claim is not limited to the common law claim pursuant to the contract which is the Facility Letters, but extends also to the equitable doctrines of restitution and unjust enrichment. He submits that the ingredients of unjust enrichment include establishing that the defendant has been unjustly enriched at the expense of the plaintiff, and that the trial will necessitate examination of the plaintiff's conduct and actions including the transaction by which it acquired the loans and the price.

24. The plaintiff says that this principle means examining the respective equities of the parties to the loan, namely Ulster Bank and the borrowers, and not the plaintiff as successor of the Bank. It says that it acquired the loans subject to and with the benefit or burden of any equities which may be relevant. Having acquired the entire collection of rights, both legal and equitable, as against the defendant, it accepts that this will necessitate an analysis of the rights of the parties up to the time of transfer when the loans and facilities were acquired. It does not agree that the price paid by it for the transfer can be relevant. The plaintiff says that the failure of the defendant to repay gave rise to an entitlement on the part of Ulster Bank to repayment not only under the Facility Letters but also to the remedy of restitution of the money advanced and that the defendant would be unjustly enriched if the monies were not repaid. The plaintiff says that the analysis of those rights both legal and equitable cannot be affected by the price paid for the transfer of the loans. The plaintiff says that this case is no different from any other case in which an assignee of a loan pursues the debtor and where it could not be said that the price paid for the assignment is relevant.

25. The defendant's argument is that the matrix of facts which are relevant for a consideration of the merits of the equitable claims, includes the question of whether a defendant is unjustly enriched at the expense of the plaintiff and should not be "frozen" as of the time of or before the transfer and that all facts relevant to the "equities" of this plaintiff's position must be taken into account, including what it paid for the transfer.

26. If this were simply a case of a loan purchaser suing in contract on the Facility agreement, it would be difficult to see how the price paid would be relevant, although it is sometimes contended that it has such relevance in special circumstances, (see *Eileen Courtney v OCM Emru Debtco DAC and David O'Connor* [2019] IEHC 160, discussed below). However, in a case where the plaintiff itself has invoked the equitable doctrines of restitution and unjust enrichment, it is less clear that the price it paid is not relevant.

27. The defendant still has to overcome the burden at trial of establishing that the price paid by the defendant is one of the factors in assessing the relative equities of the parties, even where equitable principles are invoked, and I have some doubt about the prospect of the defendant succeeding in that position. However, on the facts of this particular case, that will be a substantive issue

for determination at the trial. If I were to refuse discovery of material relating to the amount paid this would amount to determination of that substantive question at this interlocutory stage, which the court should not do.

28. The plaintiff says that on the pleadings the question of the price paid does not arise. The matter of the price paid is referred to twice in the pleadings. In paragraph 15 of the defence where the defendant states as follows: -

*"15. Insofar as the plaintiff makes an equitable claim for restitution of monies advanced, which it did not advance and for which it made no payment of substance, the defendant will seek discovery of the amount paid for the loan by the plaintiff".*

29. In para. 8 of the Reply to Defence, it is pleaded as follows: -

*"8. By way of special reply to paras. 14 and 15 of the Defence, the Plaintiff pleads that pursuant to the Global Deed of Transfer, the plaintiff acquired all right, title, interest, estate, entitlement, benefit and obligation (past present and future) in the loans and security held by the Bank, relevant to the within proceedings. As a result, the plaintiff is entitled inter alia, to make an equitable claim for restitution of monies advanced to or to the benefit of the defendant. It is denied that the plaintiff made no payment of substance".*

30. The plaintiff says firstly that whilst it did not itself advance monies to the borrowers, its predecessor Ulster Bank made the original advances and it has acquired the right of repayment. Secondly it says that the plea by the defendant that the plaintiff "made no payment of substance" for the loans is a bare assertion unsubstantiated by any facts and that this is a classic instance of a bare assertion inserted in the pleading effectively to support a request for discovery in the nature of a "fishing exercise".

31. When the plaintiff sought particulars of this plea, the defendant replied: -

*"This is a matter peculiarly within the knowledge of the plaintiff who purchased the loan. The defendant will seek full discovery of the amount paid for the loan in the context of the purchase of whatever loan portfolio was purchased through the Global Deed of Transfer".*

32. In the reason given for the request for delivery of this category, the defendant says:

*"The plaintiff at paragraph 16 of the Statement of Claim makes a number of equitable claims for restitution of monies advanced. It makes these equitable claims in respect of funds which it did not advance one for which it made no payment of substance. The Plaintiff further pleads at paragraph 17 of the Statement of Claim that the Defendant is not entitled to be unjustly enriched or otherwise benefit from monies advanced by the Bank, and claims damages for unjust enrichment. The Defendant pleads at paragraphs 13 and 16 of his defence that the plaintiff has suffered no loss and denied that he has been unjustly enriched or otherwise benefitted from monies advanced by the Bank. The Defendant accordingly requires discovery to be made with regard to the actual amounts paid by the Plaintiff in the context of its commercial trade in distressed debt, and in particular in respect of the loan alleged to be payable by the Defendant so that the actual amount of the Plaintiff's loss can be ascertained".*

33. The first part of this reason is largely a restatement of the assertion made in the Defence. As regards the form of the pleading, at first pass, there is some force in the plaintiff's submission that on its face, the allegation in the defence that the plaintiff made no payment of substance for the loan is a bare allegation without supporting facts or evidence. Whilst it is not necessarily the case that the plaintiff would have been obliged in its Reply to give any particulars, the plea "it is denied that the plaintiff made no payment of substance" is equally bare as an assertion.

34. The plaintiff has invoked the equitable principles of restitution and unjust enrichment which give rise to the necessity to engage with the analysis of the respective equities of the parties. Whilst the onus is on the party making the request for discovery to at least refer the court to facts substantiating its allegation, in the particular circumstances of this case it is clear that the matter of the price paid for the loan has been fairly put in issue in the proceedings. In *Delany and McGrath on Civil Procedure*, (4th edn, Round Hall 2018) it is stated as follows: -

*"It should also be noted however that whilst relevance falls to be determined by reference to the pleadings, the court may refuse to order discovery by reference to the inclusion in the pleadings of bare assertions or speculative pleas for which there is no apparent factual or evidential basis. In *Framus Limited v. CRH plc*, Murray J. held that: - "an applicant is not entitled to discovery based on mere speculation or on the basis of what has traditionally been characterised as a fishing expedition".*

35. The authors also quote the judgment of Bingham J. in *R. v. Secretary of State for Health, ex parte, Hackney London Borough* (which in turn was cited by approval by O'Caoimh J. in *Short v. Dublin City Council*) where he stated as follows: -

*"It is not open to a plaintiff in a civil action, or to an application for judicial review, to make a series of bare, unsubstantiated assertions and then call for discovery of documents by the other side, in the hope that there may exist documents which will give colour to the assertions that the applicant, or the plaintiff, is otherwise unable to begin to substantiate. This is the prescribed activity usually described as "fishing": the lowering of a line into the other side's waters in the hope that the net may enclose a multiple of fishes, the existence or significance of which the applicant has no rational reason to suspect".*

36. In this case the request for discovery of documents relating to the price paid by the plaintiff for the loan is not what can be described as a general or wide "trawl" of the type prohibited by the principles described above. It goes to one particular fact.

37. During submissions a question arose as to whether the information the subject of this category could be obtained by an appropriate interrogatory. Counsel for the plaintiff was unable to confirm that this would resolve the matter, stating that it would depend on the form of the question. That was an understandable observation, but it means that this alternative method of obtaining the information is not unequivocally available. Nor can it be said that making discovery in this category would necessitate an extensive trawl or could be characterised as oppressive.

38. The plaintiff submitted that if the court were minded to order discovery of documents in this category relevant to the price, this should be done on the basis that an affidavit would be sworn detailing the price, or exhibiting documents relevant to the calculation of the price, so that this information would be available to the court and to the parties if the trial judge determines at the level of

principle that the price is relevant to the claim of unjust enrichment. It submits that the price information could then be relevant only to quantum. This would in effect require the court to hold a hearing on a preliminary issue of law. No such issue has been identified or directed. Furthermore, it is not clear to me that such a question would be appropriate for trial as a preliminary issue, since the question of the relevant equities of the parties or of their predecessors, will engage an analysis of more facts than simply the price paid by the plaintiff for the loans.

39. The plaintiff submits that if the court were to find that the purchase price paid for the loans could be relevant to the unjust enrichment claim then every borrower could plead that it owes not the sum stated on the Facility or the balance then due, but only what was paid for the assignment and the plaintiff says that there is no authority for such a proposition. That is correct in the overwhelming majority of common law debt recovery cases. It does not follow that the amount of the balance due will be the only factor informing the price paid. Others will include such matters as an assessment of the value of the accompanying security or an assessment of the ability of the debtor and/or co-borrowers to pay and in a competitive bid process the final price will be a function of other considerations particular to the bidding parties. There may be cases where it is not possible to identify definitively what proportion of a purchase price for a loan portfolio is directly referable to a particular loan and this court has not been informed if this is such a case. The parties to the transaction will each have their own matrix or formula for calculating offers for loans or portfolios of loans. Therefore, I do not find that the matter of the purchase price will definitively inform the court in its assessment of the relative equities of the parties. However, it is not for the court at this interlocutory stage to close out such a case by refusing discovery of material which may inform the court at the plenary trial in its assessment of the relative equities of the parties.

40. I will add that this does not mean that in every case where the purchaser of a loan pursues a debtor, if the purchaser then invokes an equitable remedy in addition to the contract claim in common law, such as an injunction, it will always be exposed to an obligation to disclose the purchase price of the loan or make discovery of documents relevant to that price. The claim of unjust entitlement is being met by a particular plea concerning the question of whether the plaintiff made a payment of substance, which is relevant to the relative equities of the parties on the unusual facts of this particular case.

#### **Redactions of commercially sensitive information**

41. In *Courtney v. OCM Emru Debtco DAC*, Haughton J considered an application which related to the redaction of extensive parts of a loan sale deed and a deed of transfer of loans. Whilst that judgment arose from issues concerning redaction which arose following a request for inspection of documents the discussion of the policy which the court would follow in relation to such matters as price and otherwise commercially sensitive information is informative.

42. In the context of disclosure, Haughton J. cited with approval the quotation by *Maye v Byrne Wallace Solicitors* [2015] IEHC 530 of the principles adopted also by Kelly J. in *Cooper Flynn v. RTE* [2000] 3 IR 344, and enunciated by Brown L.J. in *Wallace Smith Trust Company v. Deloitte* [1997] 1 WLR 257, where he held *inter alia*: -

*"Disclosure will be necessary if: (a) it will give 'litigious advantage' to the party seeking inspection, (Taylor v. Anderton) 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) and (c) such order for disclosure would not be oppressive, perhaps because of the sheer volume of the documents (e.g. Siena Research Council v. Nosse)".*

43. Haughton J. also cited with approval the judgment of Baker J. in *Playboy Enterprises International Incorporated v. Entertainment Media Networks Limited* [2015] IEHC 201, where she stated: -

*"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".*

44. Haughton J. summarised -

*"that in commercial cases, possibly all cases, the starting position is that the parties should be 'forthright in the production of documents'".*

45. He continued: -

*"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.*

*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".*

46. As to the question of commercial sensitivity, it has never been the case that commercial sensitivity of itself affords a party the level of protection which such matters as privilege would afford. In that case, Haughton J. adopted the approach that the commercial interests of the party making the disclosure can be adequately protected by directing that no wider disclosure or use could be made without further leave of the court. In that case, he ordered that the clauses of the Loan Sale Transfer relating to price were relevant and must be produced for inspection. He continued by stipulating certain further limitations on the further dissemination of such documents, all by way of extension or implementation of the well – established principle that the party obtaining sight of documents under discovery is under an implied undertaking that documents obtained on discovery may only be used for the purposes of the litigation in which they are discovered.

47. He directed in that case that certain undertakings be given both by the plaintiff herself and by her solicitors and counsel as to the

further use of the relevant documents or information. When it comes to the form of order to be made in this case, I shall require that appropriate undertakings of a similar nature be given. (See paragraph 65 below).

#### **The Four Categories of Discovery**

48. A total of six categories had originally been requested by the defendant and agreement was reached in relation to categories numbered 2 and 5. The following are the outstanding categories in dispute.

##### **Category 1**

49. *"All documents relating to the transfer by Ulster Bank Ireland Limited ("the bank") of the loan facilities of 21 February 2005 ("the 2005 Facility Letter") and 27 May 2009 ("the 2009 Facility Letter") to the plaintiff including (without limitation) all documents relating to the Global Deed of Transfer dated 12 February 2015, all finance documents and underlying loan agreements as referred to in paragraph 5 of the Statement of Claim, and documents related to due diligence carried out by the Plaintiff in relation to the acquisition of the Defendant's loans".*

50. In giving the reasons for this request the defendant refers to paras. 4, 7 and 8 of the Statement of Claim, which recite the transfer of the facilities to the plaintiff and recite the original facilities. Reference is also made to paras. 6 and 12 of the defence in which the defendant denies having become a party to the 2009 Facility.

51. It is submitted on behalf of the plaintiff that this category is too broad and also that the due diligence carried out is not relevant, and is not a matter pleaded.

52. Nowhere in the pleadings are claims made about the due diligence process and it can only relate to matters between the plaintiff and Ulster Bank. I shall refuse the request for documents relating to the due diligence.

53. Insofar as it is suggested by the defendant that the pleas at paras. 4 to 6 of the Statement of Claim and the denial of liability in paras. 14 and 15 of the defence are predominantly a legal issue, there is some force in the submission, but I am satisfied that documents which relate to the transfer of the facilities and of underlying finance documents and loan agreements are relevant and necessary. Accordingly, I shall order discovery under this category in the following terms: -

*"All documents evidencing the transfer by Ulster Bank Ireland Limited ("the bank") of the loan facilities of 21 February 2005 ("the 2005 Facility Letter") and 27 May 2009 ("the 2009 Facility Letter") to the plaintiff including all documents relating to the Global Deed of Transfer dated 12 February 2015 insofar as they relate to the defendant and all finance documents and underlying loan agreements referred to in paragraph 4 of the Statement of Claim".*

54. The request referred to finance documents and underlying loan agreements referred to in paragraph 5 of the Statement of Claim. This appears to be an error in that finance documents and underlying loan agreements are referred to in para. 4 of the Statement of Claim.

##### **Category 3**

55. *"All documents and correspondence between Ulster Bank Ireland Limited and/or the plaintiff and Brian Moloney and Noel Tynan or any of them, in relation to the indebtedness of Brian Moloney and Noel Tynan with the Plaintiff, whether pursuant to the 2005 Facility Letter and 2009 Facility Letter or otherwise, and to include any correspondence between Ulster Bank and/or the Plaintiff, and Brian Moloney and Noel Tynan about the Defendant".*

56. The principal objection to this request is that it extends to documents and material relating to indebtedness as between the Third Parties and Ulster Bank to which the defendant is not a party.

57. The reason given by the defendant is that the plaintiff settled with the other parties and diverted funds which he claims should have reduced the indebtedness on the Facilities.

58. He continues in the reasons given to claim that: -

*"Both the plaintiff and Ulster Bank purported to arrange with the Third Parties that they will use money from the Romanian asset to discharge other indebtedness to the plaintiff and would endeavour to force the Defendant alone to pay the entirety of the amount due by the Third Parties to the Plaintiff. In particular, the defendant pleads that the plaintiff does not come with 'clean hands'"*

59. The plaintiff submits that the contention that the plaintiff and Ulster Bank purported to make such arrangements with the Third Parties, cited in the reasons given, is not in fact pleaded by the defendant.

60. This category as formulated is too wide and it would not be appropriate to extend the discovery to communications between the plaintiff or Ulster Bank and the Third Parties concerning other loans and facilities. If and to the extent that any dealings between the plaintiff and/or Ulster Bank Limited and those Third Parties relating to the facilities the subject of these proceedings were in some way influenced by the treatment of other facilities or indebtedness of the Third Parties to Ulster Bank, and/or the plaintiff, such matters ought to be capable of discernment even from the communications which relate to the facilities which are subject to these proceedings.

61. Accordingly, I shall make an order for discovery under this category as follows: -

*"All documents and correspondence between Ulster Bank Ireland Limited and/or the Plaintiff and Brian Moloney and Noel Tynan or any of them, in relation to the indebtedness of Brian Moloney and Noel Tynan with the Plaintiff, pursuant to the 2005 Facility Letter and the 2009 Facility Letter, including any correspondence between Ulster Bank and/or the plaintiff, and Brian Moloney and Noel Tynan about the defendant".*

##### **Category 4**

62. *"All documents relating to the amount paid by the plaintiff for the transfer of the loans allegedly entered into between Ulster Bank Ireland Limited and the defendant".*

63. I have outlined my conclusions in relation to this category earlier in this judgment. In summary, I have concluded that in the unusual circumstances of this case, having regard to the equitable relief claimed by the plaintiff and the fact that the question of

whether a payment of substance was made by the plaintiff is in issue on the pleadings, it is appropriate to direct discovery in the terms of this request, subject to the restrictions outlined in the next paragraph.

64. I shall direct particular restrictions regarding access to the material be made such as were made by Haughton J. in *Courtney v. OCM Emru Debtco and O'Connor* (Op. cit.) Inspection of documents under this category shall be limited to the defendant and his solicitor having conduct of the case and counsel only, without further leave of the court, and undertakings must be given by those parties not to use or quote this information in open court or in any documents or electronic transmissions (other than secure inter parties correspondence or correspondence between solicitors and counsel) including further pleadings, requests for particulars and replies or affidavits save with the redaction agreed inter parties or with leave of the court. As these proceedings will be heard in open court, this restriction will not limit the defendant from relying fully on the relevant information at further hearings, or at the trial, and subject to further direction of the court hearing this matter, this judgment shall not preclude full references to this information at the trial.

#### **Category 6**

65. *"All documents relating to borrowings by Brian Moloney and Noel Tynan from the Bank and all steps taken by the plaintiff to secure repayments of amounts due from Brian Moloney and Noel Tynan pursuant to any loan arrangements, including but not limited to, the borrowings alleged to have been advanced pursuant to the 2005 and 2009 Facility Letters and all documents relating to any agreement to the release by the Plaintiff of the obligations of Brian Moloney and Noel Tynan pursuant to the 2005 Facility Letter and the 2009 Facility Letter or otherwise".*

66. There is overlap between this category and Category 3 discussed above. I accept the plaintiff's objection that the category is too broad and in particular that it should not be granted insofar as it relates to other borrowings or indebtedness between the Third Parties and Ulster Bank and/or the plaintiff.

67. The plaintiff has proposed that it will provide the following:

*(a) "A list of the outstanding liabilities of Brian Moloney and Noel Tynan as at the date of their respective settlements.*

*(b) All documents in respect of the steps taken by the plaintiff to secure repayments of amounts due from Brian Moloney and Noel Tynan pursuant to the 2005 loan Facility and the 2009 Loan Facility.*

*(c) Copies of the settlement agreements in respect of Noel Tynan and Brian Moloney respectively."*

68. Documents relating to the release of the Third Parties by the plaintiff from obligations under the Facilities, and not limited to the settlement agreements themselves are relevant. Accordingly, I shall direct the modification of the plaintiff's proposed category to include at the end of (b) the following: - *"and all documents relating to any agreement to the release by the plaintiff of the obligations of Brian Moloney and Noel Tynan pursuant to the said facilities".*

69. I shall hear counsel as to the appropriate length of time for discovery to be made or any other matter relevant to the form of order.