

THE HIGH COURT

COMMERICAL

[2011 No. 1548 S]

[2011 No. 86 COM]

BETWEEN

LSREF III STONE INVESTMENTS LIMITED

PLAINTIFF

AND

JOHN MORRISSEY

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered on the 1st day of July, 2015

1. This is an application by the defendant for discovery against the plaintiff in which he seeks orders for discovery in respect of three categories of documents. The case has a particularly complex history and has been the subject of four judgments by Finlay Geoghegan J. and one by this Court. I do not propose to rehearse the history of the claim. Many issues in the case have been disposed of and there is one remaining net issue. The defendant had borrowed very considerable sums from Anglo Irish Bank Corporation Ltd. Its successor in title, Irish Bank Resolution Corporation ("IBRC"), instituted summary proceedings seeking judgment for the sums outstanding on the loans. Ultimately, Finlay Geoghegan J. determined the sum due and owing in respect of the defendant's borrowings, having granted the defendant a credit in the amount of €143,676.64 due to the overcharging of interest by the then plaintiff. During the course of the proceedings IBRC went into special liquidation and the Special Liquidators and IBRC (in Special Liquidation) entered into a loan sale agreement with the plaintiff for the sale, *inter alia*, of the defendant's facilities and associated proceedings in March, 2014. The plaintiff says that the loans and the associated chose in action were assigned to it by a deed of transfer dated 11th July, 2014. The former plaintiff applied to substitute the plaintiff as plaintiff in the proceedings and Finlay Geoghegan J. duly substituted the plaintiff as plaintiff in these proceedings. In doing so she acknowledged that the defendant would have the right to contest whether the substituted plaintiff was entitled to judgment against him. The substituted plaintiff amended the Summary Summons to plead the assignment of the loans to it and sued for judgment. The defendant is defending his right to judgment on a number of grounds, but the precise scope of the defence open to him is limited and was the subject of my judgment in this matter of 11th March, 2015.

2. Order 31, r. 12 of the Rules of the Superior Courts requires that the discovery sought by a party must be relevant and necessary and the relevance of the individual categories of discovery sought is determined by reference to the issues as defined in the pleadings. A party seeking discovery must first send a letter seeking discovery from his opponent and the letter must set out the reasons why the discovery sought is said to be relevant and necessary. By a judgment delivered by this Court on 11th March, 2015, this Court held, following the four judgments of Finlay Geoghegan J. previously in the action, that all matters had been disposed of save for the matters pleaded at paras. 65, 66, 68, 69, 72-74, 91, 143-147 of the Re-amended Defence and Counterclaim of 16th January, 2015. A Reply to these remaining paragraphs in the Statement of Claim was delivered on the 17th April, 2015. These, including the Amended Summary Summons, are the pleadings which define the remaining issues in the case and thus the question of relevance in the context of the defendant's application for orders for discovery.

3. The First Category (A)

All documents, records, notes, memoranda, emails, internal notes and communications between the Plaintiff and the IBRC and/or its special liquidators, relating to the purported agreement for sale, transfer and/or assignment of the credit facilities and/or debts of the Defendant from the former Plaintiff substituted by order of Commercial Court to the Plaintiff substituted by order of Commercial Court (hereinafter "the Substituted Plaintiff"), including but not limited to unredacted copies of: (i) the purported loan sale agreement dated 31st March 2014 and (ii) the purported loan sale deed of 11th July 2014.

4. The defendant was asked to identify where an issue arose from the pleadings to which this category of discovery related. The relevant plea is found at para. 65 of the Re-amended Defence and Counterclaim where the defendant pleads:-

"[t]he plaintiff is put on strict proof that by an agreement in writing on or about the 31 March 2014, IBRC (In Special Liquidation) as vendors and the special liquidators agreed to sell to Stone Investments, inter alia, the credit facilities and debts the subject matter of these proceedings."

5. In the letter seeking voluntary discovery of the 25th March, 2015, the defendant's solicitors said that the documents sought at category A were relevant and necessary as the plaintiff had been put on strict proof in respect of the Agreement of the 31st March, 2014. It is claimed that the plea puts in issue whether the Agreement had the effect of transferring the credit/debts of the defendant to the plaintiff. It is said that the redacted Loan Sale Agreement of which has been furnished discloses clauses which lead the defendant:-

"...to apprehend that such a level of control of litigation by a non-party is or may be savouring of illegality and or otherwise contrary to public policy, rendering the said contract void or unenforceable."

6. It is also said that an unredacted copy of the entire Loan Sale Agreement is required as the Agreement must be interpreted as a whole and it is not possible to do so when part of the document is redacted. It is said that the Loan Sale Agreement forms part of the

basis for the Loan Sale Deed (*sic*) and it is not possible to interpret one without the other:-

"[a]t the very least the agreement relates to the loan sale deed and therefore, insofar as a loan sale deed purports to be the more significant document, it is nonetheless relevant to the same.

In addition it is well established that background documents will be relevant in interpreting an agreement and therefore discovery is also relevant and necessary."

7. There is no issue in the case to which would require discovery of the documents, records, notes, memoranda, emails, internal notes and communications between the parties in relation to the Loan Sale Agreement and no argument was advanced establishing why this wider category of documents was either necessary or relevant in either the letter seeking voluntary discovery or in submissions to this Court. Putting a party on strict proof of an agreement does not require discovery of the scope sought, even to assist a defendant to challenge the existence and validity of the agreement. A simple plea putting a party on strict proof does not entitle a party to trawl through all of the documents leading to the execution of the agreement. The second reason advanced for widening this wide category of discovery is that the defendant wishes to challenge the alleged legal effect of the Loan Sale Agreement. Undoubtedly he is entitled to raise this, but this is a matter of law, a matter of legal submission. There is no issue in this case which requires the wider discovery sought. This then leaves the question as to whether or not the defendant is entitled to discovery of un-redacted copies of the Loan Sale Agreement and the Deed of Transfer.

8. The defendant has redacted copies of both the Loan Sale Agreement and the Deed of Transfer. The defendant says that he needs an un-redacted copy of the Loan Sale Agreement in order to argue whether or not the Loan Sale Agreement has merged with the Deed of Transfer. The plaintiff says that this is irrelevant as it is relying on the Deed of Transfer as the basis for its claim to judgment against the defendant. The question as to whether merger occurred is not an issue in the case. Therefore this reason for seeking this discovery can only arise if it relates to an issue in the case. Even if the defendant is correct and there was no merger between the Loan Sale Agreement and the Deed of Transfer, this does not, and could not, lead to the conclusion that the Deed of Transfer is either invalid or void as has been argued by the defendant. It was also submitted that it was not possible to interpret the Deed of Transfer without sight of, and comparison with, the un-redacted Loan Sale Agreement. I do not accept this submission. The Deed of Transfer will fall to be construed in the normal way. It will be construed by looking to the document and its meaning is to be found objectively from the terms of the document. There is no allegation in these proceedings that the document does not reflect the terms agreed between the parties or that it is ambiguous. There is therefore no need to refer to other documents when the court comes to construe the Deed of Transfer.

9. The second reason advanced for seeking the un-redacted Loan Sale Agreement has been disposed off by a prior judgment of Finlay Geoghegan J. in these proceedings when she held that there was no issue of either maintenance or champerty arising out the Loan Sale Agreement. She reached this conclusion on the basis of a redacted copy of the Loan Sale Agreement which was furnished to the defendant and to the Court. No other allegation of illegality was raised by the defendant when the issue was dealt with by Finlay Geoghegan J. In submissions before this Court it was argued that the defendant would be raising new, additional grounds of illegality which would require the discovery sought. In light of the history of these proceedings and the various judgments handed down it is not open to the defendant to raise new issues which do not fall within the scope of the permitted pleadings. It is not permissible to say that the Agreement was illegal and we will advance the grounds later. Illegality is a matter which must be properly pleaded if it is alleged so that the responding party knows the case he has to meet and is not taken unfairly by surprise at trial. This fundamental rule applies with even greater force in court managed proceedings in the Commercial Court.

10. In order for the Court to conclude that the discovery sought was relevant the defendant first must satisfy the Court that there is an issue of illegality arising from the existing pleadings to which the category relates. It was clear from lengthy submissions that the defendant was intending to introduce a new species of illegality as part of its defence of the proceedings. There was reference made to illegality based on turpitude as forming a basis for the discovery sought. This plea is not part of the proceedings and clearly discovery cannot be order where no issue was joined in relation to a particular matter. It was also argued that there was intentional illegality in relation to the charging of interest to which the substituted plaintiff may have been a party. Finlay Geoghegan J. has already ruled that the question of intentional overcharging of interest was never an issue in the proceedings and it cannot be introduced at this stage. Much less it is open to the defendant to allege that the purchaser might have been a knowing party to the alleged intentional overcharging of interest which allegation itself is based upon the defendant's interpretation of the evidence previously given on behalf of IBRC at an earlier hearing of the modular trial in this matter and which was not upheld by the judge hearing the matter. The then plaintiff gave evidence that there had been no overcharging of interest and subsequently was obliged to resile from that position in evidence. Finlay Geoghegan J. awarded a credit in the sum of €143,676.64 but gave no indication whatsoever that there was anything improper in the stance of the plaintiff or the conduct of the litigation. This cannot form the basis of the claim for discovery in category A of the Notice of Motion.

11. The plaintiff offered to provide the defendant with a copy of the Deed of Transfer of the 11th July, 2014, with the personal data relevant to facilities other than those of the defendant redacted. In submissions, Senior Counsel for the defendant accepted that this was proper and that the defendant had no interest in or entitlement to that data. It follows therefore that the plaintiff has offered to provide the document in a redacted version which the defendant has been accepted is appropriate. Thus the defendant has available to him a redacted copy of the Loan Sale Agreement, which the plaintiff is obliged to prove, and a redacted copy of the Deed of Transfer and no further documents in this category are either relevant or necessary to the issue in the case. I will make no order for discovery in respect of category A.

12. The Second Category (B)

All documents, records, notes, memoranda, emails, internal notes and records of board meetings in connection with or referring to the existence and/or consequences for the purported agreement to sell the Defendant's Loans to the Substituted Plaintiff.

13. In relation to this category of discovery, the defendant relied upon the pleadings in paras. 143, 146 and 147 of the addendum to the Re-amended Defence and Counterclaim dated 16th January, 2015. These paragraphs relate to the basis upon which the former plaintiff allegedly transferred the loans of the defendant to the substituted plaintiff and whether or not it was pursuant to the clause 18.2 of the General Terms and Conditions of the defendant's facilities dated 2nd February, 2009, or whether the substituted plaintiff relies upon s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877 or s. 12 of the Irish Bank Resolution Corporation Act 2013. The legal basis (or bases) for the assignment of the loans and chose in action is a matter of law suitable for legal argument. The case advanced justifying the discovery sought does not explain why any documents are allegedly either relevant or necessary. It is predicated on the false premise that the plaintiff is obliged to elect between one of the three legal bases for asserting that the assignment is legal and binding on the defendant. The plaintiff is entitled to rely upon any and all grounds for so arguing that are

legitimately open to it. It is not obliged to select between them and therefore discovery directed towards ascertaining which ground in fact is or was relied upon is not relevant. I refuse this category of discovery.

14. The Third Category (C)

All documents, records, notes (including internal notes), memoranda and emails relating to the alleged Notice in writing of the assignment given to the Defendant by letters transmitted by email dated the 23 July 2014 and 28 July 2014.

15. The defendant in his Defence argues that the purported Notice of Assignment of his loans was invalid and ineffective. The plaintiff relies upon the letters of 23rd July, 2014, and 28th July, 2014, as constituting valid Notices of Assignment. In submissions, Senior Counsel on behalf of the defendant accepted that the letters had been received and that the defendant had copies of the letters. He stated that they had been improperly served and thus no legally effective Notice of Assignment was given. This is one of the matters that remain to be decided in this case. However, it does not mean that the discovery sought is relevant to any issue in the case. There is no issue surrounding the letters as such. The dispute relates to the party purporting to issue the Notices and this is clear from both the emails and the terms of the letters. It follows that the discovery sought is not necessary for the defendant's defence and I refuse this category of discovery.

Conclusion

16. As the plaintiff has voluntarily agreed to furnish a redacted version of the Deed of Transfer and the defendant already has copies of the Loan Sale Agreement (albeit in a redacted form) and the Notices of Assignment, I will make no orders for discovery on this Motion.