THE COURT OF APPEAL
CIVIL

APPROVED
NO REDACTION NEEDED
Appeal Number: 2022/274
Neutral Citation Number [2024] IECA 16

Whelan J.
Faherty J.
Haughton J.

BETWEEN/

AIDAN FARRELL

APPELLANT

- AND-

EVERYDAY FINANCE DAC

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 26th day of January 2024

Introduction

1. This is an appeal against the judgment and order of Ms. Justice Stack made in the High Court on 6 October 2022 insofar as the said order refused the inspection and/or copying of certain documents, including but not limited to a Global Deed of Transfer dated 2nd August 2018, together with an amended and reinstated Global Deed of Transfer dated 22 October 2018 (the Global Deeds), as made between, *inter alia,* AIB Plc (AIB) of the one part and the respondent, Everyday Finance DAC (Everyday) of the other part in both instances. The said relief was sought by the appellant pursuant to, *inter alia*, O.31, r.18, and/or O.50, r.4 of the Rules of the Superior Courts and s.91 of the Land and Conveyancing Law Reform Act, 2009 (the 2009 Act) or in the alternative, the inherent jurisdiction of the High Court.

General Background

2. The appellant entered into certain loan agreements with AIB in 2006 pertaining to the purchase of properties in Donegal and Dublin. In 2014 AIB instituted proceedings against him arising from default on said loans. In 2015 certain negotiations took place between the appellant and AIB. It is pleaded that this was for the purposes of facilitating restructuring of the loans. It is pleaded by the appellant and falls to be determined at the substantive trial of the action as to whether certain documents dated 23 September 2015 and 28 September 2015 gave rise to a variation in respect of a Heads of Terms document dated 9 April 2015. It is contended on behalf of Everyday that it acquired the said loans and indebtedness of the appellant under and by virtue of, *inter alia*, the Global Deeds.

3. On 10 August 2020 the appellant instituted proceedings against Everyday seeking injunctive and declaratory reliefs, including an order permitting the appellant to inspect the documents of title relating to his mortgaged properties in the possession or power of Everyday. He disputes that Everyday validly acquired his loans and all underlying securities. Various declarations were sought, *inter alia*, pursuant to s.91 of the 2009 Act contending that the appellant as mortgagor was entitled to inspect unredacted documents of Everyday's title, as mortgagee, *"for the purpose of ascertaining their full terms meaning and effect".* It was contended that the appellant was entitled to first refusal or pre-emption in respect of all offers advanced to purchase loans and securities granted to AIB and/or that he had a right to be consulted and to participate in relation to the sale of his loans and securities. In a Statement of Claim delivered on 30 September 2020 the appellant pleaded:

> *"4. The Defendant asserts itself as successor in title to AIB's interest in the said loans and security and asserts title as mortgagee in respect of the Plaintiff's interest as mortgagor and for that purpose relies on a Global Deed of Transfer dated 2 August*

2018 and an amended and reinstated Global Deed of Transfer dated 22 October 2018."

It is pleaded that the appellant invoked s.91 of the 2009 Act for the purpose of seeking inspection of the said documents. (para. 6 of Statement of Claim)

"7. The Defendant has refused to provide inspection of the deeds dated 2 August 2018 and 22 October 2018 which have been described collectively as 'the Global Deed of Transfer' and has thereby unlawfully interfered with the Plaintiff's statutory right of inspection."

4. It is pleaded that the appellant is prevented from obtaining informed legal advice by reason of having been refused the inspection of the global deeds. Extensive matters are pleaded said to give rise to breaches of duties owed by Everyday to the appellant. It is pleaded that Everyday obstructed the sale and disposition of various secured properties by the appellant and that Everyday has wrongfully threatened the appointment of a receiver and that it is estopped, *inter alia,* by virtue of assurances and/or representations and/or conduct on the part of Everyday and its predecessor in title AIB from so doing.

5. The appellant seeks a declaration at para. 4 for relief that:

"the Defendant as mortgagee having been validly requested to provide inspection of documents of title pursuant to Section 91 of the Land and Conveyancing Law Reform Act 2009 by the mortgagor may not appoint or direct a receiver or take any enforcement steps against the mortgagor until it has provided such inspection."

Further, a declaration is sought that Everyday's *"failure to provide title deeds when requested to do so was in fundamental breach of contract."*

6. The appellant issued a notice of motion on 15 February 2021 seeking inspection of the two Global Deeds made between Allied Irish Bank Plc, AIB Mortgage Bank and EBS DAC and Everyday. Same was sought on several alternative bases as outlined aforesaid.

7. Everyday delivered a Defence dated 19th March 2021. Insofar as relevant to the issue of inspection of the Global Deeds of Transfer of 2 August 2018 and 22 October 2018, the following pleas are germane. At para. 3 reliance is placed on Everyday's status as registered owner of the mortgages' securities on the relevant folios in the Land Registry:

> *"…in respect of the subject investment properties which were originally registered in the name of AIB and …subsequently registered in the name of the Defendant to deny that the Plaintiff is entitled to the relief claimed against the Defendant."*

It is alleged that the appellant acquiesced in the *"transfer of the loan agreements and related mortgage securities"* to Everyday:

> *"… and did not challenge or dispute the transfer, and subsequently accepted and acknowledged the Defendant's title in the agreements and related mortgage securities by, inter alia, requesting the Defendant to release the Title Deeds in respect of the subject investment properties and by requesting the Defendant's consent to the sale of the subject investment properties."* (para. 4 of Defence)

8. At para. 12 Everyday denies it unlawfully interfered with the appellant's statutory right of inspection provided for in s.91 of the 2009 Act as alleged in the Statement of Claim. Everyday denies:

> *"…that its refusal to allow the Plaintiff to inspect the Global Deed[s] of Transfer… has prevented the Plaintiff from obtaining informed legal advice as alleged in paragraph 8 of the Statement of Claim. Without prejudice to the foregoing, the Defendant denies that such legal advice is necessary in circumstances where confirmation of the Defendant's lawful acquisition of the agreements and the related mortgage securities was confirmed to the Plaintiff by AIB and the Defendant in advance of the transfer. In addition to the foregoing, the Defendant also relies on the Plaintiff's conduct, including, inter alia, the correspondence issued by the*

Plaintiff's solicitors in which the Plaintiff subsequent to the transfer of the agreements and related mortgage securities by AIB to the Defendant, requested the Defendant to release title deeds and to consent to the Plaintiff's proposed sale of the subject investment properties. The Defendant also relies on, inter alia, the matters pleaded in paragraphs 60, 64 and 73 of the Statement of Claim in which the Plaintiff confirms that he requested the Defendant to release Title Deeds and the Defendant's consent to the sale of the subject investment properties."

9. With regard to matters pleaded at paras. 44 to 47 inclusive of the Statement of Claim whereby the appellant had pleaded a continuing entitlement to enforceable rights and remedies as against AIB notwithstanding the latter's purported disposition of the appellant's loans to Everyday, in its Defence Everyday denies that a sale and transfer of the appellant's loans and related mortgage securities to Everyday required the prior consent of the appellant in the circumstances as pleaded. Everyday pleads that in the circumstances, the appellant having failed to discharge his indebtedness under the agreements, it is entitled to the lawful exercise of its rights and powers under the related mortgage securities, including the right to appoint a receiver over the subject investment properties.

10. Para. 10 of the Defence pleads;

"10. The Defendant pleads that s.91 of the 2009 Act entitles the Plaintiff as mortgagor, and so long as the right to redeem exists, to inspect and make copies of the documents of title furnished by the mortgagor to the mortgagee and executed by the mortgagor and mortgagee relating to the mortgaged property, which are held by and are in the possession and power of the mortgagee. With the exception of this category of title documents, the Defendant denies that the Plaintiff is entitled to inspect and take copies of other title documents and, in particular, the title documents executed further to the agreements entered into between, inter-alia, AIB and the

Defendant and further to which the Defendant as transferee acquired the legal rights, interests and title previously vested in AIB in the agreements and related mortgage securities. These title documents which are confidential and commercially sensitive do not come within the scope of s.91 of the 2009 Act."

Service of Notice to Produce

11. On 22 March 2021 the appellant served a Notice to Produce documents on Everyday pursuant to O.31, r.15 in respect of the documents referred to at para. 10 of the Defence:

1. *"... the agreements entered into between, inter alia, AIB and the Defendant..."*
2. *"...the title documents executed further to the agreements ..."*

The notice sought a time within three days when the documents might be inspected at the office of Everyday's solicitor and indicated that should Everyday fail to consent to inspection, an application may be made to the High Court pursuant to O.31, r.18 or otherwise.

12. Subsequently on 21 May 2021, solicitors for the appellant wrote to Everyday's solicitors requesting consent to the inclusion of additional relief pursuant to O.31, r. 18 in a Notice of Motion (Inspection Motion) which had issued on 8 October 2020 seeking inspection of the documentation referred to in para. 10 of the Defence and in the Notice to Produce on sundry bases including pursuant to O.50, r.4, s.91 of the 2009 Act and the inherent jurisdiction of the High Court. The matter was dealt with on that basis at the hearing.

13. The inspection motion together with the (proposed) amended Notice of Motion seeking relief in the alternative pursuant to O.31, r.18 was grounded on the affidavit of the appellant sworn on 8 October 2020. Same sets out in detail together with supporting exhibited documentation the history of the appellant's course of dealing and loan

arrangements with AIB. At para. 100 the appellant deposes that he seeks inspection of the relevant documents:

> *"...for the purpose of an opinion in relation to the title of the Defendant. ... I seek inspection to obtain legal advice for the purpose of advancing my case on the effect of the deeds in the particular circumstances of my pleaded case which include the fact that I made offers to buy out my own loans and security and instead it appears that my loans and security were bundled together into a portfolio and sold with other loans and security to someone else."*

He deposes at para. 102:

> *"102. I am not aware that there is legal adviser who would be prepared to advise me as a client on the effect Global Deed of Transfer dated 2 August 2018 and the amended and reinstated Global Deed of Transfer without seeing them in their entirety.*
>
> *103. I further seek inspection to advance my pleaded case against the Defendant in which the enforceability of loans and security by the defendant is an issue including as to the extent to which my accrued rights against AIB including the restructuring agreement and understanding were transferred to the Defendant and the effect on the validity of the loans and security if they were not, and the question of the price obtained by AIB in relation to ameliorating my outstanding liability to the plaintiff referred to at paragraph 49 of the statement of claim.*
>
> *104. I believe that when someone, who I did not enter into any agreement with, asserts themselves as a mortgagee against me as a mortgagor, I should be entitled to verify, independently, what the position is, particularly where there is a statutory mechanism for doing that.*
>
> *105. The Defendant refuses to disclose the legal title upon which it exercises its purported right to sell my secured assets and details of the transaction have not been*

disclosed. The result is that I now face an artificially accelerated sale which will not realise the full value of the security.

106. Precisely what was transferred and what was notified to the Defendant of my position by way of agreement or otherwise is critical in respect of my substantive proceedings against the Defendant and ascertaining my rights.

107. I seek to investigate the precise nature of the legal title that transferred to the Defendant and/or that the Defendant was on notice of, upon acquiring the loans. I seek to investigate the value for which the loans were sold in circumstances where in 2017 and 2018 I made various offers in respect of the loans. …

108. I am advised that I am entitled to independent legal advice as to whether and how the Defendant comes to be mortgagee. This entails my right under statute to 'trust but verify' and to investigate the legal title on which the Defendant relies as mortgagee and to take legal advice on the basis the mortgagee asserts title against me. …"

The appellant further deposes at para. 112 *et seq.* that he is prejudiced by the non-disclosure of the Global Deeds insofar as he seeks declaratory reliefs in the substantive proceedings relating to the obligations of the mortgagee AIB pursuant to the 2015 restructuring agreement and the nature and extent of the obligations as may be continuing on the part of AIB thereunder.

14. The first affidavit in response on behalf of Everyday was sworn by Andrew McCudden on 8 April 2021. Redacted copies of the said Global Deeds are exhibited. He deposes at para. 10:

"…I say and believe that the redactions contained in the Deeds of Transfer 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 Defendant (sic) ability to 'work out' the loans acquired, Defendant's ability to

negotiate and complete the acquisition of future loan books and Defendant's ability to negotiate and complete possible future loan book sales), (2) bank and/or client confidentiality (instancing the Data Protection Acts 1988-2018) 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)."

15. The operative parts and all schedules of the Global Deeds exhibited were very extensively redacted, save and except where the appellant as borrower and the borrowings of the appellant with AIB are identified in the Schedules.

16. By a further affidavit of 21 May 2021 the appellant deposed that Everyday had carried out redactions to the documents *"without express reference to the issues in the pleadings"*. It was contended that if Everyday had decided to redact certain documents, the relevance of those redactions *"must be determined by reference to the pleadings."* Issue is taken with the stance adopted by Mr. McCudden that redaction could be carried out where *"…the Defendant considers it appropriate"*. At para. 7 the appellant deposes:

"The Defendant's deponent makes no averment as to whether it was he who advised that redactions be made and, if so, whether it was in his capacity as Head of Compliance or his capacity as a solicitor to the Defendant. The Defendant has not made reference to whether he personally supervised redactions or whether he could personally justify them in evidence. There is no statement that the deponent or the officers of Court with carriage of the case for the Defendant, have seen all original unredacted documents of title and documents bearing on the validity and enforceability of a transfer of loans and security."

It is contended that *"if redaction is to be permitted by the Court it should be undertaken or supervised by an Officer of the Court with carriage of the case acting impartially and with*

duties to the Court and who has both knowledge of the issues and the contents of original documents." (para. 9)

17. Reliance is placed on the relevance of the material to the plaintiff's case, it being asserted that *"if any redaction is permitted (having regard to a statutory right to inspect title documents) it is subject to the Court's right to review unredacted and complete documents so as to verify that redaction is appropriate."* It is further deposed that *"…nothing should be done by a party which would deprive a Court of understanding completely the nature of documentary evidence of a transaction which forms part of an issue in the case."* (para. 10) The appellant complains in his affidavit that Mr. McCudden made no reference to advice having been received in relation to the issue of relevance or legal issues from the solicitors on record for Everyday having carriage of the conduct of this litigation at the time the redaction was carried out. *"There is no averment to the effect that they have seen originals of all of the agreements by which loans and security were transferred and all documents bearing on validity and enforceability or that they have verified the authenticity and completeness of copies or that it is they who have carried out redactions."* (para. 11)

18. It is contended that Mr. McCudden on behalf of Everyday had provided *"general justifications for the redactions of copy deeds."* In respect of the assertion that same was justified on the basis of *"commercial sensitivity"* or that same *"could impact future transactions"*, the appellant deposed:

> "*It is not at all clear that any adverse impact which the defendant seeks to avoid would not include borrowers such as myself having a greater knowledge of their rights. I am advised that the reasons advanced were not sufficient to justify the redaction of what could otherwise be relevant material for two reasons*." (para. 12)

Firstly, it was said that Mr. McCudden had failed to *"… identify which redactions were made for reasons of commercial sensitivity and whether an assessment was made as to whether*

the material was relevant or irrelevant as an initial determination before moving to a consideration of commercial sensitivity." Secondly, Mr. McCudden had identified *"potential future breaches of confidentiality from competitors."* The appellant deposed:

> *"I am not a competitor of the Defendant. I am advised that confidentiality concerns can be met by more appropriate methods of disclosure to a discrete category of legal advisors and a suitable undertaking to the Court. The Defendant's evidence in Mr. McCudden's affidavit does not make reference to whether this exercise was considered."*

19. On the issue of confidentiality, it was contended that confidentiality *per se "is not a reason to withhold relevant material and the first consideration is whether the material is relevant."* (para. 14) The appellant complains that Everyday has not explained how the conclusion was arrived at *"that the redacted parts of the document are irrelevant"*, in particular whether that irrelevancy arose in regard to s.91 of the 2009 Act or O.50, r.4 RSC or merely having regard to the issues between the parties in the litigation. It is complained that the Global Deed of Transfer dated 2nd August 2018 *"appears to have run to 970 pages, 15 of which are selectively disclosed with redactions."*

20. A variety of alleged unexplained irregularities in the said Global Deed are identified. No explanation has been offered for the exclusion of *"large swathes of this agreement."* (para. 16) The appellant complains that the redactions are not insubstantial and apply to the operative parts of the Deed and relate specifically to the assignment provisions. It is contended in regard to documents of title *"…it is necessary to consider the entire of a document and the chain of documents of which they form part in order to precisely understand the terms, nature and effect of the transfer."* (para. 17)

21. The appellant complains that there is an absence of

> *"explanation as to how the documents Mr. McCudden has exhibited are sufficient evidence or proof of title (other than a bald statement that they do at paragraph 16 of his affidavit). ... The redacted copy excerpt from the Global Deed of Assignment dated 2 August 2018 does not contain any reference to the defendant's express acceptance of the assignment or transfer to the defendant."* (para. 18)

Issue is raised as to the identity of each party to the Deed and whether some may have been redacted. (para. 19)

22. At para. 20 the appellant complains that *"there is no inclusion or reference to the consideration paid for loans and security or the consideration paid or allocated to my loans and security."* It is averred that part of the appellant's claim *".. is that my loans and security should not have been used to cross subsidise other borrowers' loans and security and that my loans and security were sold against a background of my having bid very substantial sums to buy them out which, I believe were in excess of whatever the defendant purports to have paid or allocated consideration for them."* (para. 20) The appellant objects that the court should be deprived of knowledge of the contents, and still less the existence, of all agreements whereby the defendant comes to assert itself as mortgagee against him. *"It appears that a proper understanding is being obscured."* (para. 21)

23. At para. 22 he deposes that the agreements for the transfer of loan portfolios:

> *"are not limited to transfer deeds in relation to specific security but will usually deal with a variety of matters including matters bearing on the validity and enforceability of loan agreements and security and can deal with… (1) A statement of the liabilities which the seller owes to the borrowers arising from breaches of obligations to borrowers which are being transferred to the buyer; (2) Recitals may also be included which state what the loans being transferred relate to, a recital stating whether the buyer is assuming obligations, identification of any relevant litigation,*

whether rights and claims ancillary to facilities finance agreements are being transferred, statements as to whether the benefit of covenants and undertakings from borrowers is being transferred, statements as to when transfer of risks occur…, provisions as to the adjustment of consideration on the happening of certain events, a statement or statements as to the extent to which the seller's obligations to borrowers are being assumed by the purchaser, including in relation to litigation and identification of documents relating to assets; (3) A statement of what liabilities which the seller owes to the borrowers arising from breaches of obligations to borrowers are being transferred to the buyer…"

The appellant raises sundry other complaints, including the absence of explanation as to why EBS DAC is included in the loan sale as seller of the appellant's loans and security.

Affidavit of Suzanne Bainton

24. An affidavit sworn on 23 June 2021 by Suzanne Bainton, an independent solicitor and conveyancer, was filed on behalf of the appellant. In her affidavit she considered whether a purchaser would accept the documents furnished as proof of the title of Everyday to sell the secured properties listed in Schedule 2 of the relevant Global Deed of 22 October 2018 and whether documentation furnished in redacted form was sufficient to advise on the validity of the transfer of the loans. In a careful and comprehensive affidavit analysing the relevant legal principles, she concludes at para. 8.1:

"*I have serious doubts about the effectiveness of the deed dated 2nd August 2018 as amended by the deed dated 22nd October 2018. This is for the following reasons;*

(a) Terms referred to in the documents are not defined.

(b) The deed of the 2nd August 2018 refers to the transfer to the buyer of the estate, right, interest and entitlement in the properties 'at the relevant date of Completion.' This term is not defined …there is no reference to what date it is.

(c) The deed transfers the sellers' interests in the properties listed in Schedule 2. There is no Schedule 2 and this is purported to be replaced by the Amendment and Reinstatement Deed dated 22nd October 2018. This deed refers to the Original Schedule 2. This term is not defined and there is no Schedule 2 in the deed dated 2 August 2018.

(d) The Amendment & Reinstatement Deed of 22 October 2018 is for conveyancing purposes a deed of rectification but does not assure to the buyer the sellers' interest in the property

(e) Evidence of proper execution of the deeds has not been provided.

(f) In relation to the properties registered in the Land Registry, there are no folio numbers referred to in the deeds provided. There may well have been separate documentation lodged in the Land Registry to transfer the charges but this has not been furnished or provided."

25. In an affidavit in response sworn on 13 July 2021 and filed on 16 July 2021, Naomi O'Connor, solicitor for Everyday, deposes:

"9. It is the Defendant's position that the Plaintiff's application for inspection of unredacted title documentation and to take copies of the unredacted title documentation has little to do with satisfying himself about whether the Defendant has acquired title in the loans and mortgage securities, and has more to do with the Plaintiff seeking to elicit information as to what price the Plaintiff's loans were in fact sold by the Bank to the Defendant. It is the Defendant's position that this is confidential and commercially sensitive information to which the Plaintiff has no entitlement."

26. It is contended that Ms. Bainton in her affidavit at para. 5.7 *"acknowledges that the Defendant as the registered owner of the mortgaged securities over the investment*

properties which constitute registered land, has acquired good and marketable title which is beyond challenge." Further, with regard to unregistered lands Ms. O'Connor deposes that the Irish Law Deeds of Conveyance and Assignments signed and dated 2 August 2018 with regard to such of the subject investment properties as constitute unregistered property and on foot of which the title came to be registered in the Registry of Deeds, *"also constitutes evidence of title confirming the title in the mortgage securities can be lawfully transferred under such a Deed."* (para. 11) It is contended at para. 12:

> *"It is the Defendant's position that having regard to the foregoing, that there is absolutely no need for the Plaintiff to seek inspection or to take copies of unredacted title documentation arising from the agreements entered into between the Bank and the Defendant concerning the Plaintiff's loans and related mortgage securities as the Defendant's conclusive title to the Plaintiff's loans and related mortgage securities is established by its registration in the Land Registry as the owner of the mortgages and by the Irish Law Deeds of Conveyance & Assignment."*

She further deposes that:

> *"As the Global Deeds of Transfer and Restatement do not have to be registered in the Registry of Deeds, there is no stamp duty affixed to either deed. A stamp will be on the Irish Law Deeds of Conveyance &Assignment which records the Defendant's title in the mortgage security."* (para. 20)
>
> *...*
>
> *...The Defendant also does not accept that the redaction which has been made to the title documents furnished to the Plaintiff in any credible or real sense impedes the Plaintiff in obtaining legal advice with regard to whether the Defendant has acquired good title to the loans and related mortgage securities."* (para. 22)

The copy deeds exhibited, an "Irish Law Deed of Conveyance & Assignment (Unregistered Property – Judgment Mortgages)" and an "Irish Law Deed of Conveyance & Assignment (Unregistered Property)", of even date, are exhibited in redacted format.

27. An affidavit of another independent solicitor was obtained on behalf of the appellant from Karen Sheil Solicitor, sworn 4 October 2021. With regard to, *inter alia*, the 2018 Transfer she noted that same was heavily redacted such that for terms including "*underlying loan*", "*mortgage asset*", "*finance documents*", "*security documents*", definitions were not provided. She claimed: "*These definitions are relevant as they relate to the Loans and the transfer of that underlying security to the Defendant."* She notes at 5.2 that;

> *"Clause 1.1 of the operative part of the 2018 Transfer states that the various security documents and Mortgages to be transferred includes those documents listed in Schedule 1. However, there was no Schedule 1 contained in the 2018 Transfer. There is only a 'Schedule' in the 2018 Transfer which contains a list of the Mortgages, certain judgment mortgages and other mortgages. There is an error in the 2018 Transfer in that the operative part of the Deed does not correctly identify the correct Schedule in which the security documents and Mortgages to be transferred are contained. It is curious that this error was not also rectified on the 2018 Amendment when the Defendant sought to rectify an error in the Properties related to the underlying security."*

At 5.3 she notes, supporting the conclusion of Suzanne Bainton in her first affidavit of 27th May 2021 referenced above, *"Schedule 2 of the 2018 Transfer is meant to contain a list of the Properties related to the Loans but there is no Schedule 2 in this Deed."*

At 5.4 she observes:

> *"Clause 2.1 of the 2018 Transfer contains an agreement by the parties to that Deed that the Loans and related security over the Properties will be transferred by way of*

a separate deeds of transfer… These Completed ROI Transfers … were not initially furnished but following the Plaintiff's repeated requests for complete evidence of transfer of the Loans, some of the Completed ROI Transfers were furnished as Exhibit 2 to the replying affidavit of Naomi O'Connor sworn 13th July 2021. From a review of these Deeds of Conveyance and Assignment, some evidence of the purported transfer of some of those mortgages affecting some of the unregistered properties has been provided. The Deeds of Conveyance and Assignment for Numbers 18, 20 and 21 Quayside Apartments, 31 Fairbrook House and 48 Letterkenny Town Centre (if unregistered title) - have not been furnished."

28. She identifies at 6.1 that *"The 2018 Amendment has also been redacted in such a manner such that the definitions of defined terms referred to in the operative part of the Deed have not been provided."* She further notes (at 6.2) that reference to "original Schedule 2" in the Deed *"… causes further confusion as it appears that there was no Schedule 2 whatsoever contained in the 2018 Transfer so it is difficult to understand what is being replaced."* With regard to the effective registration of relevant incumbrances on Folios she deposes at 7.2: *"… Based on an examination of the Folios furnished, the Defendant has been registered as charge holder in respect of four Properties. This statement does not mean and should not be interpreted as confirming that this title/entitlement is beyond challenge."* At para. 8 she concludes:

"…On balance and making certain reasonable assumptions, I am of the opinion that the 2018 Transfer and the 2018 Amendment, while they may point towards the transfer of the Loans to the Defendant, production of these two deeds does ***not*** *comprise* ***complete*** *evidence of transfer of the loans. The difficulty is that to take this position requires … one to make certain assumptions, in respect of which that there is no guarantee that same would be accepted by a third party purchaser of the Properties.*

In order to provide certainty and to deal with the confusion caused by the discrepancies in these two deeds and their over redaction, the omitted information should be provided by the Defendant including:

(1) The omitted definitions from the operative sections of the 2018 Transfer and the 2018 Amendment.

(2) [Certain deeds of conveyance and assignment]…

(3) The omitted definitions from the operative section of all the Deeds of Conveyance and Assignment.

(4) Evidence of due execution of all the Deeds of Conveyance and Assignment and the 2018 Transfer and the 2018 Amendment; and,

(5) A copy of the Mortgage dated 26th October 2011 between (1) Aidan Farrell and (2) Allied Irish Bank Plc (which was not provided with the Mortgages).

In the absence of the information requested above, I am of the view that the redacted 2018 Transfer and 2018 Amendment would be queried by a third party purchaser of the Properties." (emphasis in original)

29. In her supplemental affidavit of 1 October 2021 Suzanne Bainton deposes at para. 6 that Ms. O'Connor (for Everyday) had:

"…interpreted my evidence to the Court as an acknowledgment that the Defendant has acquired good and marketable title 'beyond challenge'. I have not made those comments in my Affidavit. I stated that a land registry folio is accepted as evidence of a charge holder's entitlement. This is in the context of conveyancing practice as referred to in paragraph 3.2 of my first affidavit. This is not to say that the validity of the transfer of a charge could not be challenged by any person but that conveyancing transaction the title to the charge would be accepted by a solicitor acting for a purchaser of the property. Ms. O'Connor acknowledges in paragraph 21 of her

affidavit that in certain circumstances the conclusiveness of the Land Registry register can be challenged."

She further deposes at para. 7:

"It is my understanding that the Plaintiff's case is a challenge brought to whether the Defendant has validly acquired the loans as well as the secured properties. It is on that basis that I understand he seeks documentation evidencing the steps taken in the sale process by which his loans and the secured properties were transferred by AIB to the Defendant. Insofar as my role is concerned, I can comment on what a purchaser would accept as evidence of the Defendant's entitlement to sell the secured properties in the context of acceptable conveyancing practice…

The ability of the bank to sell the properties to a third-party purchaser is the ambit of my expertise and not the entitlement of the Bank to repay and/enforce the loans as against the borrower."

30. In another affidavit sworn on 3 November 2021 Naomi O'Connor deposed, *inter alia:*

"14. It is evident that the Plaintiff is doing so for the purpose of gaining access to contractual and conveyancing commercial documentation to which the Plaintiff is not a party and which the plaintiff knows is confidential, commercially sensitive and secret. The Defendant does not accept that the plaintiff has any such entitlement to do so in this regard."

31. Following two days of hearing on 29 and 30 March 2022, and judgment being reserved, the judge gave initial directions on 24 May 2022 that certain redactions be removed. As the transcripts record, when the matter initially came on for judgment on 24 May 2022 the court directed that Everyday swear a further affidavit dealing with the redaction of the Global Deeds and directed that certain portions of the said Deeds material to the case as pleaded should be disclosed.

32. It was on foot of the said direction that the matter was further adjourned and a supplemental affidavit of Andrew McCudden was filed on 12 July 2022 . He deposed:

> *"3. Having read and considered unredacted copies of the respective Deeds, I can confirm that the revised and reduced redactions contained in the copies of the respective Deeds, which I exhibit in this Affidavit, are limited to those portions of the respective Deeds which are genuinely commercially sensitive and confidential."*

That position is reiterated with regard to the Irish Law Deed of Transfer dated 2 August 2018 (the Transfer Deed) as well as the Schedule to the Transfer Deed, it is deposed that *"information which has been redacted in the Schedule to the Transfer Deed, contains data relating to other borrowers, which is not only commercially sensitive and confidential to the borrowers, but also to the defendant in the course of conducting his business."* (para. 6) The affidavit confirms that it is sworn to comply with the directions of the High Court judge in its initial direction of 24 May 2022 to specify the nature of the information contained in the redacted portions of the Transfer Deed. The deponent confirms that Everyday reduced the extent of the redactions contained in the Global Deeds previously exhibited and had reduced the redactions contained in the schedule to the Global Deed exhibited to his first affidavit. Further it was deposed in relation to the second Global Deed of 22 October 2018 that parts had been unredacted following review, including Clause 1 *".. because it does not contain genuinely commercially sensitive and confidential information"*, along with Clause 4 which was now exhibited unredacted. It was asserted regarding redactions in the later Global Deed that same were justified as the information redacted *"is commercially sensitive and confidential information relating to Third Party borrowers' dealings with the Bank, and who transfer the Third Party borrowers' loans and mortgage securities to the Defendant."*

Judgment of the High Court

33. In her judgment [2022] IEHC 303 the judge considered the application to inspect documents on the four distinct bases relied on by the appellant. She noted that pursuant to O.31, r.18 inspection was sought of *"all documents as are required to allow the plaintiff to obtain legal advice as to whether the defendant is the successor in title to [AIB] to the mortgagee's interest in respect of the lands and premises listed in the schedule herein [being the eleven properties the subject of the mortgages] to the interest of including [the Global Deed of Transfer] and [the Amended and Reinstated Global Deed of Transfer]."*

34. The court noted that *"the documents sought at the hearing of the application are much broader than those set out in the notice of motion or the amended notice of motion, and include the agreements between AIB and the defendant for the transfer of the loans and security, as well as the actual deeds of transfer, as well as a global claim to all deeds which the defendant has asserted against the plaintiff."*

35. Noting that the appellant had brought applications pursuant to the Rules of the Superior Courts and in particular O.31, she declined to consider the matter by reference to the inherent jurisdiction of the court.

Application pursuant to O.31

36. The court noted the position of Everyday that it had produced redacted copies of both Global Deeds. Both were exhibited to the affidavit of Andrew McCudden sworn on 8 April 2021. Everyday denied any obligation to produce documents other than the said redacted documents. (para. 16)

37. The court identified two net issues to be determined in the context of O.31, r 18:

(i) Whether there is a right to inspect pursuant to O.31, r. 15, and

(ii) Whether the plaintiff is entitled to see the unredacted documents or if the extent of redactions should be reduced.

38. The court in its judgment noted the analysis of the historic origins of O.31, r.15 by Haughton J. in *Courtney v. OCM Emru Debtco DAC* [2019] IEHC 160 (*Courtney*), observing that *"it appears that the right to inspect arose where a party stated the effect of a document in his or her pleading and indicated that he or she would rely upon it at trial."* The court noted that in the decision of *Hardman v Ellames*, 39 ER 1124, it had been held that:

> *"...by referring specifically to the deeds and indicating that they would be further produced and relied upon, the defendant had made the deeds part of his pleading, and it followed as a necessary consequence that the plaintiff, having a right to read the whole of the defendant's answer, had a right to read the document so made a part of his answer."*

39. The judgment notes that this approach was followed in *M'Intosh v. Great Western Ry Co.* (1849) 1 Mac & G 73 where Cottenham L.C. had observed:

> *"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 than the Defendant thinks proper to admit."*

40. At para. 23 the judge observed:

> *"It seems from that line of case law that the origin of the modern rule relates to documents which are specifically identified in the pleadings for the purpose of relying on them at trial, as opposed to more general references to categories of documents."*

41. The court considered paras. 9 and 10 of Everyday's pleaded Defence. It was noted that para. 10 denied that the appellant was entitled to inspect and take copies of other title documents whereby the defendants *"as transferee acquired the legal rights, interests and title previously vested in AIB in the agreements and related mortgage securities."*, the judge

observed *"I do not think that general references to documents of this kind trigger the entitlement to inspect pursuant to Order 31, rule 15".* (para. 25 of the judgment)

42. The judge observed:

> *"This interpretation of rule 15 I think is consistent with the procedures set out in rule 17 for objection to the production of documents to the other party. Rule 17 applies where at least some of the documents in the notice are ones listed in an affidavit as to documents in rule 13 and prescribes a very short deadline for objecting to the production of documents. It is difficult to see how those short deadlines could be met if the documents had not already been identified and therefore the entire inspection procedure seems to me to be predicated on a prior identification of the precise documents which are in issue."*

43. The judgment continues at para. 28:

> *"…the right to inspect attaches only to the specific documents mentioned in the defence. The only such documents are the Global Deed of Transfer and the Amended and Reinstated Global Deed of Transfer, which are specifically identified by date at para. 9 of the defence. Paragraph 10 of the defence does not identify any specific documents, and therefore the right to inspect under Order 31, rule 15 does not arise."*

44. The judgment then turns to the second issue which engaged O.31, r.18: *"Whether the plaintiff is entitled to see the unredacted documents, or whether the extent of the redaction should be reduced".* Concerning the first Global Deed, the judge observed at para. 30:

> *"…the date and parties are fully replicated but the portion between the parties and the operative clauses have been redacted in full. It is not clear whether this contains recitals or whether it contains the definitions for the Deed as a whole."*

45. The court further noted that the introductory clause of Part 1 of the operative parts of the deed had been redacted and identified other redactions including Clauses 1.6 and 4.1.

The judge noted the position of Everyday in submissions *"that the purpose of the redaction was to exclude the greater part of the schedule as it relates to third parties and had been redacted for the purpose of preserving their right to confidentiality".* The judge noted *"The only real objection to this aspect of the redaction is that it is not confirmed on affidavit that this is what has been done."* (para. 31) The court further reviewed the second Global Deed, noting that all recitals had been redacted along with Clauses 1 and 4 and the Schedule. The court noted that justifications advanced by Mr. McCudden in his affidavit of 8 April 2021 for the redactions included (1) commercial sensitivity, (2) bank and/or client confidentiality and (3) irrelevance (para. 36). The court also noted that at para. 16 Mr. McCudden had deposed that the exhibited Global Deeds:

> *"…in addition to confirming that the Defendant has legal title in the Plaintiff's loan agreements and related mortgage securities also simultaneously protect by way of redaction confidential and commercially sensitive information which is not relevant to the determination of the matters in dispute between the parties in the proceedings."*

46. That stance had been reiterated in the affidavit by Everyday's solicitor, Ms. O'Connor, sworn 13 July 2021. It was noted at para. 40 that in Ms. O'Connor's second affidavit sworn on 3 November 2021 she had stated that the consideration specified in the Global Deed had been agreed *"without individual consideration being agreed with respect of each loan or mortgage security, which is being assigned by the bank to the third-party commercial undertaking such as the Defendant."*

47. In considering the issue of redactions, the court distinguished the decision of Murphy J. in *English v. Promontoria (Aran) Ltd (No. 2)* [2017] IEHC 322, observing:

> *"…that judgment was based on the limited nature of the challenge in those proceedings, which was to question the validity of the transfer. The larger issues canvassed in these proceedings as to whether the plaintiff had a right to redeem his*

loans at a discounted rate (whether this is expressed as a right to pre-emption, first refusal, or an aspect of the equity of redemption) were not at issue in that case."

48. The judge considered that there was no authority in Irish law for a proposition that leave of the court is required to exhibit redacted copies of deeds in advance of swearing a replying affidavit. She noted that the appellant's written submissions contended that the effect of O.31, rr.15-18 is to create a presumption in favour of disclosure.

She observed:

"…but the court can scrutinise the redacted copies in order to ascertain whether it can be satisfied that the redactions made are limited to what is necessary to protect the defendant's legitimate commercial interests, and in particular information that is so commercially sensitive that the defendant is entitled to redact the documents to protect its confidentiality, and to information about third parties."

49. Citing *Courtney* (*supra*) and *Victoria Hall Management Ltd v. Cox* [2019] IEHC 639, the judge considered:

"These authorities show that this Court should require evidence, first, that the redaction has been effected on the basis of legal advice as to the proper parameters of redaction in the particular case."

50. The judge considered at para. 49: *"…that proper explanations need to be put on affidavit in order to rely on redaction"*, citing *Victoria Hall*. In the latter case Barniville J. (as he then was) had noted that the court would only look behind affidavits pertaining to redactions in limited circumstances. He had held that it was in the interests of justice that the redactions in question be further explained and justified on affidavit.

51. The court considered that arguments on behalf of Everyday that the onus is on the plaintiff to demonstrate why redaction was excessive were *"somewhat overstated"*:

"…the burden to demonstrate that greater disclosure is required only moves to the party seeking inspection when the redaction is done in a manner which gives confidence to the party seeking inspection and to the court, that it has been effected only in so far as that can be justified on legitimate grounds such as commercial sensitivity and third party confidentiality."

52. The court emphasised that the redaction ought to be done *"under the supervision of the solicitor, and that detailed explanations are offered to the court…".* The court attached weight to the decision in *Everyday Finance DAC v. Woods* [2019] IEHC 605 where McDonald J. considered that a detailed justification ought to be provided on affidavit in respect of redactions, particularly definitions.

53. The judge considered that a detailed explanation should be given on affidavit for specific redactions insofar as they concerned the operative part of the deed including definitions, Clause 1, Clause 2, Clause 3 and Clause 4.

54. With regard to the purchase price of the appellant's loans, the court noted that Ms. O'Connor in her affidavits *"...makes the point that the price disclosed on the deeds the subject of this application is the price of the overall loan book and is not broken down by reference to the plaintiff's loans."* The court, however, was of the view that her averments that the redactions did not *"in any credible or real sense impede the plaintiff in obtaining legal advice is made on the basis of a misunderstanding of the issues in the proceedings."* The court was satisfied that the issues *"…are broader than the net issue of whether the defendant can establish title to the loan facilities and related securities."*

55. The court noted that in one of her affidavits Ms. O'Connor had alluded to confidential, commercially sensitive and secret information but had not explicitly stated that the consideration was such. The court directed that all portions of the deeds material to the case as pleaded were to be disclosed to the appellant *"the plaintiff may get a 'litigious advantage'*

from sight of a greater part of each deed, and in particular, may be in a position to furnish a reply to the defence." She further directed that Everyday *"should identify on a clause by clause basis, the precise justification for the redaction and give an indication of the content of the redacted portion in order to link the specific redaction to the available legal bases upon which such redaction can be effected."* The court had previously directed that a further affidavit be sworn by the respondent's solicitor dealing with the redactions.

56. The judgment analysed the arguments pursuant to s.91 of the 2009 Act but did not ultimately grant reliefs under that section. Several grounds in the Plenary Summons and Statement of Claim seek declaratory orders pursuant to s.91 of the Act. It is clear that the nature and extent of the appellant's rights pursuant to the said statutory provision constitutes a significant material aspect of the substantive action. The judge's focus was on the claim as framed pursuant to O.31, rr. 15-18 RSC.

The appeal

57. The appellant appeals against the decision of the High Court comprised in the written judgment of 24 May 2022, together with the subsequent *ex tempore* decisions and findings, including the court's finding that its directions made on 24 May 2022 were complied with by Everyday. The Notice of Appeal is prolix with 89 grounds identified.

58. Grounds 1-26 are general in nature. Briefly put, Grounds 27-36 inclusive are directed towards the contention that the trial judge erred in her interpretation of s. 91 of the 2009 Act and in failing to grant inspection pursuant to same. Grounds 37-62 are directed towards the contention that the court had erred in finding that production of a photocopy by way of exhibit complied with a Notice to Inspect, failed to have due regard to the affidavit of the independent experts and otherwise erred in her interpretation and application of O.31, rr. 15-18 inclusive. Ground 63 is directed towards O.54, r.4, contending the judge erred in finding that this provision did not apply in relation to the appellant's application to inspect

documentation. Grounds 64-72 pertain to the court's treatment of the application based on the inherent jurisdiction and its refusal to exercise same in the circumstances. Grounds 73-84 inclusive contend that the High Court judge erred in holding that the directions given on 24 May 2022 had subsequently been complied with by Everyday. Grounds 85-89 are directed towards the continuing redactions maintained by Everyday and effected in the partly unredacted documents exhibited in the supplemental affidavit of Mr. McCudden sworn 12 July 2022 and Everyday's alleged failure to adduce evidence from anyone who had seen the original documents sought by the appellant.

59. In its Notice of Opposition, Everyday succinctly engages with the key issues, contending that the High Court judge *"properly exercised her discretion in the determination of the Appellant's interlocutory motion"*. With regard to O.31, r.18, it was contended the High Court judge was correct that same attaches only to specific documents expressly mentioned in a Defence and further that the judge was correct in holding at para. 28 of the judgment that the right to inspect extended only to the two Global Deeds. It was further contended that the High Court judge was correct at para. 25 of the judgment that the general reference to documents at para. 10 of the Defence gave rise to no right to inspect pursuant to O.31, r.18.

60. Everyday asserts that by a supplemental affidavit of Andrew McCudden sworn on 12 July 2022 to which less redacted copies of the Global Deeds were exhibited Everyday had complied with the directions of the High Court given at para. 58 of judgment that all portion of the Deeds pleaded at para. 9 of the Defence, which were material to the proceedings, should be disclosed to the appellant. It was emphasised that production of the copy deeds in unredacted form was explicitly recorded in the judgment (para. 29) and order of the High Court. Everyday noted that the appellant did not object to redaction of portions of the Schedules which relate to other borrowers. The issue of redaction was said to be *"moot"*.

61. Everyday contended that the trial judge was correct in finding that the respondent did not require leave to redact documents prior to disclosure of same pursuant to O.31, r.18. It was contended that since a copy of the unredacted version of the Global Deeds had been exhibited, the matters raised by the defendant at para. 55 of the Grounds of Appeal concerning the evidence of Karen Sheil could not avail the appellant. It was contended that the High Court judge had correctly held in the exercise of her discretion that the respondent had complied with the directions of the court concerning redaction of documents disclosable pursuant to O.31, r.18.

62. Everyday cross-appealed on the issue of costs, contending that since the High Court judge had refused the majority of the relief sought by the appellant and refused the appellant's application for inspection pursuant to O.31, r.18, and that although the judge had directed that the extent of redactions to the deeds should be revised and reduced, it had held that it was open to Everyday to effect appropriate redactions without prior leave and that it was open to it further to redact the schedules to the deeds where they relate to borrowers other than the appellant. It was contended that since neither party had been entirely successful in the motion, neither was entitled as a right to the costs of the motion. It was open to the High Court judge to award costs to a partially successful party. It was contended that the appellant had been *"overwhelmingly unsuccessful in his applications for disclosure and/or inspection"* and that Everyday had successfully defended all but one limited aspect of the motion. The trial judge had thereby erred in the application of ss.168 and 169 of the Legal Services Regulation Act, 2015 (the 2015 Act) and of O.99, r.1 in awarding the entirety of the costs of the motion to the appellant. It was further contended that the trial judge had erred in the exercise of her discretion in failing to have any or any adequate regard to the fact that the appellant had significantly altered the nature and scope of his application on two occasions, including during the course of the hearing, as noted at paras. 7 and 11 of the High

Court judgment. It was contended that an order ought to be made varying the High Court costs order made on 6 October 2022 and that costs ought to be awarded to Everyday, same to be adjudicated in default of agreement.

63. In his Grounds of Opposition to the cross-appeal filed 2 March 2023, the appellant submits that the High Court judge correctly exercised her discretion in the award of costs to him. It is contended that the award was appropriate in circumstances where Everyday *"fundamentally misunderstood the redaction process when carrying out the initial redaction."* The appellant cites *Chubb European SE v The Health Insurance Authority* [2020] IECA 183 and *Higgins v Irish Aviation Authority* [2020] IECA 277 in support of the argument that a party who has succeeded on the '*event*' should normally obtain their costs, even if not successful on every point. It is further contended that the judge correctly exercised her discretion in circumstances where Everyday failed to substantiate its claim of commercial sensitivity and that she correctly noted that legal practitioners should not be penalised for raising legal issues. The appellant submits that the judge was correct to make no order as to costs in respect of the notice to cross-examine as the appellant was not unreasonable in challenging the redactions. It is further submitted that the judge was correct to award costs to the appellant in circumstances where Everyday refused to disclose the deeds referred to in its Defence, which formed the basis for the motion for inspection, which was the '*event*' upon which the appellant was successful.

Written Submissions of the parties

64. The appellant furnished lengthy legal submissions, outlining that he sought physical inspection of the documents relied on by Everyday as evidence of it having acquired the mortgagee's interest in his loans and security. It was stated that in the written judgment the judge had found that errors were made by Everyday in relation to the redaction of copy documents exhibited in the reply to the application. Remedial action in respect of those

errors was directed by the High Court, however *"ultimately no inspection of documents was ordered, notwithstanding that the remedial action that was taken by swearing a further affidavit, was not in compliance with the Court's directions."* It was complained that following receipt of the respondent's affidavit (sworn by Andrew McCudden on 12 July 2022) in purported compliance with the court's directions given on 24 May 2022, the appellant ought to have been given an opportunity to file a further affidavit in reply. The exhibited Global Deeds with recitals unredacted made clear that same incorporated definitions from another undisclosed document. The court should have ordered full inspection of all documents incorporated by reference into the Global Deeds. The court had directed at para. 73 of the judgment that the process of making further disclosure be supervised by the respondent's solicitors but same had not occurred. The affidavit of Mr. McCudden was erroneously accepted by the High Court as meeting the entirety of the appellant's application and the court's directions.

65. The grounds of appeal are summarised as:

(a) O.31, r.15 specific documents and documents of title;

(b) Redactions;

(c) Section 91 of the 2009 Act;

(d) Inherent jurisdiction;

(e) Everyday's Solicitors' supervision of the redaction, and

(f) Costs.

66. The appellant attaches significant weight to para. 10 of the Defence, contending that the judge erred in holding that reference therein to documentation pertained to a class of documents and fell outside Order 31. Everyday had relied on the said documents as part of its title and pleaded as to their effect. Each document was known to Everyday to have a specific number and insofar as they may be described as a class, they are no different from

the class of documents ordered to be produced, as was directed by the High Court (Baker J.) in *Playboy Enterprises International Inc. v. Entertainment Media Networks Ltd.* [2015] IEHC 102. It was contended that to understand the Global Deeds required that they be read with other documents when assessing the enforceability of the transfer of the appellant's loans and security to Everyday which is under challenge by the appellant in the Statement of Claim. Reliance was placed on *Trendtext Trading Corporation v. Credit Suisse* [1982] QB 629 (CA) and *SPV Osus Ltd. v. HSPC Institutional Trust Services (Ireland) Ltd. & Ors.* [2018] IESC 44. It was contended that ultimately all documents in the chain of title would require to be seen by the court to understand their nature and effect.

67. It was contended that the trial judge erred in refusing to order inspection of documents referred to or relied on in pleadings, particularly where same concerned documents of title and no adequate reasons were furnished for the refusal. It was submitted that the purported evidence from Everyday as to the contents of documents sought to be produced was inadmissible or in any event ought not to have been admitted and amounted to hearsay without any verification that copies exhibited were true and accurate by reference to comparison with the originals.

68. It was contended that the affidavit of 12 July 2022 of Andrew McCudden ought to have been prepared with the benefit of legal advice from a solicitor with carriage of the case exercising the same duty as that owed to the court by a solicitor advising a client in discovery (in accordance with para. 48 of the judgment). No officer of the court on record for Everyday and no deponent averred to having inspected the original documents.

69. The appellant argued that a plea referring to title documents in a Defence is not a general reference but rather a "*compendious reference*" to a class of documents. Reliance was placed on *Smith v. Harris* (1883) 48 L.T. 869 and *Dubai Bank Ltd. v. Galadari & Others (No. 3)* [1990] 2 All ER 738. In *Smith v. Harris* Chitty J. had held that a reference to *"letters*

and bill heads" in a pleading was *"... both a general reference and also a special reference to each and every bill head and each and every letter; because the plaintiff, instead of setting out each document separately, refers to them compendiously, that is no reason why the inspection should not be allowed."*

70. In *Galadari (No. 3)* Slade L.J. had held: *"... a compendious reference to a class of documents, as opposed to a reference to individual documents, is well capable of falling within the rule, provided that it is indeed a reference"*. The decision was said to be authority for the proposition that *"a direct allusion to a document or documents"* was required to trigger the right to inspection. Slade L.J. stated: *"...a mere opinion that on the balance of probabilities, a transaction referred to in a pleading or affidavit must have been effected by a document, does not give the court jurisdiction to make an order... unless the pleading or affidavit makes direct allusion to the document or class of documents in question."* *Galadari* was emphasised for its emphasis on context, the court observing: *"In such cases, the task of the court must always be to extract the fair meaning of the words used in their context."*

71. Slade L.J. considered the question should be whether words used were capable of being read as a reference to a document. The appellant contended that the decision of *Lowry v. Moriarty* [2014] IEHC 602 is distinguishable since the court is not invited to infer that any particular class of documents existed and that his claim is advanced with greater specificity. The finding of the judge at para. 26 of the judgment was said to be too narrow an interpretation of the rule. It was further contended that the appellant had an entitlement to inspect all documents of title and agreements that Everyday relied on to establish its title as referenced in para. 10 of the Defence without any redaction. The respondent's references to the said documents were said to be particular rather than general insofar as Everyday asserted its legal rights were derived from same.

72. Reliance was placed on *Hardman v Ellames* (*supra*) which had been referred by Haughton J. in *Courtney* (*supra*) and *Hunter v. Dublin Wicklow and Wexford Railway Company* [1891] 28 LR Ir. 489 where the court held: *"…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."* (citing *Tebbutt v Ambler* (7 Dowl. 674)). The decision of Lindley L.J. in *Quilter v. Heatley* (1883) 23 Ch D. 42 was relied on, where Lindley L.J. had observed, citing an earlier decision of *Mercier v. Cotton* (1876) 1 QBD 442, that:

> *".. discovery was not to be given as a matter of course before a defence was put in. 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."*

73. On the issue of redaction, reliance was placed on the decision in *Hancock v. Promontoria (Chestnut) Ltd.* [2020] EWCA Civ 907 where Henderson L.J. observed, *inter alia,* at para. 74: *"In general, irrelevance alone cannot be a proper ground for redaction of part of a document which the court is asked to construe, and there must be some additional features (such as protection of privacy or confidentiality, but no doubt there are others too) which can be relied upon to justify the redaction."* The appellant contends that inspection or review of the original documents by the court would afford the most secure way to ensure a just outcome, particularly *"where they are central to pleaded issues and the disclosing party has already been found to be in error."* (para. 43) It was contended that the High Court erred

in refusing to grant inspection of the original unredacted documents referred to at paras 9 and 10 of the Defence or that same were subject to any form of legitimate objection akin to privilege.

74. The appellant asserts that: *"Had the Respondent disclosed or been compelled to disclose the complete documents exhibited as redacted documents to the trial Judge prior to its written judgment, the Court would have been in a position to know that a separate document existed with definitions which were relevant to the document in dispute."* It is contended that the documents unredacted are central to the appellant's claim, the appellant arguing that there is a clear distinction to be drawn between disclosure/production of documents listed in an affidavit of discovery and disclosure of documents where their legal effect is relied upon in pleadings. In the latter case it is likely that the document as a whole will need to be considered by a party's legal advisors and ultimately by the court. It is alleged that both Mr. McCudden and the solicitor Ms. O'Connor *"had demonstrated an incomplete understanding of their redaction obligations..."* The appellant contends he is entitled to view the documents and there was no lawful basis to pre-emptively redact same on the grounds of irrelevance confidentiality or commercial sensitivity without leave of the court.

75. Everyday emphasised the standard of review and in particular that the Supreme Court has noted that appellate courts do not lightly overrule the exercise of discretion at first instance, citing *PCO Manufacturing Ltd. v. Irish Medicines Board* [2001] IESC 46. Reliance was also placed on further authorities, including *Waterford Credit Union v. J & E Davy* [2020] IESC 9 where Clarke C.J. observed:

> *"... when a first instance court exercises a judgment of that type, it should not be overturned on appeal unless the appellate court is satisfied that the determination of the court below was outside the range of judgment calls which were open to the first instance court. Clearly, if the appellate court takes the view that documents whose*

discovery had been ordered were not relevant at all, then it should have little difficulty in overturning an order which directed that they be discovered. A similar approach should be adopted where clearly relevant and necessary documents were refused. However, the fact that the appellate court takes a somewhat different view from the trial court as to the degree of relevance should not lead to the overturning of the decision of the trial court unless the appellate court considers that the trial judge's assessment of the weight to be attached to relevance was clearly wrong and, as a result, he or she made an order which was outside the range of any order which could reasonably have been made."

76. Everyday contends that the trial judge was correct in holding that the right of inspection under O.31, r.15 extended only to documents expressly mentioned in the relevant pleading or affidavit and did not extend to documents other than the Global Deeds. Reliance is placed on *Galadari (No.3)* where Slade L.J. observed of the words: *"references made to any documents"* - the formulation also found in O.31, r.15 - *"To our minds, the phrase imports the making of a direct allusion to a document or documents. If the plaintiff were correct in its broad submission, this would oblige the court to enter into a process of inference and conjecture in order to determine the document or the class of documents in question even existed."*

77. With regard to para. 10 of the Defence, Everyday asserts that it does not contain a direct allusion to any particular document as envisaged in *Galadari (No. 3)* (*supra*). Further that the purpose of para. 10 of the Defence was to deny the appellant's entitlement to inspect certain documents under s. 91 of the 2009 Act. It argues that the appellant's contentions as to the applicability of O.31, r. 15:

"… if correct…would mean that a party could never refer to a document or class of documents in order to deny an entitlement to inspect such documents, because by the

> *very act of making such plea the party would be required to make inspection available. That cannot be the intended effect of Order 31, rule 15. That rule is intended to ensure that a party who relies on its pleadings or affidavits in its pleadings or affidavits on a document is ordinarily required to make that document available to the opposing party. The Respondent has not relied on the class of documents referred to at para. 10 of the Defence, but has rather mentioned them solely for the purpose of opposing the Appellant's claim for inspection under section 91."*

Everyday not having appealed against the decision of the High Court, the issue of redaction is said by Everyday not to arise for determination on this appeal.

The law

78. The judgment in *Courtney* is important in regard to the ambit of permissible redactions and the principles governing same. Haughton J. presciently observed at para. 57 that *"Such redactions frequently cause suspicion and resentment, and their justification has absorbed considerable court time…"* He instanced a number of decisions, including his own earlier decision in *Vitgeson Limited & anor. v O'Brien & anor.* (Unreported, High Court, 7th November 2017), where at full trial he had *"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.'"* The third element considered by Haughton J. in *Courtney* and which arose centrally on its facts was the particular wording of O.31, r.15 providing for an exception where the document in question *"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".* Quite properly, Everyday has not relied on that exception and that was acknowledged before the High Court.

79. Haughton J. cited *Hardman v. Ellames* (*supra*), noting that even where an exceptionality can be asserted the court should be disposed to direct disclosure wherever it is necessary either for the *"fair disposal of the action"* or where disclosure is shown to be necessary where the document *"will give litigious advantage".*

80. Haughton J. in *Courtney* comprehensively reviewed the jurisprudence, including *Playboy Enterprises* (*supra*) and *Hunter v. Dublin Wicklow and Wexford Railway Company* (*supra*) where Fitzgibbon L.J. stated:-

> *"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 …"*

81. Haughton J. ordered disclosure of the redacted parts as being necessary for doing justice to the plaintiff's case for the fair disposal of the interlocutory applications that were pending before the court and was satisfied that the disclosure would give *"litigious advantage"* to the plaintiff, it being information that was not otherwise available to her.

82. The long procedural history of discovery, inspection of documents and redaction in the 19th and 20th centuries was the subject of detailed review by the Supreme Court of Queensland in *Curlex Marketing Pty. Ltd & Anor v. Carlingford Australia General Insurance Ltd*. [1981] 2 Qd. R. 11. McPherson J., delivering a judgment with which the other members of the court concurred, citing Wigram, *Points in the Law of Discovery* (2nd ed., Maxwell, 1840), noted at para. 5 the practice both before and after the Judicature Act:

> *"An aspect of the Chancery practice adopted by the common law courts was that of permitting the party producing a document to claim upon a sufficient affidavit to seal up those parts of it that he objected on some proper ground or producing. See Forshaw v. Lewis (1855) 10 Ex. 712, at 716, per Parke B. Thereafter there are many decisions recognising or applying the rule that sealing up of parts of documents was*

permissible…As a result the practice of sealing up the parts of documents to which the objection to produce was taken prevailed both at common law and in equity. It continued to be followed after the Judicature Act, as can be seen, for example, in Jones v. Andrews (1888) 58 L.T. at 601; and is referred to by textwriters both present and past: see Bray on Discovery, at 237…"

McPherson J. observed at p.6:

"The point to be gathered from this digression is that for at least 150 years it has been possible to resist on some proper ground production of parts of discoverable documents..."

83. The judgment in *Curlex* was cited by the English Court of Appeal in *GE Capital Corporate Finance Group Limited v. Bankers Trust Co.* [1995] 1 WLR 172, a case concerning discovery where the plaintiff had disclosed documents with passages deleted on the basis that same were "*irrelevant*". The High Court had ordered disclosure of the unredacted documents. On appeal Hoffman L.J. observed:

*"*The oath of the party giving discovery is conclusive, *'unless the court can be satisfied – not in a conflict of affidavits, but either from the documents produced or from anything in the affidavit made by the defendant, or by any admission by him in the pleadings, or necessarily from the circumstances of the case – that the affidavit does not truly state that which it ought to state:' per Cotton L.J. in Jones v. Andrews (1888) 58 L.T.601, 604."*

Hoffman L.J. distilled the issue to be decided as; *"Can one in this case see from the documents produced that the affidavit must be wrong in claiming that the blanked-out passages do not relate 'to any matter in question', in accordance with the Peruvian Guano test…?"* (p.174). He continued:

"The Peruvian Guano test must be applied to the information contained in the covered-up part of the document, regardless of its physical or grammatical relationship to the rest. Relevant and irrelevant information may, as in this case, be contained in the same sentence. Provided that the irrelevant part can be covered without destroying the sense of the rest or making it misleading, a party is permitted to do so." (emphasis in original)

84. In his concurring judgment in *GE Capital* Leggatt L.J. observed:

"*The present case is not about privilege: it is about relevance. The plaintiffs are obliged to disclose the relevant parts of documents, but not the irrelevant. There can be no argument that in doing so they were in some way waiving any rights not to disclose each of the documents as a whole…The court will not ordinarily disregard the oath of the party that the parts concealed do not relate to the matters in question. …The test is whether it is not unreasonable to suppose that the passages blanked out do contain information which may, either directly or indirectly, enable Arthur Anderson either to advance their own case or to damage the plaintiffs' case."*

85. *Galadari (No. 3)* (*supra*) concerned O.24, r.10 of the now repealed England and Wales Rules of Supreme Court (revision) 1965/1776 which was in material parts substantially similar to O.31, r.15. O. 24, r. 10(1) provided:

"Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof." (emphasis added)

There, the appellant served a Notice to Produce requiring the tenth defendant to produce for inspection and copying seventeen items to which, it was asserted, reference had been made in an affidavit sworn on behalf of the said defendant. The core objection advanced by the

said defendant was that only five of the seventeen items constituted reference to documents. The English Court of Appeal essentially determined that "*reference to a document*" (in that case an affidavit) for the purposes of its production pursuant to the relevant rule was established where the affidavit contained a direct allusion to the document. There was no right to production under the rule where a document was not specifically mentioned and its existence could be merely inferred. The English Court of Appeal noted that certain words or phrases are capable of being read as references to a transaction in some contexts and a document in other contexts. In adopting the correct approach to an interpretation of the right to inspection, *"the task of the court must always be to extract the fair meaning of the words used in their context."*

Observations

Notice to Produce

86. Discovery, of course, has not yet taken place in the instant case and the issue is directed, *inter alia,* to the ambit of the Notice to Produce filed on 24 March 2021 and whether same has been validly complied with. The appellant's Notice to Produce seeks to inspect and take copies of other title documents and, in particular, the title documents executed further to the agreements entered into between, *inter alia,* AIB and Everyday and further to which Everyday as transferee acquired the legal rights, interests and title previously vested in AIB in the agreements and related mortgage securities of the appellant. Such agreements included the Mortgage Sale Agreement of 16 March 2018 recited in the recital of the Global Deed. Everyday contends that same are confidential and commercially sensitive. The question is whether the said categories fall outside O.31, r.15, such that the Notice to Produce lacked sufficient specificity and fails to comply with same.

87. It is relevant that in direct consequence of the redactions initially impermissibly effected by Everyday, the appellant was excluded from being in a position to identify the

actual date of the mortgage sale agreement when the Notice to Produce was served on 22 March 2021. This information first came into the possession of the appellant on 12 July 2022.

88. As was noted by Baker J. in *Playboy Enterprises International Incorporated v. Entertainment Media Networks Limited* (*supra*), it is to be expected that a request to produce documents will arise without the need to await discovery in circumstances such as where the documents form the basis of a claim in respect of a contract for the sale of land, since particulars of same are likely to be relevant to matters of pleading. She emphasised that:

> *"…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."* (para. 38)

Relevance and Redactions

89. Turning in the first instance to the issue of relevance, same must be viewed through the prism of the pleaded case advanced on behalf of the plaintiff. These are no mere enforcement proceedings but, as the Plenary Summons and Statement of Claim make clear, and the judgment of the High Court judge acknowledges, it is comprehensively pleaded that the appellant has, *inter alia*, concluded agreements and enjoys enforceable rights to buy out his loans and securities on equitable terms and further that he has a right of first refusal/pre-emption of the loans and securities were they to be offered by AIB for sale at below par value. He further asserts entitlement to redeem various mortgages and loans on terms alleged to have been agreed and claimed to be specifically enforceable which effectively vary the

original contractual terms of the loans and securities in question. This court takes the appellant's claim at its highest in this interlocutory application.

90. The stance maintained by Everyday throughout up to delivery of judgment in the High Court on 24 May 2022 [2022] IEHC 303 was that its redactions were appropriate and the blanked-out passages of the Global Deeds exhibited did not relate to any matter in question in the proceedings, in other words that the *Peruvian Guano* test was not engaged. Examples of the asserted basis on which Everyday redacted the two Global Deeds are instanced in the affidavit of Andrew McCudden sworn on 8 April 2021. At para. 10 he characterises the stance of Everyday thus; *"…the Defendant considers it appropriate to exhibit in this Affidavit appropriately redacted copies of the Global Deed of Transfer…and the Amended and Reinstated Global Deed of Transfer …which identify the Plaintiff's loan agreements with the Bank and their related mortgage securities executed in relation to the subject investment properties…".* The asserted justifications are expressed as follows:

> *"…the redactions contained in the Deeds of Transfer 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 defendant ability to 'work out' the loans acquired' defendant's ability to negotiate and complete the acquisition of future loan books and the defendant's ability to negotiate and complete possible future loan book sales), (2) bank and/or client confidentiality (e.g. restrictions imposed by Data Protection Acts… 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)."*

91. The issue of redaction of details pertaining to other borrowers was never in issue in the instant case. The Notice to Produce on its face and para. 5 of the Notice of Motion make clear that the application was directed solely towards documents relating to the mortgaged property. The appellant through his counsel freely acknowledged and accepted that position

and indeed that aspect is not the subject of any appeal. As such, therefore, the Data Protection Acts, 1988-2018 basis for redaction of the schedules was never controversial.

92. In his affidavit of 12 July 2022 Mr. McCudden appears to cavil with regard to the directions of the trial judge to disclose redacted operative parts of the of the Global Deeds exhibited in his first affidavit, stating, *"…the Defendant considered that the redactions made to the copy of the respective Deeds exhibited in my First Affidavit were appropriate and necessary…"* However, the deponent acknowledges that *"…the Defendant in compliance with the Court's direction that the redaction should be limited to genuinely commercially sensitive and confidential information, accepts that the original redactions went beyond the limits of the redaction directed by the Court".*

93. It is evident from a perusal of the further disclosed operative parts of the Global Deeds unredacted following the High Court's direction that the blanked-out passages did indeed directly relate to *"matter(s) in question"* in these proceedings. The initial redactions were excessive and inappropriate. For instance, the now unredacted recital 1.6 of the Global Deed of 2 August 2018 shows that AIB sold its *"rights title and interest"* in the loans, mortgage assets and financial documents said to include:

> *"Subject to Clause 9.2.12 of the Mortgage Sale Agreement, all reports, valuations, opinions, certificates and consents given in connection with each Mortgage Asset or the Underlying Loans which are assignable to the Buyer and all causes and rights of action of the Sellers against any person in connection with any report, valuation, opinion, certificate, consent or other statement of fact or opinion given in connection with each Mortgage Asset, each Underlying Loan or any Property and other assets which are the subject of Security whether before or after the relevant date of Completion;"*

94. The consideration (now unredacted) is described as "*the adjusted purchase price*" (operative part of the first Global Deed, Clause 1). Several other key recitals which were initially redacted included the recital of a Mortgage Sale Agreement dated 16 May 2018. Recital B states*: "Terms defined in the Mortgage Sale Agreement shall have the same meanings in this Deed, save where otherwise specified or where the context requires otherwise."* Thus, crucially, definitions to be found in the undisclosed Mortgage Sale Agreement of 16 May 2018 were incorporated by reference into the Global Deeds. Accordingly, the redacted operative parts of the Global Deeds were entirely relevant and highly material to a number of key matters in question in the litigation and as such *prima facie* met the *Peruvian Guano* test. The justifications advanced for the redactions as including commercial sensitivity/confidentiality/irrelevance would not withstand even the most cursory scrutiny and were potentially misleading. However, there is no cross-appeal on the issue.

95. It will be recalled that the first affidavit of Ms. O'Connor sworn 13 July 2021 posited that the appellant was *"...seeking to elicit information on what price the Plaintiff's loans were in fact sold by the Bank to the Defendant."* It was asserted: *"...this is confidential and commercially sensitive information to which the Plaintiff has no entitlement."* However, none of the redactions sought to be stood over by Everyday identified the actual price for which the appellant's loans were sold by AIB to Everyday. To that extent it could be said that the affidavit was potentially misleading. Para. 16 of the said affidavit had deposed:

> *"...the Defendant does not accept that the Plaintiff requires sight of the unredacted title documentation to establish whether the Defendant has acquired good and marketable title in the loans and related mortgage securities in circumstances where the Defendant is registered as the owner of the mortgage securities in the Land*

Registry and is party to the Irish Law Deeds of Conveyance & Assignment dated the 2nd August 2018…"

96. This stance does not properly engage with the extensive ambit of the claim advanced by the appellant in the Statement of Claim which, in light of the manner in which same is pleaded, goes far beyond an issue as to whether Everyday acquired title to the loans and mortgage securities of the appellant. The three affidavits of Ms. O'Connor failed to properly engage with the concerns raised by the independent conveyancing experts, Suzanne Bainton and Karen Sheil in regard to the inappropriateness of the redactions to the operative part of the relevant deeds. The averment in Ms. O'Connor's affidavit of 3 November 2021 is directed towards *"the global consideration paid in respect of the global acquisition of individual loans and mortgage securities"* which were said to be *"confidential, commercially sensitive and secret".* It was averred: *"…redaction of the global consideration paid, together with other commercially sensitive and confidential clauses in the agreement is fully justified."* (para. 6) However, neither the global consideration paid nor the part/s referrable to the appellant's loans and securities were specified in the parts redacted. The deponent offered no authority for non-disclosure of the consideration paid for the appellant's loans and securities by reason that they were "secret".

97. It is of significance that nowhere in their affidavits is it denied or meaningfully contested by Everyday that the documentation sought is relevant to various matters in question in the proceedings in the *Peruvian Guano* sense.

98. We are now confronted by the fact that the originally sealed-up or redacted parts of the documentation now uncovered at the High Court's direction demonstrably do relate to matters in question in the litigation and ought never to have been redacted. This potentially undermines Everyday's credibility and the reasonableness of the stance it adopted and requires the court to consider with caution the basis of "*confidentiality*" and "*commercial*

sensitivity" as justifications for the continued non-disclosure and non-production of the Mortgage Sale Agreement of 16 May 2018 .

99. The appellant has established that it was not unreasonable for him to suppose that the passages blanked out by Everyday in the operative part of the deeds contained information relevant to various claims being explicitly advanced in his proceedings against Everyday. Such information may ultimately, either directly or indirectly, enable the appellant either to advance his own case or to damage Everyday's case and ought to have been produced in unredacted form in the first instance without the need to resort to court.

100. In my view, the request in the Notice to Produce served in March 2021 must be viewed in its context. This is a conveyancing transaction concerning the appellant. Thus, a finite number of documents are in issue. The ambit of the request contained in the notice is unequivocally located by reference to the documents referred to at para. 10 of Everyday's Defence. The "*documents" "title documents"* and "*agreements*" referred to therein directly relate to and subtend the Global Deeds referred to at para. 9 of the Defence. Paras. 9 and 10 require to be read together. As matters stood, on the date when the Notice to Produce was filed (24 March 2021) the appellant was impeded from identifying with absolute particularity any document under reference at para. 10 of the Defence because same did not identify the documents by date, although it identified both Global Deeds by date at para. 9. The possibility of identifying any of the documents and severally describing them was only partly available from and after delivery of the affidavit of Andrew McCudden dated 12 July 2022. That divulged for the first time that the Mortgage Sale Agreement was dated 16 May 2018. To that extent this court does not accept the High Court's analysis of the High Court.

101. Lord Fraser in the House of Lords in *Sedgwick Group Plc v Johns-Manville Fibreboard Corp* (also known as *Re Asbestos Insurance Coverage Cases*) [1985] 1 W.L.R. 331 was called upon to consider a request for production of classes of documents pursuant

to the relevant statutory provisions of the Evidence (Procedure and Other Jurisdictions) Act, 1975 where the language in the relevant section referred to *"particular documents specified in the order"*. Having considered the purpose of the relevant statutory provision and jurisprudence suggesting that a restrictive view of the effect of the section should be adopted so as not to countenance "*fishing*" expeditions at p.337/338 Fraser L.J. considered the view of Diplock L.J. in *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] AC 547, stating: *"I do not think that by the words 'separately described' Lord Diplock intended to rule out a compendious description of several documents provided that the exact document in each case is clearly indicated."*

102. Fraser L.J. adopted the following example used by Slade L.J. in the court below:

> *"If I may borrow (and slightly amplify) the apt illustration given by Slade L.J. in the present case, an order for production of the respondents' 'monthly bank statements for the year 1984 relating to his current account' with a named bank would satisfy the requirements of the paragraph, provided that the evidence showed that regular monthly statements had been sent to the respondent during the year and were likely to be still in his possession. But a general request for 'all the respondent's bank statements from 1984' would in my view refer to a class of documents and would not be admissible."* (pp. 337-338)

He further observed that:

> *"The second test of particular documents is that they must be actual documents, about which there is evidence which has satisfied the judge that they exist, or at least that they did exist, and that they are likely to be in the respondent's possession. Actual documents are to be contrasted with conjectural documents, which may or may not exist."*

Inspection

103. The principles governing applications for inspection of documents are analysed comprehensively in *Delany & McGrath on Civil Procedure*, (4th ed., Round Hall, 2018) from paras. 11.37 to 11.64. At para. 11.49 the authors cite *Holloway v Belenos Publications (No. 2)* [1988] IR 494, [1988] ILRM 68 where Barron J. observed; "…*the essence of an order for inspection is knowledge of the existence of the particular documents to be inspected."* At para. 11.53 they note *"Rule 18(2) stipulates that the order for inspection will not be made unless the court is of opinion that it is* '*necessary either for disposing fairly of the cause or matter or for saving costs'."*

104. Here the pleadings disclose a very significant claim by the appellant against Everyday. The documentation sought to be produced for inspection is directly relevant to the claim. The issue of redaction is now substantially resolved by the intervention of the High Court, at least as far as the two Global Deeds is concerned. The appellant does not contest the right of Everyday to redact parts which exclusively concern other third parties and have no relevance to the claim. There has been a very significant break down in trust as between the parties contributed to by the unwarranted scale of unnecessary redaction. Everyday in the first instance significantly over-redacted the Global Deeds thereby depriving the appellant of access to material parts of deeds which ought properly to have been disclosed. The matter was very belatedly resolved after the intervention of the High Court and the filing of the affidavit of Andrew McCudden of 12 July 2022.

105. It cannot be reasonably contested but that para. 10 of the Defence, which falls to be read with para. 9, makes direct allusion to, acknowledges the existence of and effectively discloses the "agreements" concluded in furtherance of which the Global Deeds were executed. There could have been no doubt in the mind of Everyday as to what agreement or agreements inspection of which was at issue. We are dealing here with a conveyancing

transaction and the "agreements" in question were anterior to, subtended and were ultimately executed by virtue of the Deeds in question. The decision in *Burke v. Boston Scientific* [2016] IECA 230 is materially distinguishable, being one where the plaintiff in an employment dispute had failed to seek any inspection of documents discovered by the defendant. Instead she had sought inspection of all data stored by the defendant on its own server or that it had stored on third party servers *"in the hope of identifying documents which the defendant had failed to discover".* In other words, a classic fishing expedition. Further, para. 26 of the *Burke* judgment makes clear *"...the right of a party to inspection of documents is confined to documents known to exist and which have been identified in an affidavit of discovery or specifically referred to in pleadings."*

106. In the instant case, by contrast, the existence of the "agreements in question" is acknowledged, disclosed, and pleaded with sufficient specificity in para. 10 of the Defence when read together with para 9. The further unsealed part of the Global Deeds of 2 August 2018 definitively identifies the Mortgage Sale Agreement. What was in train in the *Burke* application was a vast fishing expedition in circumstances where the plaintiff was electing not to even seek copies of what had actually been discovered in the first instance. Thus the comments of Irvine J. (as she then was) in *Burke* are not directly apposite to the factual matrix obtaining in the instant case.

Necessary for Fair Disposal

107. As was observed by Haughton J. in *Courtney* (*supra*) at para. 55:

> *"...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."*

Haughton J. cited Hollander in the text *Documentary Evidence,* (13th ed., Sweet & Maxwell, 2018) para. 10-16 which cited from Snowdon 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...*
>
> *... 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. ... It will often be sensible to ask for the lawyers 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."

Haughton J. comprehensively reviewed the jurisprudence arising from the Rules of the Supreme Court (Ireland), 1905 and considered the commentary on Order 31, r.15 in its 1905 iteration to be found in Wylie, *The Judicature Acts* (1905).

108. Reference was also made by Haughton J. to *Quilter v. Heatley* (*supra*) where Jessel MR expressed the view that the relevant rule (akin to O.31, r.15 RSC) was in his view "*clear*". In his view, it conferred an entitlement to give notice to any other party in whose pleadings *"reference is made to any document to produce such document for the inspection of the party giving the notice, or of his solicitor…"* He expressed the view in light of the other relevant rules of O.31 RSC: *"That means that the applicant is to have such an order unless good cause to the contrary is shewn... The defendant may say '…I wish to see the documents to know whether I have made such admissions, and it is important for me to see them before I put in my defence'".* The judge observed *"It is reason enough why the Defendant should be allowed to see them that the Plaintiff has made them part of his statement of claim."* Insofar as the defendant had sought copies of certain correspondence and letters written by the plaintiff, the court was of the view that production and inspection was not permitted because they were not referred to in the Statement of Claim. Lindley L.J. characterised the rule as being *"… 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."*

Confidentiality and Public Interest

109. Having regard to the extensive matters pleaded on behalf of the appellant in the Statement of Claim, in the context of this application where the claim must be taken at its highest, the question arises as to whether confidentiality has been meaningfully asserted vis-

à-vis the specific consideration paid by Everyday for the loans, security interests and rights held and enjoyed by AIB over the appellant's properties. Given the specific nature of what is sought, I am satisfied that the threshold of confidentiality as would warrant either non-production of the originals of the three documents or redaction/non-disclosure of consideration relevant to the appellant's loans and securities has not been established by Everyday. Any confidentiality asserted by Everyday in relation to disclosure of consideration paid for the appellant's loans and securities is outweighed by the supervening importance and relevance to the appellant's pleaded case of ascertaining the consideration paid by Everyday attributable to acquisition of the interests in question in light of the pleaded case. That information is very limited and essential to enable the appellant to deliver an appropriate Reply to the Defence and to enable his advisers to advise him in the manner sought.

110. The grounds on which objection to production of the unredacted document were advanced fall also to be considered particularly in light of the fact that the consideration of the purchase of the appellant's loans are being sought. Objections to production are succinctly dealt with in Abrahamson, Dwyer and Fitzpatrick, *Discovery and Disclosure* (3rd ed., Round Hall, 2019) at Chapter 13, section 9. The authors note at 13.42 where there is an agreement not to disclose sensitive aspects *"... this will be a material factor in determining an application for production."*

111. Abrahamson *et al.* observe at 13.46:

> *"In Science Research Council v. Nassé, [1980 AC 1028] Lord Wilberforce, considering confidentiality as a defence to an application for discovery ... set out the following principle:*
>
> > *'There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone. But there is no reason why, in*

> *the exercise of its discretion to order discovery, the tribunal should not have regard to the fact that documents are confidential, and that to order disclosure would involve a breach of confidence.'"*

In that judgment the court went on to note that in the employment field, a relevant tribunal may … *"have regard to the sensitivity of particular types of confidential information, to the extent to which the interests of third parties (including their employees on whom confidential reports have been made, as well as persons reporting) may be affected by disclosure…"* Lord Wilberforce identified the balancing process to be carried out by a court where confidentiality is asserted as a basis for refusing disclosure. Those principles apply equally to production of documents as they do to discovery. As the authors note at 13.48: *"Lord Wilberforce also envisaged that it might, in certain cases, be necessary to adopt 'protective measures' when granting discovery or production of confidential documents."*

112. Hardiman J. in *O'Callaghan v Mahon* [2005] IESC 9, [2006] 2 IR 32, cited Goff L.J. in *Attorney General v. Guardian Newspaper Ltd. (No.2)* [1991] AC 109, (the Spycatcher case) where the latter observed:

> *"I start with the broad principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others."*

Hardiman J. observed:

> *"To this very general statement Lord Goff recognised certain limitations amongst which were:*

(1) The general principle as premised upon the information being confidential and can therefore have no application once information has entered the public domain.

(2) Confidentiality may be negated by public interest."

113. Hardiman J. further observed that *"[t]he fundamental nature of confidentiality is elaborately discussed in Toulson and Phipps Confidentiality (London, 1996)."* He went on to observe that the authors had concluded that *"... the essential foundation of the law of confidentiality lies in an obligation arising from the circumstances under which the information was obtained .... [it] is founded on an equitable obligation, for the breach of which the Court may now award monetary compensation in addition to or instead of other equitable remedies."*

114. It is self-evidently in the public interest that litigants are not deprived of documentation or instruments which directly affect their rights and interests in circumstances where the very substance of those rights and interests are the subject matter of litigation. The consideration paid by the respondent for the appellant's particular loans and securities have not been shown to warrant redaction on any basis. It is in the public interest that in the conduct of litigation a plaintiff not be deprived of a right to production of originals of documents for inspection particularly where the substance of the claim pertains to assertions of loss of rights and interests in the nature of property rights alleged to have been trenched upon or infringed by virtue of the instruments in question. *Delany & McGrath* (*opus cit.*) note at para. 11.63 that *"it was stressed by Murphy J in Gormley v Ireland [1993] 2 IR 75, 80, that where inspection of documents is ordered by the court, these documents should only be made available for 'the proper processing of the present litigation and not for any other purpose'".* In claims such as that of the appellant, Order 31, rule 15 falls to be interpreted and applied with due regard to s.2 of the European Convention on Human Rights Act, 2003 and Article 1 of the first Protocol to the said Convention.

115. Confidentiality is not a separate head of privilege and may in general be overridden by the exercise of the court's discretion whereas of course privilege is absolute and may not. The law has not accorded privilege against inspection even to confidential documents where they are shown to be necessary for the fair disposal of the proceedings. Inspection of the three documents in question, redacted to protect third parties, is warranted on grounds of relevance, necessity for doing justice between the parties, appropriate for the fair disposal of the proceedings and to provide litigious advantage to the plaintiff and to repair trust between the parties in light of the excessive and unwarranted redaction previously effected.

116. In *Al Rawi v. The Security Service* [2012] 1 AC 531, Lord Clarke observed:

> "*As to disclosure, the general principle is that if the court*
>
> > *'is satisfied that it is necessary to order certain documents to be disclosed and inspected in order fairly to dispose of the proceedings, then … the law requires that such an order should be made'.*"

He relied on the decision of Lord Wilberforce in *Science Research Council v Nassé* (*supra*). The latter decision indicates that assertions of confidentiality can be taken into account by a court in the exercise of its discretion as to whether to order disclosure of a particular document. It is authority for the proposition that the confidential nature of a particular document is not a ground for refusing to disclose the document if the interests of justice requires it. That principle was established by *Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2)* [1974] AC 405. Addressing the issue of where a party seeks to resist documents being disclosed on the basis that to do so would involve a breach of confidence, Lord Wilberforce in *Nassé* observed, relying, *inter alia*, on *Crompton*:

> *"English law as to discovery is extremely far reaching: parties can be compelled to produce their private diaries; confidences, except between lawyer and client, may have to be broken however intimate they may be. But there are many examples of*

cases where the courts have recognised that confidences, particularly those of third persons, ought, if possible, in the interests of justice, to be respected."

Necessary for fair disposal

117. In *Canadian Imperial Bank of Commerce v. Beck* [2009] EWCA Civ 619, Wall L.J., delivering the judgment of the English Court of Appeal, distilled the relevant principles as follows:

"22. In our judgment, the law on disclosure of documents is very clear, and of universal application. The test is whether or not an order for discovery is 'necessary for fairly disposing of the proceedings'. Relevance is a factor, but is not, of itself, sufficient to warrant the making of an order. The document must be of such relevance that disclosure is necessary for the fair disposal of the proceedings. Equally, confidentiality is not, of itself, sufficient to warrant the refusal of an order and does not render documents immune from disclosure. 'Fishing expeditions' are impermissible."

118. In the instant case I reiterate that information pertaining to third parties in the three documents is not to be the subject of disclosure nor does the evidence before the High Court suggest that such was ever sought. Apart from the Mortgage Sale Agreement, other documents directly referred to in para. 10 do not meet the threshold in the jurisprudence and can be the subject matter of discovery as the appellant may be advised.

119. As such therefore I am satisfied that the trial judge had the jurisdiction to make an order for production of the two Global Deeds and the Mortgage Sale Agreement in the proper exercise of her discretion. The issue is whether there are sufficient grounds for this Court to interfere with the exercise of her discretion in not making the order sought. I am satisfied that there are.

Analysis and Conclusions

120. In the instant case, it is Everyday which, quite properly in the context of the Defence, at para. 10, asserted the existence of the documents. In any event, this being a conveyance and transfer whereby the benefit of loans and securities and associated rights concerning the plaintiff effectively are claimed to have vested in Everyday, the existence of such *"documents", "title documents"* and *"agreements"* subtending the Global Deeds is to be expected. In my view, the particularity of the pleading in para. 10 of the Defence which is reflected in the Notice to Produce circumscribes the ambit of the documents being sought and particularises them, confining them to title documents *"executed further to the agreements entered into between, inter alia, AIB and the Defendant…"*. In light of the pleaded claim, the tenor of the Notice to Produce and para. 5 of the Notice of Motion, the request is confined to Everyday's title to the mortgaged property. The Mortgage Sale Agreement of 16 May 2018 is clearly such a document and the determination of the court below to the contrary was outside the range of judgment calls which were open to it for two reasons. Firstly, had the Global Deeds not been the subject of improper redaction in the first place, the appellant would have been aware of the Mortgage Sale Agreement's date from the date of service of the initially exhibited Global Deeds by Everyday. Secondly, since the Mortgage Sale Agreement is incorporated by reference into the first Global Deed and forms part and parcel of same, it ought to have been exhibited alongside the Global Deeds. The appellant was entitled to production of the originals of both Global Deeds, as now redacted and also to production of the Mortgage Sale Agreement, redacted to exclude reference to third parties.

121. Moore-Bick L.J. in *Tajik Aluminium Plant v. Hydro Aluminium A.S.* [2006] 1 W.L.R. 767 observed:

"…Ideally each document should be individually identified, but I do not think it is necessary to go that far in every case…

…

…without describing them individually, it may be possible to identify the documents to be produced with sufficient certainty to leave no real doubt in the mind of the person to whom the summons is addressed about what he is required to do. In my view, that is the test that should be applied…It is unlikely to be met if the documents are described simply by reference to a particular transaction or event which is itself described in broad terms, although in cases where the transaction is self-contained and sufficiently well-defined that might be satisfactory. In general, I think, that doubts about the adequacy of the description should be resolved in favour of the witness."

122. The transaction effected by the Global Deeds is "*self-contained*" in the sense outlined by Moore-Bick L.J. The Mortgage Sale Agreement of 16 May 2018 is the underlying contract incorporated by reference into the Global Deeds as identifying the consideration for the transaction. Everyday could be left in no doubt as to what was being sought. The appellant's request for production and inspection of "*documents", "title documents"* and "*agreements*" is clearly confined to such as are relevant to him and whereby Everyday contends his loans and securities vested in it.

123. The approach in *Tajik* is efficient and practical and facilitates the efficient disposal of litigation, particularly commercial litigation. The ambit of the documents referred to in para. 10 of the Defence is circumscribed by para. 9 and their exact identity was exclusively within the knowledge of Everyday. It included the Mortgage Sale Agreement of 16 May 2018 which was incorporated by reference to the Recitals into the Global Deed of 2 August 2018 and for that reason alone ought to have been exhibited/produced in the first instance, unredacted save as concerns third parties, along with the Global Deeds.

124. A purposive approach ought to be adopted to a Notice to Produce, rather than relying on undue technicality. It must be construed in its context and as the servant of the administration of justice. Whilst clear identification of documents is to be recommended generally in the context of a Notice to Produce, the exceptional circumstances disclosed in the instant case, coupled with the conduct of Everyday in creating gratuitous obstacles (subsequently shown not to have been warranted or justified) to the appellant identifying the relevant Sale Agreement dated 16 May 2018, warrants that in this instance the Notice to Produce is to be deemed sufficient to extend to and include the said Mortgage Sale Agreement. It goes without saying that references therein to any detail pertaining to any borrower other than the appellant is to be redacted. It is clear from the position of the appellant to date that that limitation is uncontroversial. In light of the very extensive Statement of Claim delivered, any references therein to the appellant or his loans and securities must not be redacted and are to be disclosed. The formulation *"the agreements entered into between, inter alia, AIB and the Defendant …"* in the Notice to Produce derives immediately and directly firstly from the deeds pleaded at para. 9 and secondly from the compendiously pleaded para. 10 of the Defence.

125. Applying the approach in *Galadari (No. 3)* to the instant case, the facts are substantially distinguishable from those obtaining in *Galadari (No.3)*. The defendant does make direct and clear allusion to documents in para. 10 of the Defence to, *inter alia, "the title documents executed further to the agreements…" "… agreements entered into between, inter alia, AIB and the Defendant and further to which the Defendant as transferee acquired the legal rights, interests and title previously vested in AIB in the Agreements and related mortgage securities"* and *"these title documents…"*. This is a conveyancing transaction concerning the appellant's loans and securities. There is repeated direct reference and allusion to existing documents in para. 10 of the Defence. The agreements referred to of

necessity are in writing and can only be reasonably construed as such since it is evident that it led to the execution of the Global Deeds of Transfer. Thus, in the ordinary way they can be reasonably understood to have constituted a sufficient memorandum for the purposes of s.51(1) of the 2009 Act. The existence of the Mortgage Sale Agreement is, in terms, positively asserted and pleaded, but it is not identified by its date. No valid basis for its non-production has been identified.

126. I am satisfied that the proper application of the principles outlined above to para. 10 of the Defence leads to the conclusion that same, when read with para. 9, disclosed and made direct allusion to and sufficiently identified for production not alone the two Global Deeds (explicitly identified in para. 9 in any event) but also the underlying Agreement of 16 May 2018. Further, I reiterate that the now unredacted Recital A in the Global Deed of 2 August 2018 expressly identifies the mortgage sale agreement of 16 May 2018 and Recital B in substance effectively incorporates it by reference to the said Mortgage Sale Agreement where it states: *"terms defined in the mortgage sale agreement shall have the same meanings in this Deed, save where otherwise specified or where the context requires otherwise."* Therefore, the trial judge erred in failing to make an order for the production of same pursuant to Order 31 and also for production of both Global Deeds.

127. I do not understand Everyday to suggest that the agreements and title documents referred to in para. 10 of the Defence refer to anything other than documents. It would operate an unduly rigid approach to O.31, r.15, in a manner that unfairly burdens the appellant and advantages Everyday, to require a fresh Notice to Produce to be served now in circumstances where the dual impediments prior to 12 July 2022 to the appellant being in a position to identify the agreement of 16 May 2018 was that its existence had not been identified by Everyday by reference to its date and by reason of the unwarranted redactions which were only removed when the High Court gave its directions on 24 May 2022. As a

matter of logic *"... the title documents executed further to the agreements entered into between ... AIB and the Defendant..."* in para. 10 of the Defence explicitly refers to document/s constituting the underlying contract document giving rise to the Global Deeds. The exact date of the agreement was uncovered when the unredacted Global Deed was exhibited by Andrew McCudden on 12 July 2022. In my view, the arguments advanced on behalf of Everyday to the contrary are ultimately unpersuasive.

128. It is very evident in the instant case that the information being sought by the appellant is directed solely and exclusively towards his own litigation. He has evinced no interest whatsoever in the private data or details pertaining to the loans, securities, rights or interests of third parties. That stance was maintained throughout in relation to the Schedules to the Global Deeds.

129. In my view a common sense approach must be adopted to the words *"reference is made to"* in O.31, r.15. The language of O.31, r.15 *"... in whose pleadings ... reference is made to any document"* must be purposively construed and can in the instant case be readily considered referable to and encompass the Mortgage Sale Agreement of 16 May 2018 which was initially improperly or erroneously redacted by Everyday.

130. Everyday has not discharged the burden of proof to justify its stance opposing production of the Originals of the Global Deeds, as currently redacted as well as the Mortgage Agreement of 2018.

131. I conclude that it is in the interests of justice that solicitors for the appellant be permitted to inspect the originals of the two Global Deeds and the Mortgage Sale Agreement of 16 May 2018. Everyday is entitled to cover up or redact all parts which are now redacted in the Global Deeds and is further entitled to redact parts of the Mortgage Sale Agreement which identify unconnected third parties or does not relate to the appellant or any of his loans or his mortgaged properties.

132. I am satisfied for all the reasons stated above that the discretion of the trial judge falls to be re-exercised in two material respects. Firstly, the appellant is entitled to inspect and make a copy of the Mortgage Sale Agreement of 16 May 2018, recital whereof was improperly redacted in the Global Deed. Same may be redacted by Everyday to protect the data rights of all third parties. It has been demonstrated to be relevant and its disclosure is necessary to fairly dispose of the proceedings in light of the specific issues pleaded. Secondly, the appellant is entitled to inspect the originals of the two Global Deeds, except the parts currently redacted as exhibited to the affidavit of Mr. McCudden of 12 July 2022.

133. Insofar as the Mortgage Sale Agreement of 16 May 2018 is impressed with the need to preserve confidentiality, same is confined solely and exclusively to third parties alone. Everyday is to produce the said agreement otherwise unredacted.

The Cross Appeal

134. Everyday cross-appealed the order of the High Court requiring it to pay costs to the appellant in respect of the motion before the court. Everyday emphasised that it had been successful in resisting the order sought by the appellant pursuant to the inherent jurisdiction of the court, pursuant to O.31, r.15, O.50, r.4 and s.91 of the 2009 Act.

135. Everyday places reliance on the decision of this Court in *T.A.O. v. The Minister for Justice* [2021] IECA 293 where Collins J. extrapolated from the authorities a key series of principles at para. 30:

> *"(1) While costs orders are discretionary, this Court nonetheless has 'full appellate jurisdiction in respect of such orders'*: *Godsil v Ireland [2015] IESC 103, [2015] 4 IR 535, per McKechnie J. (Dunne and Charleton JJ. concurring) at para. 65, citing In bonis Morelli; Vella v Morelli [1968] IR 11.*
>
> *(2) It follows that the Court 'may substitute its own discretion in place of that of the trial judge': Mangan v Independent Newspapers [2003] 1 IR 442...*

(3) The jurisdiction 'is not dependent on having to establish an error of law or otherwise on proving that in the exercise of such discretion the trial judge acted erroneously' (Godsil, at para 65)

(4) At the same time, however, an appellate court 'will, in general, be slow to interfere with the exercise of a trial judge's discretion in awarding costs': MD. v ND [2015] IESC 66, [2016] 2 I.R. 438, per MacMenamin J (dissenting in the result), at para 46.

(5) Furthermore, an appellate court 'should not simply substitute its own assessment of what the appropriate order ought to have been but should afford an appropriate deference to the view of the trial judge who will have been much closer to the nuts and bolts of "the event" itself": Nash v DPP [2016] IESC 60; [2017] 3 I.R. 320…

(6) Absent some error of principle on the part of the trial judge, an appellate court should intervene only where it 'feels that the exercise by the trial judge of an assessment in relation to costs has gone outside of the parameters of the margin of appreciation which the trial judge enjoys': Nash, at para 67. Where the costs order is '*within the range of costs orders which were open to the trial judge within the margin of appreciation which must be afforded to a High Court judge*', *there will be no basis for appellate intervention: Nash, para 73."*

136. Everyday comprehensively set out the relevant authorities, including ss. 168 and 169 of the 2015 Act and the decision of Murray J. in this Court in *Chubb European Group SE v. The Health Insurance Authority* (*supra*) where he analysed the effect of the said provisions in the context of a final disposition of proceedings. Particular reliance is placed on para. 37 of *Chubb,* at which Murray J. observed:

"Chubb, not having been 'entirely successful' in its proceedings has no entitlement under s.169(1) of the 2015 Act to its costs. The Court has, however, the power under

s.168(2)(a) to make an order in its favour to the extent that it was 'partially successful' in the proceedings, just as it has the power to make an order on the same basis in favour of HIA. That power extends to awarding 'costs relating to the successful element' of the proceedings. The difference between the two provisions is important: the party who prevails entirely has a right to costs unless there is a reason not to order them. A party who only succeeds partially may obtain an order for costs in respect of the successful aspects of its claim if, having regard inter alia to the criteria specified in s.169(2), it is appropriate to award them. Issues will arise in other cases as to what exactly 'entirely successful' means. Depending on the precise construction placed on that phrase, the pre-existing position that a party who won 'the event' but succeeds in respect of only some of the issues addressed in support of the relief it obtains is presumptively entitled to all its costs, may have been changed by the Act."

137. A core question to be asked in the first instance is whether the appellant in substance did succeed in obtaining from the High Court something which was not available to him or forthcoming prior to bringing the application before the High Court. I am satisfied that he clearly did, insofar as, with the assistance of the affidavits of Ms. Suzanne Bainton solicitor and Ms. Karen Sheil solicitor and after a lengthy hearing, significantly less redacted copies of the Global Deeds were furnished to the appellant in mid July 2022. The nature and scope of the application was altered twice but that was substantially necessitated by the unreasonable stances being maintained by Everyday. I am further satisfied that same would not have been forthcoming or made available to the appellant but for the fact that the said application was brought. The sustained objections to removal of redactions, ultimately unsealed by direction of the High Court, were demonstrably not well made by Everyday and the trial judge acted well within the ambit of her discretion in the allocation of costs and no

valid basis is established for this court interfering with same in light of s169 (1) (a), (b) and (c). The cross-appeal of Everyday falls to be dismissed.

Costs of this Appeal

138. In light of s.169(1) of the 2015 Act it is appropriate to have regard to the particular nature and circumstances of this case. The appellant has been partly successful within the meaning of s. 168(2)(d) and is entitled to inspect the originals of both Global Deeds (as currently redacted) and also the Memorandum of Agreement of 2018 (as redacted in respect of third parties) and to take copies of same. The fact that the documents were in the exclusive control of Everyday and were not otherwise procurable by the appellant is relevant.

It is relevant that these are plenary proceedings where a process of negotiations said to have been varied by conduct is pleaded extensively in a Statement of Claim that is 86 paragraphs in length and wherein the appellant pleads part performance and reliance on his part in respect of the contended for variations.

139. It was reasonable for the appellant to raise, pursue and contest in this appeal the issue of production for inspection of the original, less redacted Global Deeds and the 2018 Mortgage Sale Agreement and on the pleaded case, same are clearly necessary to enable the appellant to conduct his case. It is necessary that the court have regard to the manner in which Everyday conducted itself in regard to this appeal and the sundry objections articulated, which, apart from third party data and confidentiality (a matter never in dispute by the appellant), were not established as valid grounds for the reasons outlined above.

140. The manner in which the issues were approached in the appeal was unduly prolix. I find no basis for advancing 89 separate grounds of appeal. Further, the right to production and inspection of the documents directly and compendiously alluded to at para. 10 of the Defence was pursued on a wide range of bases. Only one document is now to be produced for inspection under para.10 of the Defence.

141. With regard to Grounds of Appeal 1-26 (inclusive) the appellant entirely succeeds in respect of Grounds 2 and 21-26 and partly succeeds under several grounds otherwise insofar as this court directs disclosure of the 3 instruments in the terms outlined above. Various "*principles*" were asserted and not convincingly established in argument (Grounds 9-19 inclusive). It might be considered that the High Court factored in the matters advanced in Grounds 20 – 22 in the Order for Costs made.

142. I do not think it is appropriate to make determinations in the context of this appeal in relation to the arguments advanced pursuant to s.91 of the 2009 Act (Grounds 27-36 inclusive) in circumstances where several distinct declarations are being pursued under that section in the substantive action (e.g. paras. 3-6 inclusive of the Plenary Summons and also in the Statement of Claim). I agree with the judge's approach to s. 91.

143. With regard to O.31, rr.15-18 (Grounds 37-62 inclusive) the appellant has succeeded in respect of the 3 instruments subject as aforesaid. Arguments directed, *inter alia*, to Grounds 44, 48, 55-58 were particularly well made. Sundry other grounds succeeded in part as the variations to the High Court Order indicate.

144. The appellant did not succeed in respect of Ground 63 directed to Order 50, rule 4 RSC.

145. The High Court judge was correct that the exercise of the inherent jurisdiction was not called for in circumstances where specific bases were identified, *inter alia*, pursuant to the Rules of the Superior Courts as warranting the order for production and inspection sought. Grounds 64-72 accordingly do not succeed.

146. With regard to the trial judge's treatment of the affidavit sworn by Andrew McCudden on 12 July 2022, the appellant takes issue with same and her finding that there had been compliance with the directions of the court in regard to same. It was contended that the trial judge had further erred in rulings wherein she had found that the directions giving by the

High Court on 24 May 2022 with regard to a supplemental affidavit had, in fact, been complied with. (Grounds 73-84) This complaint was not made out and the judge was particularly well placed to evaluate whether the direction she had previously made had been satisfactorily complied with.

147. It is contended that the judge erred in admitting redacted and part copy into evidence *"notwithstanding the terms of both Section 13 of the Civil Law Miscellaneous Provisions Act and Order 31 Rule 15 of the Rules of the Superior Courts".* (Ground 85) It was further alleged that the court failed to have regard to the principle *"that redaction without leave of the Court is spoliation".* (Ground 86) The appellant claimed that the High Court erred in *"in applying discovery practice of allowing redaction, usually on consent of the parties, in relation to the admissibility of evidence".* (Ground 87) These grounds are substantially overstated and not made out. The court was said to have erred *"to have regard to the failure by the Defendant to adduce any evidence from anyone, at any time before or after the written Judgment and directions given on 24 May 2022, who had seen the original documents sought"* and it was asserted that the *"discretion to admit hearsay in an interlocutory application should be the exception not the rule and generally only in circumstances of urgency"*. (Grounds 88 and 89) These arguments have succeeded in part as outlined above.

148. However, I am mindful that the appellant has succeeded in reversing the outcome and as a result is entitled to production and inspection of the two original Global Deeds and the Mortgage Sale Agreement of 16 May 2018 unredacted, save and except as more specifically outlined above. As Murray J. notes in *Heather Hill Management v An Bord Pleanala* [2022] IESC 43 at para. 133, ss. 168 and 169 of the 2015 Act significantly enhances the court's capacity to apportion costs in a case where the "*winner*" has not been "*entirely successful*" and s. 169(1) identifies factors that can be taken into account in the exercise. In *Higgins v. Irish Aviation Authority* (*supra*) at para. 10, Murray J. held that a party who is partly

successful in proceedings may nonetheless obtain all of its costs if, having regard to the matters iterated in s. 169 of the 2015 Act, it is appropriate to do so. This is not such a case.

149. In my preliminary view, the proper allocation of costs of this appeal requires a balancing of sundry material factors, including the net and succinct manner in which the cross-appeal was pursued by Everyday in contrast to the excessively prolix and broad approach of the appellant, give rise to the necessity of an overall adjustment as stated hereafter. The appellant is entitled to an order for costs of the unsuccessful cross-appeal as against the respondent.

150. The appellant is further entitled, in my preliminary view, to an order for costs of the appeal against the respondent subject to a discount of one third of same to mark the court's disapprobation of the excessively prolix nature of the notice of appeal and the sundry extraneous matters unsuccessfully pursued thereunder and the fact that several grounds succeeded in part only. The order is as to two thirds of the appellant's costs, same to be ascertained in default of agreement.

151. However, given that the issue of discovery has not been concluded and given the trajectory of the litigation to date, it may well be that further interlocutory applications will transpire. I am satisfied in all the circumstances that a stay ought to be granted in respect of the costs order hereinbefore proposed, pending the determination of the substantive proceedings in the High Court.

152. If either party contends for a different order, written legal submissions no longer than 2,500 words to be submitted within 21 days from the date of delivery of this judgment firstly to the other party and to the court. The recipient of the said submissions to be afforded a further period of 21 days thereafter to furnish a response of like length. The court will thereafter adjudicate in regard to same including as to the further costs arising from same.

153. Faherty and Haughton JJ. concur in this judgment.