

## THE HIGH COURT

## COMMERCIAL

[2018 No. 741 P]

BETWEEN

MUNICH 1 PROPERTY FUND GmbH

PLAINTIFF

AND

GEMSIDE LIMITED

DEFENDANT

**JUDGMENT of Mr. Justice Quinn delivered on the 2nd day of May, 2019**

1. The plaintiff was the owner of a building in Munich, Germany leased to BMW, known as the BMW Building ("the Property"). The investors in the plaintiff were a group of Irish persons, who in or about 2005/2006 funded the plaintiff by a combination of loans and share capital. Two of them, Michael and Dymphna Daly, made their original investment through the defendant, a company wholly owned by them. By the time of the events giving rise to these proceedings ownership of the defendant had changed and I shall return to this later in this judgment.

2. In May 2017 the Property was sold for €41.7m. A secured loan originally granted by Anglo Irish Bank Plc and subsequently acquired by NAMA and sold by NAMA to Promontoria (Gem) DAC ("Promontoria") was redeemed by a payment of €33,750,000 leaving a balance of proceeds of €7,950,000, before certain costs of sale and tax.

3. In form this action is a claim by the plaintiff for specific performance of one particular Agreement, referred to as the "Assignment and Transfer Agreement", which the plaintiff claims it made with the defendant on 5 May, 2017, it says *"in conjunction with the sale of the Property"* and various counterclaims are made. However the proceedings are essentially a dispute concerning the distribution of the net proceeds of the sale of the Property.

4. This judgment relates to contested discovery motions by the parties.

**Participation Agreement – 23rd June, 2011**

5. On the 23rd June, 2011 the investors in the plaintiff, referred to in the proceedings as "the Participants", entered into an agreement referred to as the Participation Agreement. The purpose of the Participation Agreement was to provide for the distribution of the net proceeds of sale of the Property among the Participants, having regard to their respective shareholdings and loan positions and taking account of certain residual obligations as between the Participants arising from the sale of a different asset in Munich (the H&W Building), by Munich 2 Property Fund GmbH ("Munich 2"), a company in similar ownership to the plaintiff.

**Assignment and Transfer Agreement – 5th May 2017 ("the Agreement")**

6. On 5 May, 2017, when the property was being sold, the defendant executed the Assignment and Transfer Agreement. The plaintiff says that by this agreement the defendant received its due share of the proceeds of sale. The Agreement provided that in full and final settlement of all outstanding loans due to the defendant, the following was agreed: -

(1) The plaintiff would pay a sum of €1.4m to the defendant, as to €1,135,000 within seven days, (which was duly paid), and as to a balance of €265,000 within fourteen months.

(2) The defendant would assign to the managing directors of the plaintiff the balance of its debt owed to it by the plaintiff, namely the sum of €6,415,000, for a consideration of €1.00, and

(3) The defendant would transfer its shareholding in the plaintiff to the managing directors of the plaintiff.

7. The Agreement was stated to be in *"full and final settlement of all outstanding loans by the defendant to the plaintiff"* and the defendant confirmed on the face of the Agreement that *"We hereby assign the balance of the debt owing to the defendant by the plaintiff in the amount of €6,415,629 to the managing directors of the plaintiff for a consideration of €1.00."* In the Agreement the defendant also acknowledged and confirmed -

*"That we have no claim or right of action of any kind outstanding or otherwise against the company or any of its officers or employees arising out of or in connection with the sale or any documents that are ancillary to the sale or any prior or subsequent business of the company".*

The Agreement contains a statement by the defendant as follow:

*"I confirm that I have sought independent legal and professional advice prior to executing this document and understand the effect of this document".*

8. The plaintiff says that in reliance on this Agreement it paid the sum of €1.135m to the defendant and is ready and willing to pay and is in funds to pay the balance of €265,000 when the defendant executes the necessary documents to give effect to the assignment of the debt and transfer of the shares.

**Pleadings**

9. The statement of claim itself is concise and recites the Assignment and Transfer Agreement. It says very little else about the context of the Agreement except for para. 6 which states as follows: -

*"But for the assignment and transfer the defendant would not have received sum of €1.4M arising on the sale of the property. Rather the defendant would likely have received a substantially lesser sum having regard to tax liability under German Law than would otherwise have been payable in priority by the plaintiff."*

10. The plaintiff contends that the effect of the Agreement was to implement the distribution of the sale proceeds in a tax efficient manner, and that this method of distribution was agreed to by all the Participants, including the defendant. It claims that the Agreement superseded the earlier Participation Agreement, although the Agreement does not expressly so provide, reciting only that it is "in full and final settlement of all claims of the defendant against the company or its officers or employees".

11. The defendant pleads that the Assignment and Transfer Agreement is not valid or enforceable. It makes a number of pleas regarding the *locus standi* of the plaintiff and invoking the doctrines of mutuality, privity and consideration; all of which will be matters for determination at the trial. As regards the circumstances giving rise to the execution of the Agreement it pleads as follows: -

- (1) That the defendant was owed certain duties by the plaintiff under the Participation Agreement.
- (2) That if the Participation Agreement were performed in accordance with its terms the defendant would have received more out of the proceeds of sale of the Property than €1.4m.
- (3) That the Agreement did not have the effect contended for by the plaintiff of cancelling or superseding the Participation Agreement.
- (4) That insofar as the Agreement was executed by the defendant it was induced to enter into it in reliance on certain representations by the plaintiff that the sum of €1.4m represented the full extent of the defendant's entitlement under the Participation Agreement and that all participants were treated equally in the distribution of proceeds of sale of the Property and that if the defendant had not signed the Agreement it would have received less than a sum of €1.4m.
- (5) That these representations were untrue and that the true effect of the Agreement was to confer certain benefits on the plaintiff's managing directors to the detriment of the defendant and in breach of the plaintiff's fiduciary duty to the defendant.
- (6) That on its calculations, the defendant should have received already a total sum of €1.78m and would be entitled to further payments "in the region of €2m" under the Participation Agreement.
- (7) That if the court grants specific performance of the Agreement the court should adjust the consideration to reflect the true value of the debt and shares to be assigned under the Agreement. It was said in submissions that there was authority for the proposition that a court in granting specific performance has jurisdiction to adjust the consideration. No authority for this proposition was cited and that raises an issue of principle for consideration at the trial.
- (8) In the counterclaim the defendant seeks orders in the following terms: -
  - (a) an injunction directing the plaintiff to allow it free and full access to inspect examine and/or copy books, files, records and/or other documents of the plaintiff;
  - (b) a declaration that the Agreement be rescinded and declared null and void;
  - (c) a declaration that the Agreement stands repudiated;
  - (d) a declaration that the defendant is entitled to be paid the net proceeds of sale of the Property in accordance with the Participation Agreement;
  - (e) a direction that the plaintiff account to the defendant for all sums due to it under the Participation Agreement;
  - (f) "disclosure pursuant to the inherent jurisdiction";
  - (g) damages.

12. In the reply and defence to the counterclaim the plaintiff denies the claims and allegations made by the defendant. In particular, it says the following: -

- (1) That the managing directors of the plaintiff are not beneficiaries but were named by the plaintiff as its nominees and will hold the balance of the debt and the shares subject to the directions of the plaintiff and to the benefit of the plaintiff. The defendant says that this is the first time it was suggested that the managing directors were not themselves beneficiaries of the Agreement. Nothing in the Agreement or in the statement of claim referred to their nominee status.
- (2) That after the sale of the property and "given the execution of the Agreement of 5 May 2017" the plaintiff is no longer obliged to distribute in accordance with the Participation Agreement and that in effect the Participation Agreement has been superseded by the Agreement.
- (3) That the Agreement represented a method of distributing the proceeds of sale of the property which minimised certain tax liabilities to the benefit of all the participants.
- (4) That all of the Participants executed an Agreement in identical terms in circumstances where each, including the defendant, had agreed that such a course of action was in the best interests of all concerned. It says that having acquiesced and agreed such a course of action the defendant is now estopped and precluded from reneging on the Agreement.
- (5) That the defendant was offered the opportunity to remain as a member of the plaintiff but declined.
- (6) It denies all of the allegations of misrepresentation and breach of fiduciary duty.
- (7) It claims that it has, in correspondence, explained the calculation of the distribution of the sale proceeds and furnished all relevant supporting documents.
- (8) That any payments made to its managing directors by the plaintiff were validly made as remuneration for services to

the plaintiff and its members and that they had been examined and approved by NAMA, which at the time held the secured interest in the Property.

14. The reply and defence to counterclaim first delivered pleaded that the Agreement was entered into on foot of advice and was approved of by NAMA. The plaintiff has amended the reply and defence to counterclaim to assert only that the sale of the property was a "process approved by NAMA." Pursuant to a separate motion, disposed of by consent save as to costs, the plaintiff has been granted leave to amend the reply and defence to counterclaim to this effect.

#### **Change of ownership and control of defendant**

15. Although the plaintiff makes the point that the change of ownership and control within the defendant is not relevant to the question of the enforceability or otherwise of the Agreement, those changes are an informative part of the narrative.

16. By the time the Participation Agreement was entered into on 23 June, 2011 the shareholders in the defendant were Dymphna Daly as to 25% and Brian Fitzgibbon as to €75%, Mr. Fitzgibbon having acquired that 75% from the Dalys.

17. In June 2016 Dymphna Daly's shares were sold to a Cathal McGlone. Therefore when the Agreement was entered into on 5 May, 2017 the defendant was owned as to 25% by Cathal McGlone and as to 75% by Mr. Fitzgibbon. At that time the directors of the defendant company were Mr. Fitzgibbon and his wife, and it was they who executed the Agreement under the seal of the defendant company.

18. At some point after October 2017 Mr. McGlone purchased Mr. Fitzgibbons' shares, bringing his ownership to 100%.

19. It has been said on behalf of the plaintiff that the fact of a change of ownership and control of the defendant would not provide justification for the defendant's efforts now to renege on the Agreement.

20. During the hearing references were made to the existence of a dispute between the current and the former shareholders and directors of the defendant and certain proceedings before Ms. Justice O'Regan in which the current owners and controllers of the defendant are said to have had recourse to court for the purposes of obtaining information and documents within the defendant. The plaintiff has suggested that a number of the requests for documents sought in this application are in truth, in furtherance of the issues as between the current and former shareholders and directors within the defendant. This Court has not seen the any of the details of those proceedings, but the existence of that dispute assists in understanding how, or at least why, the defendant is asserting that its current directors and shareholders have an information deficit in relation to transactions entered into at a time when Mr. McGlone was only a 25% shareholder in the defendant and not then in control of that company. That, of itself, would not justify certain of the broad categories of discovery now sought in these proceedings.

21. As regards information and access to books of account and records the plaintiff says that the defendant has previously been given all of the information that it would require about the sale of the Property, payments made and distribution of the proceeds. The plaintiff says that firstly that all relevant information was made available when the Agreement was being entered into. It says further that when the defendant, now under the control of Mr. McGlone, sought further information this was duly provided. I shall refer later to the extensive correspondence on this subject. The plaintiff therefore says that the discovery now sought is a form of fishing expedition, the objective of which is to look behind an Agreement made and concluded in May 2017 and to do so only in response to the plaintiff's efforts to enforce that Agreement. It asserts also that it is still willing to address queries arising from the disclosures made to date where they are relevant and necessary to the determination of these proceedings.

22. It is also worth noting that the substantive reliefs sought in the counterclaim include orders granting the defendant free and full access to records of the plaintiff, and orders that the plaintiff account to it for sums due under the Participation Agreement. That being the case the question now for determination is how much of the documents sought is the defendant entitled to receive at the discovery stage.

#### **Relevance**

23. The plaintiff submits that these proceedings fundamentally concern only its claim for specific performance of one agreement made 5th May, 2017. It submits that this Agreement supersedes the Participation Agreement, and therefore that matters concerning the meaning and effect of the Participation Agreement, and whether the plaintiff has properly observed its terms in the administration and distribution of the sales proceeds are not issues in the case. But in paragraph 6 of the statement of claim the plaintiff asserts that "but for the Agreement and Transfer the defendant could not have received the sum of €1,400,000 arising on the sale of the Property". By this plea, which is denied by the defendant, the plaintiff has clearly brought into the case the circumstances in which the Agreement was entered into.

24. In *Hartside Limited v. Heineken Ireland Limited* [2010] IEHC 3, Clarke J. considered what he described as:

*"... the point of principle which arises is as to the approach which the court should take where the real reason why a set of documents is said not be relevant is that it is argued that there is no legitimate basis for suggesting that the issue to which those documents might be relevant can properly arise in the case."*

Clarke J. continued: -

*"It is, of course, clear that such questions could, in theory, arise in virtually any case. At its simplest almost all cases involve a series of sequential propositions which need to be established in order that the plaintiff concerned might succeed. Even the most basic case will involve questions of liability, causation, and loss. Questions of loss, for example, only arise when liability and causation has been established. ...*

*Once it is probable that a document would be relevant to the calculation of loss, then its discovery must be directed (in the absence of any other good reason for not so doing) even though there might well be a risk that loss will never come to be assessed by the court at all. Loss is an issue because it is pleaded and denied. Whether it may be reached as a consequence of decisions on other issues is neither here nor there in the context of discovery. To take any other view, would be to invite the court to attempt to resolve potentially contested issues at the preliminary stage of a discovery application. The relevant general proposition must, therefore, be that, provided that an allegation is properly made on the pleadings, then documents which are probably relevant to the resolution of that issue should be discovered even though that issue may only arise in the event that other matters are resolved in favour of the party concerned".*

25. In this case the court must consider the issues pleaded, not only in the statement of claim but also in the defence and

counterclaim and the reply and defence to counterclaim. From these it is clear that the parties have joined issue as to whether the Assignment and Transfer Agreement superseded the Participation Agreement, and on a range of issues as to the circumstances in which the Assignment and Transfer Agreement was executed, many of which go to the very question of whether that agreement had the effect of superseding the Participation Agreement as claimed by the plaintiff.

#### **Clause 6.2 of the Participation Agreement**

26. The Defendant cites clause 6.2 of the Participation Agreement.

*"The participants shall be entitled at all reasonable times to free and full access to inspect, examine and/or copy any books, files, records and/or other documents belonging to or maintained by or on behalf of the Company and for such purpose, to free and full access to the properties and buildings of the company".*

27. Insofar as the plaintiff claims that the Agreement supersedes all rights under the Participation Agreement it submits that to grant the defendant all of the categories of discovery which are now sought in the form requested would be to, in effect, pre-judge the question of whether clause 6.2, or any of the other provisions of the Participation Agreement for that matter, survive the entry into the Agreement.

28. Clause 6.2 was repeatedly relied on by the defendant in its submissions and effectively became a "fall back" position for a number of the categories sought, particularly some of the more general categories. Even without pre-determining the question of whether the Participation Agreement survived the Agreement, I have concluded that for the purpose of ordering categories of discovery to be made, Clause 6.2 cannot be invoked to avoid the well-established tests to be applied in relation to each category sought, namely, whether the category is relevant, necessary and proportionate having regard to the pleadings.

#### **Pre-discovery correspondence**

29. Before turning to the categories sought in the defendant's motion, it is appropriate to refer to certain correspondence before and after the issue of the motion for discovery.

30. Before the commencement of these proceedings, correspondence was exchanged between the parties' solicitors in which the defendant's solicitors sought information and documents from the plaintiff. This correspondence appears to have commenced even before Mr. McGlone acquired the controlling interest in the defendant. The proceedings were commenced by a plenary summons issued on 25 June, 2018 and on 25 July, 2018 the plaintiff applied for entry of the matter into the Commercial List.

31. After the issue and service of proceedings the correspondence between the parties continued in which the plaintiff delivered certain information and material to the defendant. In October 2018 the matter was entered in the Commercial List.

32. On 21 December, 2018 the parties exchanged letters requesting voluntary discovery of certain categories.

33. On 23 January, 2019 the plaintiff issued its motion seeking one category of documents, after certain exchanges and agreement relating to other categories. On 7 February, 2019 the defendant issued its motion seeking fourteen categories of documents.

34. The respective motions were listed for hearing before the court on 10 April, 2019.

35. After the defendant's motion for discovery was issued, the plaintiff's solicitor wrote to the defendant's solicitor on 18 February, 2019 inviting it to identify specific queries. The plaintiff also suggested that the defendant's retained accounting expert meet with the plaintiff's accountant/auditor to address any queries which were outstanding. It appears that although the discovery motions were listed for hearing on 10 April, 2019 it was not until 3 April, 2019 that the defendant's solicitor responded to the plaintiff's letter of 18 February, 2019 suggesting a meeting and inviting specific queries. This reply of 3 April, 2019 led to further exchanges of correspondence and ultimately on 9 April, 2019, the eve of this hearing, a conference call took place between the defendant's expert accountants and the plaintiff's accountant. As a follow up to that conference call, at 10pm the night before the hearing of these motions, the defendant's solicitor furnished a list of documents sought by its expert. That list comprised twenty-four documents and categories of documents, stating that if the plaintiff agreed to provide those documents this would satisfy its requests in relation to five out of the fourteen categories of documents now sought. This correspondence did not lead to agreement and this Court is now requested to rule on the fourteen categories applied for by the defendant.

#### **Category 1: The books and records of the plaintiff, within the meaning accorded by Section 281 of the Companies Act 2014, for the past six years.**

36. The reason given for the request in relation to this category (and in relation to categories 2, 3 and 4) was as follows: -

*"The case concerns the amount of money due to the defendant in respect of its shareholding in the plaintiff and the loans due to it by the plaintiff. While the plaintiff accepts that the defendant was a 37.5% shareholder of the defendant and had loans of €7,815,629 due to it, it seeks to limit the amount payable to the defendant to €1.4M by virtue of the terms of the assignment and transfer Agreement made on the 5 May, 2017.*

*The defendant has pleaded that it is entitled to more money than that provided under the assignment and transfer Agreement and has pleaded that it should be paid in accordance with the provisions of the Participation Agreement. The defendant has also pleaded that if the court is to make an order for specific performance it should adjust the consideration to reflect the true value of the assignment and transfer Agreement.*

*The defendant will require these documents so that an independent expert can be instructed to calculate the amount of money due to the defendant on the basis of the Participation Agreement or on a valuation of the plaintiff. In addition the defendant is entitled to these documents under clause 6.2 of the Participation Agreement but the plaintiff has refused to provide the documents to the defendant despite many requests to do so."*

37. The defendant submitted that although this category on its face may appear wide and general, the plaintiff was a single asset and single transaction company established and operated for the purpose only of the investment in the Property, and accordingly that the production of books and records of the company over a six-year period is not disproportionate.

38. In addition to complaining about the generality of this category, the plaintiff says that the company is not an Irish company and accordingly is not subject to the provisions of s. 281 of the Companies Act 2014. The defendant states that although s. 281 does not apply the definition in s. 281 and s. 282 of the Act illustrates the kinds of books and records which are required under this category, namely those which correctly record and explain the transactions of the company.

39. Whilst it is true to say that the company was established and operated for the specific purpose of managing the investment of its participants in the BMW Building, I agree with the defendant's submission that Category 1 is excessively broad and is a general discovery request of the type which became impermissible when O. 31 r. 12 of the Rules of the Superior Court was first updated in 1999 (S.I. No. 233 of 1999). Accordingly, it is not a permissible form of request or Category and I refuse to make such an order.

**Category 2: All documents in respect of the sale of the Munich 1 property.**

40. The reason given for the defendant in this request is the same as for Category 1.

41. The plaintiff submits that this also is too broad a category in circumstances where it is not in dispute in the proceedings that the Property was sold, or that the plaintiff was entitled to sell the Property, or what price was obtained for the Property, and that such a wide category would include many thousands of documents including drafts of sales brochures, dealings with unsuccessful bidders and the like. It offered to make discovery of the "*transactional documents in respect of the sale of the Munich 1 property*" and that it would formally discover the documents previously provided by it to the defendant "as detailed in earlier correspondence". In this regard the plaintiff refers to the extensive exchange of correspondence during 2018. This Court cannot on an application of this nature examine in detail the contents of all of the material furnished with that correspondence and rule on whether it is sufficient to alleviate this necessity for further discovery. However it is relevant to refer to the summary of that correspondence which is contained in the replying affidavit of Mr. O'Mahony of Eversheds Sutherland, solicitors for the plaintiff where he refers to letters from the plaintiff's solicitor to the defendant's solicitor on 5 July, 2018, 20 July, 2018, 28 August, 2018, 30 August, 2018, 4 September, 2018, 4 October, 2018. They appear to have included the provision of such items as the following: -

(1) Signed accounts for the plaintiff for years ending December 2013, December 2014, December 2015, December 2016 and draft management accounts for year ending December 2017.

(2) Copy tax advice and insolvency advice from Eversheds Munich (the plaintiff's advisors)

(3) Schedules setting out detail of formula under the Participation Agreement and final payment.

(4) Tax calculation for sale of the property.

(5) "Amended accounts for 31 December, 2017".

(6) Letter from Stefan Rhems of Robert Booker, the plaintiff's auditor, dated 27 July, 2018, which it is said address the defendant's queries with enclosures including -

(a) Shareholder loans bookings 2012-2017.

(b) 2017 accounts notes.

(c) Note of interest and swap fees.

(d) Note of Gemside shareholder loan.

(e) Munich 1 shareholder's resolution.

(7) Contract for sale evidencing the sale of the property for €41.7m.

(8) Excel spreadsheet showing waterfall of payments arising from the sale of the property.

(9) Shareholder loans bookings 2017.

(10) Letter from Eversheds Sutherland 4th September, 2018 to the defendant's solicitor containing: -

(a) factual background Gemside accepting the settlement constituted by the Assignment of Transfer.

(b) Munich 1 tax certifications 2017.

(c) Excel spreadsheet showing waterfall of payments arising from the sale of the property.

(11) Copy of loan documents ("der Grundschriftbrief").

(12) Information from Cushman & Wakefield in relation to the payment of rent.

42. The plaintiff says that this material, together with other information provided in correspondence, addresses the queries raised by the defendant, irrespective of whether they are relevant to the matters in dispute in these proceedings. In as much as this material comprises, to an extent, correspondence from the plaintiff's own advisers, the defendant and the court at the trial of the matter, cannot be expected to rely only on these letters and summaries or explanations, without having the facility to test them by reference to underlying primary records. Furthermore, this Court has a measure of sympathy with the defendant's objection that the plaintiff is "cherry picking" the material it is willing to discover, largely by formally discovering material previously provided. Nonetheless, I consider this category as formulated to be excessively broad. In directing a narrower category below, which corresponds more closely to the category proposed by the plaintiff, I stress that this does not mean that in making the discovery, the plaintiff can simply discover documents already produced, or, more importantly, discover such items as financial statements and reports of professional firms, without also discovering the primary documents relating to the transactions of the plaintiff which are at issue in the case. This principle applies not only to this category, but to the other categories referred to later in this judgment.

43. I am also mindful that Mr. O'Mahony has indicated in his replying affidavit that the plaintiff's auditor will be in a position to swear that the accounts contain all relevant information. I take that to be a recognition that testing the authenticity of financial

statements and reports will require oral evidence at the trial, noting that it will be a matter for the parties to consider and determine who they call in evidence.

44. I shall therefore order discovery of this category as follows: -

*"All documents which record or evidence the transaction of the sale of the Munich 1 property and the documents referred to in para. 7 of the affidavit of Mr. Neil O'Mahony sworn in these proceedings on 19 February, 2019."*

**Category 3: All documents recording rental income and other income received by the plaintiff subsequent to the sale of Munich 1.**

45. The reason given for this category is the same as that in respect of categories 1 and 2.

46. A particular question arose because it had been suggested that certain rent payable by the tenant of the Property would accrue for the benefit of the plaintiff even after the sale. This was corrected when it was clarified that the completion of the sale took place without any delay and all rent thereafter was payable to the purchaser. The plaintiff has offered to make the audited accounts for the year ended 31 December, 2017 available and says that the auditor will be in a position to swear that the accounts contain all relevant and necessary information as to the plaintiff's income and expenditure which would include any such rental income.

47. A clarification was given during the course of the hearing to the effect that the plaintiff was a company which availed of certain exemptions and therefore was not obliged to file audited accounts. Therefore, references to "audited" accounts are erroneous. Instead, what are referred to as "*Statutory*" accounts are in fact completed by the plaintiff's auditors and duly filed with relevant authorities.

47. The plaintiff proposed that it would discover the relevant reports of Cushman & Wakefield, who manage the property on behalf of the plaintiff setting out relevant rental income and payments for the relevant period. As regards Cushman & Wakefield, it seems to this court that having regard to categories of discovery sought generally there is no reason why the reports of Cushman & Wakefield should be limited to extracts relating to such matters as rental income.

48. In relation to this heading I shall direct that the plaintiff discover:

- (1) The accounts of the plaintiff for the year ended 31 December, 2017; and
- (2) All reports of the firm of Cushman & Wakefield relating to the Property.

**Category 4: All documents recording the expenses incurred by the plaintiff over the past six years.**

49. Again, the reasons for this category are the same as those stated in relation to Category 1, 2 and 3.

50. The plaintiff appears to accept that had the Agreement not been entered into the defendant would be entitled to distributions in accordance with the formula as set out in the Participation Agreement. It says that the financial information applicable to such a distribution is the information recorded in the annual accounts of the plaintiff for the relevant year.

51. The defendant says that it will require more than the financial statements to enable its independent expert to be instructed to calculate the amount which would have been due to it on the basis of the Participation Agreement. It refers *inter alia* to the schedule attached to its solicitor's letter of 9th April, 2019.

52. At a first reading that schedule has the appearance of being sufficiently specific to form the basis of a reasonable request and it is regrettable that it was not until the night before the hearing of the discovery motions that such a list was presented. However, on closer examination the reality is that the material sought in that letter is of an extent which would enable a full audit of the plaintiff to be undertaken. It even extends to such material as "Trial Balance for each of the years from 2012 to 31st March 2019", all tax returns and correspondence with tax authorities, documents relating to the disposal of the Property, lease agreements and loan facilities. I do not consider that discovery in these proceedings can be used to put the defendant in a position to commission at this stage its own audit of the plaintiff, where the plaintiff has indicated that its auditor will give evidence and particularly where the substantive relief sought in the counterclaim is for access to all the books and records of account necessary for that same purpose. If and to the extent that it challenges the financial statements made available, this discovery process is not the forum for doing so. I therefore refuse to order discovery of this category.

**Categories 5, 6, 7 and 9 are not being pursued**

**Category 8: All documents touching upon advice received by the plaintiff in respect of the assignment and transfer Agreement.**

**Category 10: All documents touching upon the legal and accountancy advice provided in relation to tax planning touching on and concerning the sale of Munich 1.**

**Category 11: All documents touching upon the legal and accountancy advice provided in relation to tax planning touching on and concerning the use of the proceeds of the sale of Munich 1.**

**Category 12: All documents touching upon the legal and accountancy assistance provided in relation to tax planning touching on and concerning the repayment of the loans due to the members.**

53. The reason given for categories 8, 10, 11 and 12 is as follows:-

*"The plaintiff has pleaded that the Assignment and Transfer Agreement was necessary in order to reduce the tax liability of the plaintiff and was done so (sic) on foot of advice. They have also pleaded that the scheme was approved of by NAMA. The defendant has pleaded that it was not necessary to enter the Assignment and Transfer Agreement in order to avoid a tax liability".*

54. Insofar as the original reply and defence to counterclaim pleaded that the Agreement was part of a process engaged in by the plaintiff on foot of advice and approved by NAMA, that plea has since been amended to simply recite that the sale of the property

was "a process approved of by NAMA." However, the plaintiff has indicated a willingness in relation to categories 8, 10, 11 and 12 to make discovery of the following: -

*"All documents up to 5 May, 2017 that record or evidence legal, accounting or taxation advice received by the plaintiff in respect of the distribution of the proceeds of sale of the property and execution of the assignment and transfer, to include documents that record or evidence any tax liability on the part of the plaintiff that might arise in that regard."*

55. The defendant asserts that the provision of such advice should not be limited in time to 5 May, 2017.

56. The fundamental and first issue to be determined in the proceedings is the validity and enforceability or otherwise of the Agreement of 5 May, 2017. In those circumstances I have concluded that it is appropriate to order discovery in the terms proposed by the plaintiff quoted at paragraph 54 above, but the temporal limit will be "up to and including 5th May, 2017."

57. Categories 13 to 16 have since been the subject of certain Agreements or in some cases have been withdrawn or are not being pursued.

**Category 17: All documents recording the remuneration paid to the plaintiff's Managing Directors.**

**Category 18: All documents touching upon the Agreement of the plaintiff's members for the payment of the plaintiff Managing Directors remuneration.**

58. The reasons given for categories 17 and 18 are as follows:-

*"The defendant has pleaded that it has been treated differently to the other members to its detriment. The plaintiff has pleaded that the additional payment made to the managing directors reflects the remuneration that was paid to them and which was agreed to by the plaintiff's members. These categories of documents are necessary to establish the remuneration paid and whether the Agreement was received from the members."*

59. In relation to Category 17 the plaintiff has indicated that it is willing to discover the following: -

*"Shareholder loan bookings for 2012 to 2017, which illustrate the movement and balances of shareholder loans and reflect the remuneration paid by the plaintiff to its managing directors."*

The plaintiff asserts that the only source of remuneration of the managing directors was provided through the shareholder loan accounts, which it says have already been provided.

60. If the plaintiff is correct in its own assertion that payments through the shareholder loan accounts were the only source of such remuneration there is nothing oppressive in directing Category 17 as sought by the defendant subject to the temporal limit that it should apply for the period from 2012 to 2017 inclusive and I shall so order.

61. In relation to Category 18. There appears to be a measure of agreement to a category described as follows: -

*"All documents that record or evidence the Agreement of the members of the plaintiff to the remuneration paid by the plaintiff to the Managing Directors for the period between 2012 and 2017."*

The defendant asserts that this should extend to the year 2018. Since the transactions at issue, both the sale of the Property and the Agreement sought to be enforced, occurred within 2017, I accept the plaintiff's proposed temporal limitation of this category to the end of the year 2017.

**Category 19: All documents touching upon the secured debt owed by the plaintiff to members.**

62. The reason given for this category is as follows: -

*"The plaintiff has pleaded that the reason that some participants received additional money was because they were required to be paid to those members in circumstances where it 'constituted secured debt on the part of the plaintiff.' The defendant is unaware of the secured debt referred to, and it is not included in the Participation Agreement which records the debt due to each of the members."*

63. The controversy around this category appears to result from an assertion by the plaintiff that at the time when the Participation Agreement was entered into it also was unaware that certain members held security for debt owed to them and that this explains certain amounts paid to them.

64. On its face this may require more explanation at the trial, but to meet this point in the context of discovery, the plaintiff has proposed a reformulated category comprising "The security documents pertaining to debt owed by the plaintiff to its members".

65. The defendant submits that documents which evidence the security held by the relevant parties are only a part of the information necessary to determine this issue, and that evidence of this debt itself is equally relevant. I accept that submission, but conclude that the category sought is excessively broad. I shall order the plaintiff to make discovery of the following:-

*"All documents recording or evidencing secured debt owed by the plaintiff to its members including the documents creating such security."*

**Category 20 is not being pursued in this application.**

**Category 21: All documents recording on invitation to potential investors to provide equity to the plaintiff.**

66. The reason given for this category is as follows: -

*"The plaintiff has pleaded that the objective of the Assignment and Transfer was to hold the residual debt balance and shares to the benefit of a person who would in the future provide further equity to the plaintiff. The defendant has pleaded that the Assignment and Transfer Agreement constitutes an Agreement that is to the detriment of the defendant and to the benefit of the plaintiff's managing directors. In addition, the defendant has pleaded that the assignment and transfer of its debt and shares is a valuable asset for which it has not been properly compensated. This*

*category of documents will help establish the true value of the Assignment and Transfer Agreement."*

67. The defendant relies on the pleading made in the reply and defence to the counterclaim to the effect that the objective of the Assignment and Transfer was to hold the residual debt balance and shares in a structure which would be *"to the benefit of a person who would in the future provide further equity to the plaintiff"*. Nowhere is it pleaded that any such invitation to investors actually issued, and the plaintiff says that the objective referred to was not realised due to the failure of the defendant to perform the Agreement. In the absence of any plea by either party as to the existence of such invitations to other investors there is no basis for this category and I shall refuse it.

**Category 22: All additional documents that the plaintiff intends to rely on at the trial that have not been captured in the above categories.**

68. This category is in the same class as Category 1 requested and is a general discovery request of a nature no longer permissible under Order 31 Rule 12.

**Plaintiff's Motion for Discovery**

69. The plaintiff sought voluntary discovery of certain categories of documents from the defendants and some of these categories have been agreed or withdrawn. The application before the court relates only to one category namely, Category 4 as follows: -

*"All documents that record or evidence the provision by the defendant of monies by way of loan, or otherwise to the plaintiff and/or Munich 2 Property Fund GmbH."*

The reason given for this request is principally that, without prejudice to the plaintiff's claim to enforce the Agreement the plaintiff has pleaded in its reply and defence to counterclaim that should the Agreement be set aside the plaintiff will put the defendant on strict proof of the loans provided by it. The plaintiff refers also to the fact that in the defence and counterclaim the defendant pleads that should the court make an order for specific performance of the Assignment and Transfer, the consideration thereunder should be adjusted to reflect *"the true value of the debt"* to be assigned.

70. The plaintiff says that this plea means that the defendant has put in issue the *"actual amount due and owing to it by the plaintiff"*. The defendant submits that since the plaintiff's financial statements record the defendant's loans and since the plaintiff is not, it says, seeking to rescind the Participation Agreement, the matter of the loans by the defendant to the plaintiff is not in dispute. It seems to this Court that this presents a contradiction in that most of the categories of documents sought by the defendant go to a testing of the information behind the financial statements, and the financial "application" of the Participation Agreement.

71. Taking the pleadings as a whole into account, it is clear that if the plaintiff fails in its claim for specific performance then the court will at trial have to consider the defendant's counter claim by reference to the Participation Agreement. This in turn will mean that having regard to the plaintiff's plea putting the defendant on proof of its loans, the documents evidencing those loans or other funding will be relevant and necessary. I shall therefore order the defendant to make discovery of this category sought by the plaintiff.