THE HIGH COURT

[2022] IEHC 303

[Record No. 2020/5639 P]

BETWEEN

AIDAN FARRELL

PLAINTIFF

AND

EVERYDAY FINANCE DAC

DEFENDANT

JUDGMENT of Ms. Justice Stack delivered on the 24th day of May, 2022.

Introduction

1. This is an application to inspect documents, which is brought pursuant to O.31, r.18 of the Rules of the Superior Courts, s. 91 of the Land and Conveyancing Law Reform Act, 2009, Order 50, rule 4 of the Rules, and the inherent jurisdiction of the court. The plaintiff borrowed monies on foot of certain loan facilities provided by AIB Bank Plc and AIB Mortgage Bank (collectively, "AIB") and granted associated securities to AIB over eleven properties in Donegal and Dublin. The defendant says it is the successor in title to AIB's interest in the said loans and securities and asserts its title as mortgagee in respect of the said securities on foot of a Global Deed of Transfer dated 2 August, 2018 ("the Global Deed of Transfer") and an Amended and Reinstated Global Deed of Transfer dated 22 October, 2018 ("the Amended and Reinstated Global Deed of Transfer").

2. Broadly speaking, there are two significant issues between the parties on this motion to inspect. First, there is the question of whether the defendant has adequately complied with the plaintiff's notice to produce dated 22 March, 2021, by exhibiting redacted copies of the Global Deed of Transfer and the Amended and Reinstated Global Deed of Transfer in its replying affidavits and, secondly, whether the plaintiff is entitled to production of documents other than those deeds.

3. The plaintiff has delivered a lengthy statement of claim which makes the following essential complaints:

   (i) The defendant has refused to permit the plaintiff to inspect the documents of title held by the defendant as mortgagee notwithstanding the plaintiff's right to such inspection pursuant to s. 91 of the Land and Conveyancing Law Reform Act, 2009;

   (ii) The plaintiff entered into a restructuring agreement with AIB in or about 2015, on foot of which he took steps to sell certain property, including his family home, thereby creating an estoppel which bound AIB and the defendant as its successor. Alternatively, it is said that insofar as a successor is not bound, then the transfer of the loans and securities is invalid;

   (iii) It is claimed that the plaintiff is entitled to buy out his loans and securities and that his right to redeem is on terms to be imposed by equity including a fair price to be paid by the mortgagor for redemption, by reason whereof the plaintiff has a right of

first refusal or pre-emption if the loans and securities are offered for sale at below par value;

(iv) That the mortgage was subject to a term or condition that the mortgagee would not sell the plaintiff's loans and security together with other assets which might be less saleable, so as to prevent the mortgagor from offering an equal or better price (which I understand is the price paid by the defendant for the plaintiff's loans and mortgages) or so as to encourage litigation;

(v) That the plaintiff had a right to redeem at the price or value offered by the defendant;

(vi) That the sale of the plaintiff's loan and security savoured of maintenance and champerty;

(vii) That AIB ought not to have transferred the plaintiff's loans and security to an entity which was not a bank or credit institution under Irish or European Union law, at least without the express consent in writing of the plaintiff;

(viii) That the defendant would make available its title deeds to the plaintiff for the purposes of disposing of the mortgaged properties;

(ix) That the defendant had caused loss to the plaintiff by causing several sales of the mortgaged properties to fall through;

(x) That the defendant is not entitled to appoint a receiver given that the plaintiff had abided by the restructuring agreement with AIB.

4. The defendant delivered a defence on 19 March, 2021, in which it is pleaded *inter alia*:

(i) That the original loan agreements and the further agreements reached between the plaintiff and AIB on 23 September, 2015 and 28 September, 2015 were to the effect that the sums advanced by AIB to the plaintiff were and remained repayable upon written demand being made of the plaintiff;

(ii) That the plaintiff had previously acknowledged the defendant's title and was now estopped from challenging it;

(iii) That the plaintiff was not entitled to claim for losses associated with sales of the mortgaged properties which did not go through;

(iv) That the defendant was AIB's successor in respect of the agreements and related mortgaged securities entered into between the plaintiff and AIB, and para. 9 of the defence specifically relied on the Global Deed of Transfer and the Amended and Reinstated Global Deed of Transfer as evidence of the defendant's lawful acquisition of, and legal title in, the agreements and related mortgage securities referred to in the statement of claim;

(v) That s. 91 of the 2009 Act did not apply to *"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."*

(vi) Alternatively, it was pleaded that s. 91 did not entitle the plaintiff to inspect and take copies of the Global Deed of Transfer and the Amended and Reinstated Global Deed of Transfer in unredacted form;

(vii) That the statement of claim did not disclose a cause of action insofar as s. 91 of the 2009 Act was concerned;

(viii) That there was no bar to the transfer by AIB of the plaintiff's loans and security;

(ix) That the 2015 agreements with AIB had not subsequently been varied by conduct or otherwise;

(x) That the plaintiff was not entitled to the benefit of any estoppel;

(xi) That the plaintiff had no sustainable cause of action in respect of the alleged right to buy out his loans and related securities;

(xii) That the transfer of the plaintiff's loans and related securities to the defendant did not require the plaintiff's prior consent;

(xiii) That the defendant was not bound by any obligations other than those created and defined by the agreements between AIB and the plaintiff and the related mortgage security;

(xiv) The plaintiff had no entitlement to bid in respect of his loans;

(xv) That the price obtained by AIB from the defendant did not affect the plaintiff's outstanding liability which was in the sum of €2,172,259.80 as of 19 March, 2021;

(xvi) That the plaintiff's equity of redemption remained and was conditional upon the plaintiff discharging in full his outstanding indebtedness lawfully due and owing to the defendant, which the plaintiff had failed to do;

(xvii) That the defendant was entitled to appoint a receiver.

Application to inspect

5. The application to inspect was originally brought by notice of motion returnable for 15 February, 2021. This notice of motion also sought interlocutory relief in relation to the appointment of a receiver, but that aspect of the motion had been dealt with by way of undertaking on the part of the defendant and therefore does not now arise.

6. The notice of motion was based on O.50, r.4 of the Rules and s.91 of the 2009 Act, as well as the inherent jurisdiction of the court.

7. Subsequently an unfiled notice of motion in amended form was provided to the defendant, and as the only amendment was to refer specifically to O.31, r. 18, in para. 2, the application proceeded on the basis of the notice of motion in amended form.

8. The documents sought pursuant to O.50, r.4, s. 91 of the 2009 Act, and the inherent jurisdiction of the court in the amended notice of motion were:

> "All deeds whereby the defendant asserts that it is mortgagee to the plaintiff as mortgagor".

9. Pursuant to O.31, r. 18, the amended notice of motion sought inspection 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]."*

10. On the second day of the hearing of the application to inspect, counsel for the plaintiffs stated that he was seeking the following:

    1. Pursuant to s. 91 of the 2009 Act, all documents of title relating to the mortgaged property within the possession or power of the mortgagee, including agreements for transfer and deeds of transfer of the plaintiff's loans and security;

    2. Pursuant to O. 31, r.18, *"the agreements entered into between inter alia AIB and the defendant", as pleaded at para. 10 of the defence and "the title documents executed further to the agreements".*

    3. Pursuant to the inherent jurisdiction of the court, *"all deeds which the defendant has asserted against us".*

11. It will be seen, therefore, 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. I am not convinced that an application can be broadened in this manner on the second day of the hearing, though counsel for the defendant did not indicate that it placed him in any difficulty. However, given the conclusions that I have reached, I do not think that it is necessary to make a specific finding as to whether the defendant was entitled to proceed in this manner.

Application pursuant to the inherent jurisdiction of the Court

12. As will be seen above, the plaintiff seeks a very broad and general category of documents under this heading, being all deeds which the defendant has asserted against him. It is difficult, however, notwithstanding the very general way in which this is expressed to see how this adds anything to the nature of the documents which are sought pursuant to s. 91 of the 2009 Act, O.31, r.18, or O.50, r.4 of the Rules. The application seems closer to

an order for discovery, but it is established in England and Wales (see *Raja v. Van Hoogstraten* (No. 9) [2009] 1 WLR 1143) that, although the court has an inherent jurisdiction to regulate the conduct of civil litigation which may supplement rules of court, it cannot be used to lay down a procedure which is contrary to or inconsistent with them, and therefore where the subject matter of an application is governed by the rules, it should be dealt with in accordance with them and not by exercising the court's inherent jurisdiction. That accords with my understanding of the position in this jurisdiction.

13. It therefore seems to me that, as the plaintiff has brought applications pursuant to the Rules, and in particular pursuant to O.31, which regulates the procedures by which it is determined whether a party is entitled to inspection of documents, it is not appropriate to consider this matter further by reference to the inherent jurisdiction of the court.

Application pursuant to O.31, r. 18

14. Order 31, r. 15 of the Rules provides as follows:

> "Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings, or affidavit or list of documents reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit copies thereof to be taken; …".

There is an exception in r. 15 from the obligation to produce documents for inspection where "such document relates only to [the defendant's] own title." Counsel for the defendant does not rely on this exemption and therefore I do not have to consider the extent of it. In this case, the plaintiff served a notice to produce pursuant to O.31, r.16, in the prescribed form. This required the defendant to produce for inspection "*the following documents referred to at para. 10 of your defence:*

1. '…the agreements entered into between, inter alia AIB and the defendant …'

2. '…the title documents executed further to the agreements …'."

This is in the same terms as outlined by counsel for the plaintiff at the commencement of the second day of the hearing.

15. The plaintiff complained that the defendant never served a notice of objection in the prescribed form set out in r. 17, but it should be noted that r. 17 does not apply unless the notice to produce served under rule 15 relates to documents at least some of which are set out in an affidavit as to documents within the meaning of rule 13. Rule 17 does not refer to documents referred in "*pleadings*" but only documents which have been "*set forth by him in such affidavit or list as is mentioned in r. 13*", so it would appear that, strictly speaking, this procedure does not apply where the documents are referred to in a defence. Rule 13, of course, refers to an Affidavit as to Documents, made pursuant to an obligation to make discovery pursuant to r. 12. I therefore do not think that the defendant was obliged to serve a notice of objection in this instance.

16. In any event, the defendant says that it did produce the documents by way of exhibit to the affidavit of Andrew McCudden of 8 April, 2021, as redacted copies of both the Global Deed of Transfer and the Amended and Reinstated Global Deed of Transfer were exhibited to that affidavit. It has not purported to produce any other documents, and the defendant disputes that it has any obligation to produce documents other than those two deeds.

17. Accordingly, insofar as the application is pursuant to O.31, r. 18, there are two significant issues between the parties: First, the extent of the defendant's obligation to produce pursuant to r. 15, and secondly the entitlement of the defendant to redact the two deeds which it has produced.

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

18. The first question is whether the notice to produce complies with r. 15. It does not refer to individual documents, but to categories of documents, though to be fair, in each case the categories of documents are ones referred to by the defendant at para. 10 of its defence. Rule 15 speaks of reference being made to "*any document*", and this seems to refer to a specific document or documents and not a category of documents such as is requested here.

19. From the review of the origin of the rule conducted by Haughton J. *in Courtney v. OCM Emru Debtco DAC* [2019] IEHC 160, 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. At para. 59, Haughton J. referred to Wylie, *The Judicature Acts* (1905) and its commentary on O.31, r.15 in the Rules of the Supreme Court (Ireland) 1905, where it was stated:

> "The rule in Chancery was that a mere statement in the answer of a document which the party was not bound to produce: Glover v Hall, to Phil. 484; or a mere reference to a document relating exclusively to the defendant's title: … would not entitle the applicant to its production; but when a party stated the effect of a document relating to his own title, which he had in his possession and craved leave to refer to it for greater certainty, it was held that he was bound to produce it: Hardman v Ellames, and 2M. & K. 745."

20. In *Hardman v Ellames*, which was not opened to me, but which is considered in detail in *Courtney* and was included in the books of authorities for this application, the defendant referred to his own title deeds which he, for greater certainty, sought leave to refer to when produced. That judgment was based on the fact 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.

21. That approach was followed in *M'Intosh v. Great Western Ry Co*. (1849) 1 Mac & G 73 where Cottenham L.C. stated at p. 77 that:

> "If a party refers to a document and sets out a part of the document and then refers to it, he cannot afterwards tell the Plaintiff that he shall not see the document, because the Plaintiff is not bound to take the Defendant's representation of the document. 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."

22. Similarly, in *Quilter v. Heatley* 23 Ch. D. 42, Lindley L.J. stated at p. 50 the provisions of O. 31, rr. 14 to 17 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*".

23. 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.

24. In the Defence in this case, para. 9 states that:

> "The Defendant confirms its reliance on, inter-alia, the Global Deed of Transfer dated the 2nd August 2018, and the Amended and Reinstated Global Deed of Transfer dated the 22nd October 2018 as evidence of its lawful acquisition of, and legal title in the agreements and related mortgage securities referred to in the Statement of Claim."

25. By contrast, para. 10 of the Defence, after pleading that s. 91 of the 2009 Act entitles the plaintiff only to documents of title furnished by the mortgagor to the mortgagee and executed by the mortgagor and mortgagee relating to the mortgaged property, then denies "*that the Plaintiff is entitled to inspect and take copies of other title documents and, in particular, the title document 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."* I do not think that general references to documents of this kind trigger the entitlement to inspect pursuant to Order 31, rule 15.

26. 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.

27. If the relevant documents have not been identified by specific reference in pleadings, then the discovery process is available for that purpose.

28. In my view, therefore, 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.

ii. Whether the plaintiff is entitled to see the unredacted documents, or whether the extent of the redaction should be reduced

29. This leads on to the next significant issue material to the application pursuant to O.31, r.18, which is whether the plaintiff should be entitled to see the two deeds either in unredacted form or with less extensive redaction. As I understand it, the plaintiff would be content to see very large portions of the Global Deed of Transfer redacted, because he acknowledges that most of the schedule relates to other borrowers and not to him. It should be borne in mind that the Global Deed of Transfer is approximately two and half pages long, followed by a very lengthy schedule which is divided into at least 7 parts. Portions of parts 1, 5, 6, and 7 have been disclosed in the redacted copy Deed which has been exhibited.

30. Insofar as the Global Deed of Transfer is concerned, 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. Furthermore, the introductory clause of para. 1 of the operative parts of this deed has been redacted. It seems to me to be quite clear from the structure of the deed that this introductory clause is a reference to the price paid by Everyday for the loan book of AIB and EBS Designated Activity Company. Clause 1 establishes that the sellers are selling as beneficial owner free from incumbrances and as registered owner as applicable or as the party entitled to be registered as owner and then contains a number of sub paras. stating what is included in the sale. These include matters such as the right to sue on all covenants with, and undertakings to, the sellers in each of the security documents. There are ten sub clauses and clause 1.6 is redacted. It is not clear to what this relates. Clause 2, which provides for the laws to govern various aspects of the matters in sale, has been replicated in full. Clause 3 has also been set out in full. Clause 4.1 and its three sub-clauses have all been included, but the substance of Clause 4 itself has been redacted. I am not sure to what this relates.

31. The Schedule has been redacted so that the pages disclosed all refer to the plaintiffs loans and securities. The attestation clause has been disclosed and the page on which it appears is p. 969. Therefore, it would appear that there are many hundreds of pages contained in the schedule. It was stated in submission 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 only real objection to this aspect of the redaction is that it is not confirmed on affidavit that this is what has been done.

32. It should be noted that the redacted copy exhibited shows only a single Schedule divided into at least 7 parts, but the operative part of the Deed refers to "*Schedule 1*" and "*Schedule 2*". As pointed out by Ms. Suzanne Bainton, solicitor, and by Ms. Karen Sheil,

Solicitor, who have reviewed the documents of title for the plaintiff and sworn affidavits on his behalf, it is not possible to resolve this discrepancy from the redacted copy.

33. As regards the Amended and Reinstated Global Deed of Transfer, again all of the recitals have been redacted, and Clause 1 which sets out what has actually been agreed has been redacted in full in a manner which prevents the reader from seeing the nature of the agreement, and not only the price (if it is restated here) paid in respect of any part of the subject matter of either deed.

34. Clause 2 sets out the purpose of this Amended and Reinstated Global Deed of Transfer, which is to replace the original schedule 2 with a revised schedule 2 appended to the Amended and Reinstated Global Deed of Transfer. Clause 3 appears to have been set out in full, and then there appears to have been a Clause 4 which is entirely redacted. It is not clear to what this relates.

35. The schedule has again been redacted in a manner which appears to have been designed to exclude any reference to third party information but, again, this has not been confirmed on affidavit.

36. The basis for these redactions is set out, in the first instance, in the affidavit of Mr. McCudden of 8 April, 2021. At para. 10 he states that the redactions contained in the Deeds 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 defendant's ability to negotiate and complete possible future loan book sales), (2) bank and/or client confidentiality (e.g. restrictions imposed by the Data Protection Acts, 1988 – 2018 requiring the redaction of all personal information relating to other borrowers which do not relate to the within proceedings) 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).*"

37. He also states at para. 16:

> "The redacted Global Deeds of Transfer exhibited above 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."

On that basis, he disputes the necessity to make the orders sought.

38. There is a further affidavit of Ms. Naomi O'Connor, solicitor for the defendant, sworn 13 July, 2021, where she states (at para. 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 good title in the loans and mortgage securities and has more to do with the plaintiff seeking to elicit information on 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."

At para. 16, having commented on the merits of the case as pleaded by the plaintiff, Ms. O'Connor states that:

> "Having regard to the foregoing, the defendant does not accept the arguments being advanced by the plaintiff to seek an inspection and to take copies of unredacted title documentation arising from the agreements entered into between the bank and the defendant under which the defendant acquired the plaintiff's loans and mortgage securities. In particular, 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 a Irish law deeds of conveyance and assignment dated the 2nd August, 2018 with regard to the investment properties which are registered in the Registry of Deeds."

39. At para. 22, Ms. O'Connor states:

> "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 in the loans and related mortgage securities."

40. In her second replying affidavit of 3 November, 2021, Ms. O'Connor points to the fact that in global transactions, to give effect to the collective sale of a large number of individual loans and mortgage securities of different bank customers, the consideration is agreed on a global basis "*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*." She says this is an important consideration in the present application as the plaintiff is claiming that he is entitled to have sight of the consideration agreed between the bank and the defendant in acquiring his particular loans and mortgage securities.

41. At para. 6, she states that as the global consideration paid in respect of the global acquisition of individual loans and mortgage securities is confidential, commercially sensitive and secret, redaction of the global consideration paid, together with other commercially sensitive and confidential clauses in the agreement is fully justified.

42. At para. 21, Ms. O'Connor states:

"As the redaction does not in any way preclude the plaintiff from being satisfied that the defendant has acquired title in the loans and mortgage securities, confirmation of which is further evident by the fact that the plaintiff is the registered owner of the mortgages in the Land Registry and is recorded in the Registry of Deeds as having acquired the mortgage securities, it is the defendant's position that the defendant's title and ownership of the loans and mortgage securities is beyond challenge and that the revised reliefs which are now being sought by the plaintiff are unnecessary to the real matters in dispute between the parties in the proceedings."

Principles relating to redaction

43. The parties opened a number of authorities where the extent of redaction of documents relating to loan book sales in proceedings similar to these were examined. For example, the defendant referred me to the judgment of Murphy J. in *English v. Promontoria (Aran) Ltd (No. 2)* [2017] IEHC 322, where Murphy J. expressed herself satisfied with the redacted copy documents produced, on the basis that the plaintiff in that case was challenging the title of the defendant to the loans and securities he had originally entered into with Ulster Bank Ireland Ltd. and related entities. It is clear from that judgment that the court refused to entertain arguments made on an entirely speculative basis and was satisfied from the portions of the documents which remained unredacted that the exhibited deeds appeared to be valid and to show the transfer of both the plaintiff's loan facilities and securities from the original mortgagee to the defendant. It is clear, however, that 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 of pre-emption, first refusal, or an aspect of the equity of redemption) were not at issue in that case.

44. The issues here are closer to those in *Courtney v. OCM Emru Debtco DAC*, already referred to above. I agree with counsel for the defendant that, while Haughton J. commented at para. 24 of that judgment, that no leave of the court to exhibit redacted copies of the deeds in issue in that case had been sought in advance of swearing the replying affidavit, he did not go so far as to establish this as a legal requirement which must be satisfied before redaction would be permitted. It does not appear to me from the authorities opened to me that there is any support in Irish law for such a principle, and the plaintiff's written submissions primarily rely on an interpretation of Order 31, rules 15 to 18 which is to the effect that they contain a presumption in favour of disclosure.

45. It seems to me that rule 15 proceeds upon the basis that inspection should take place but subject to any legitimate claim of privilege, as the right to object to production is specifically mentioned both in the prescribed form affidavit as to documents mentioned in rule 13 and in rule 17. The courts are well used to defining the legitimate basis on which a party may resist inspection but no court order is required in order to invoke it and adjudication of that issue occurs after objection has been made to inspection.

46. I am therefore satisfied that no such leave is required, 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.

47. As to how this Court should do that, it seems to me that the plaintiff is correct in pointing to the decision in *Courtney*, and that of *Victoria Hall Management Ltd v. Cox* [2019] IEHC 639, where Barniville J. specifically approved *Courtney*. These authorities show that this Court should require evidence, first, that redaction has been effected on the basis of legal advice as to the proper parameters of redaction in the particular case. In *Courtney* itself, although the defendant initially objected to the court seeing unredacted documents, ultimately it was conceded that the court could do so, and it took that option.

48. By contrast, in *Victoria Hall*, Barniville J. refused an invitation to view the unredacted documents, stating that it was more appropriate that proper explanations for the redactions would be put on affidavit. The conundrum which would be created for a court in viewing documents which one party has not seen may be avoided by requiring that the redactions be carried out on the basis of legal advice by a solicitor for the party who is seeking to redact a document which is otherwise liable to inspection, in a manner similar to which solicitors discharge their duty to the court in advising parties of their obligations to make discovery.

49. Secondly, it seems evident from the judgment in *Victoria Hall*, in particular, that proper explanations need to be put on affidavit in order to rely on redaction. In that case, significant redactions were made to two contracts for sale on the stated basis that the redacted portions referred to the "precise structure of the deal", and that this was commercially sensitive and not relevant. Barniville J. stated (at para. 59):

> "However, it is impossible to tell from that very general description whether it was appropriate to redact the documents in the manner actually done by the defendants."

Barniville J. therefore did not accept that there was an adequate explanation for the redactions made. Affidavits had been sworn in support of the redaction by two of the defendants, and by their solicitor. Notwithstanding that Barniville J. stated (at para. 61) that the court would only look behind such affidavits in limited circumstances, in the circumstances of that case he was satisfied that it was necessary in the interests of justice that the redactions be further explained and justified.

50. In light of those authorities, it seems that the submission of the defendant that the onus is on the plaintiff to demonstrate why redaction has been excessive is somewhat overstated. If redaction is done by the opposing party without the input of its solicitor, and if it appears that the basis for the redaction does not fully reflect the issues in the case, then the party seeking inspection has simply no assurance that redaction is not

excessive but, at the same time, because he or she has no idea what has been redacted, it is impossible to make a meaningful submission as to why a greater portion of the document – or indeed all of it – should be produced for inspection. In my view, 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.

51. I have significant doubts as to whether redaction can be effected on the basis of relevance as the right to inspect only arises in relation to specific documents which the redacting party has already sought to rely on in pleadings or affidavits, or which have been discovered as being relevant and necessary. It is not clear to me why relevance is a basis for redaction, although it is a basis for resisting discovery as well as a basis for resisting inspection pursuant to Order 31, rule 18. However, once it has been determined or agreed that discovery or inspection should take place, it is difficult to see how the relevance test has any bearing on the right to redact portions of a document. And I would reiterate that the Deeds themselves, at least excluding the Schedules to them, are brief documents which it would not be onerous to disclose in full.

52. In addition to ensuring that redaction is done under the supervision of the solicitor, and that detailed explanations are offered to the courts, it seems to me that on one specific point, the law on what may be legitimately redacted has become relatively settled. The defendant relied on the judgment of McDonald J. in *Everyday Finance DAC v. Woods* [2019] IEHC 605. In that case, McDonald J. was considering two deeds of the same dates and between the same parties as the deed at issue here, and it seems to me highly likely that they are the same two deeds that I am considering. However, even if I am wrong about that, and even if Everyday and Allied Irish Banks entered into a number of deeds to similar effect on the same dates, it is notable that McDonald J. was not satisfied that any explanation had been given for redacting the opening words of Clause 1 of the deed of 2 August, 2018 (see para. 13 of his judgment). It seems to me that Clause 1 of the Global Deed of Transfer that I am considering discloses the introductory words, and then more than likely redacts a number of words so as to maintain the confidentiality of the global price paid for the loan book. Clause 1, in the copy exhibited, reads as follows:

> "IT IS AGREED that in pursuance of the Mortgage Sale Agreement [redacted] the Seller as legal and beneficial owner HEREBY GRANTS, CONVEYS, ASSIGNS, TRANSFERS AND ASSURES to the Buyer: …."

However, this is not at all explained on affidavit, the justifications for the redaction being, as I think is apparent from the extracts from the defendant's affidavits set out above, quite general in nature and not specific to each clause. In my view, the solicitor for the defendant should confirm that only the price itself has been redacted, or that there is some other reason for redacting the additional words, and this has not been done.

53. In addition, in *Everyday v. Woods*, McDonald J. was clear in his view that, subject to a detailed justification being given on affidavit, the party seeking inspection was entitled to see the definitions in the deed. The portion between the parties and the operative part of the Global Deed of Transfer has been entirely redacted in the copy exhibited in these proceedings, and I think it is quite likely that this contains the definitions, although there is nothing said on affidavit about what it contains. In my view, it seems likely that this portion of the Global Deed of Transfer should be unredacted, subject to any more detailed explanation which can be offered on affidavit by the defendant. Similarly, Clause 2 has been redacted in its entirety as has the clause after Clause 3 (presumably Clause 4, though the number does not appear because the number itself has been redacted). In my view, a detailed explanation should be given on affidavit for these redactions.

54. In addition, while it seems likely that the large portions of the very lengthy schedule which have been omitted in their entirety relate to other properties, it is a simple - but nevertheless important - matter to confirm this on affidavit, and that also should have been done.

55. While at hearing the defendant relied heavily on decisions such as *English*, and *Promontoria (Arrow) Ltd v. Burke* [2018] IEHC 773, it seems to me that the issues in those proceedings were narrower than those in this case and in *Courtney*, where the plaintiff in each case seeks to assert legal arguments which would make the price paid for their individual loans material to the proceedings. Ms. O'Connor in her affidavits in these proceedings 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. Ms. O'Connor in her first replying affidavit of 13 July 2021 focusses on whether the redacted deeds establish that the defendant has acquired title from AIB. However, this is not the only issue in the proceedings, and therefore her averments that the redaction does 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. Whether those issues are sound in law is an entirely different matter, but it is clear that that is not a matter that can be determined on this application. For the moment, the issues in the case are those identified in the pleadings, and they are broader than the net issue of whether the defendant can establish title to the loan facilities and related securities. Furthermore, as pointed out by counsel for the plaintiff at hearing, the plaintiff may wish to deliver a reply to the defence, which seeks to rely on these documents of title, and the fact that the plaintiff has delivered, as Ms. O'Connor points out, a lengthy and detailed statement of claim, is not material to the issue of whether the plaintiff is impeded in delivering a reply to the defence.

56. In her second affidavit of 3 November, 2021, Ms. O'Connor appears to confirm (at paras. 4-6) that the consideration disclosed on the face of the deeds at issue in this application is the "*global consideration paid in respect of the global acquisition of individual loans and mortgage securities*", which she describes as "*confidential, commercially sensitive and secret*". However, she does not explicitly state this.

57. I would, however, make the point that, in *Courtney*, the court did not order the disclosure of the global consideration for the entire loan book, but rather focussed on the purchase price specific to the plaintiff's loans: see para. 96 of the judgment. Insofar as there is a price for the plaintiffs' loans specified in either deed, it should be disclosed, but it does not seem to me that it follows from the pleadings that the global consideration for the loan book being transferred is material to the issues between the parties and therefore, if justified on the grounds of commercial sensitivity, this may be redacted.

58. In short, all portions of these deeds which are material to the case as pleaded must be disclosed as 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.

59. Secondly, and bearing in mind that the deeds are documents of only three pages, the solicitor for the defendant or the defendant on receipt of appropriate legal advice as to the obligation to produce documents for inspection, 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. As the greater part of each deed consists of lengthy schedules, this does not appear to me to be onerous. In particular, in relation to the schedules, the only obligation on the defendant's solicitor will be to identify the nature of information to be contained in the schedule, and to confirm on affidavit that all of the redacted portions relates to third parties and that any omitted pages relate in their entirety to third parties.

60. As it now seems well established that matters such as the definition and interpretation provisions of a document should be disclosed in its entirety, unless they refer to commercially sensitive or confidential information, such as price, which is not material to the issues between the parties, this should be done as part of the exercise set out above.

Application pursuant to s. 91 of the Land and Conveyancing Law Reform Act, 2009

61. As stated at the outset of the judgment, the plaintiff seeks inspection of the following documents pursuant to s. 91 of the 2009 Act: "*All deeds whereby the defendant asserts that it is mortgagee to the plaintiff as mortgagor*".

62. Section 91, which replaced s. 16 of the Conveyancing Act, 1881, provides:

> "(1) Subject to subsection (2), a mortgagor, as long as the right to redeem exists, may from time to time, at reasonable times, inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the possession or power of the mortgagee.
>
> (2) rights under subsection (1) are exercisable –
>
> (a) on the request of the mortgagor, and
>
> (b) on payment by the mortgagor of the mortgagee's reasonable costs and expenses in relation to the exercise.

(3) subsection (1) has effect notwithstanding any stipulation to the contrary."

63. As set out above, the defendant has expressly pleaded that this section does not apply to the documents of title demonstrating that it is successor in title of AIB. It is pleaded at para. 10 of the defence that section 91 applies, in effect, only to the mortgage or charge itself.

64. The submissions on this point were made from first principles and the judgment in *Charleton v. Hassett* [2021] IEHC 746 deals only with a request for the original deed of mortgage, facility letter, deed of appointment of the receiver (who was in that case seeking possession) and any deeds supplemental to the foregoing. It is of course the case that the receiver in that case had been appointed by the successor-in-title of the original mortgagee, but the more limited nature of the request in that case did not require any analysis of the deeds to which s. 91 applied, although an argument could certainly be made that, in accepting that s. 91 applied to the deed of appointment of the receiver, Allen J. was recognising a right under s. 91 to a document which fell outside the narrower category contended for by the defendant in this case as representing the correct scope of the rights under section 91.

65. No authorities were cited to me in connection with the proper interpretation of s. 91 or indeed s. 16 of the 1881 Act, of which it appears to be a re-enactment. The leading authority on s. 16 of the 1881 Act would appear to be *Gilligan and Nugent v. National Bank* [1901] 2 I.R. 513, where Madden J. stated (at p. 533) (albeit *obiter*, as the case concerned whether a mortgagee had any duty to keep safely any deeds deposited with the mortgagee):

> "Since the Conveyancing Act the mortgagee has a right to inspect the deeds, in the condition in which they are, and to obtain copies for conveyancing purposes." [Emphasis added.]

Leaving aside the reference to the condition of the deeds, on which issue *Gilligan* was subsequently distinguished by this Court (Finlay-Geoghegan J.) in *ACC Bank plc v. Fairlee Properties Ltd.* [2009] IEHC 45, this case would suggest that the right to inspect was limited to a situation where a mortgagor was in a position to redeem the mortgage, which is not the position here.

66. However, that is an *obiter dictum* which might well not be followed in a modern case. As suggested in *Charleton v. Hassett*, where the point was not squarely in issue, the right to see the relevant title documents could also be material to a mortgagor's right not to submit to the claimed authority of a receiver without satisfying himself of the lawfulness of appointment. Similarly, if Everyday are now to take steps to enforce the rights of the mortgagee as set out in the plaintiff's mortgages and charges, why should the plaintiff not be entitled to see the basis on which Everyday asserts authority to exercise those rights and powers? It would therefore seem that s. 91 is broader than as pleaded by the defendant and would entitle the mortgagor to see all documents of title which would entitle him to redeem. If the interest of the mortgagee has been conveyed, that would

surely include the documents of title establishing the right of the original mortgagee's successor-in-title so that the mortgagor could satisfy himself or herself that he or she was paying and obtaining a discharge of the encumbrance from the correct person.

67. It must be recalled that, pursuant to s. 91, the plaintiff is seeking all documents of title relating to the mortgaged property within the possession or power of the mortgagee, including agreements for transfer and deeds of transfer of the plaintiff's loans and security. I do not believe that agreements for transfer could be included, nor would any deeds of transfer be included as, so far as those properties which are registered are concerned, registration in the Land Registry is sufficient. However, insofar as unregistered properties are concerned, I believe he is entitled to see those documents of title.

68. These comments as to the scope of s. 91 should be regarded as *obiter*, however, and do not in any sense bind the parties as regards the substantive relief sought by the plaintiff. The precise ambit of s. 91 can be argued fully at trial.

69. The real issue for the purposes of this application is whether any order should be made on foot of s. 91, given that the right of the plaintiff to documents under s. 91 is substantive relief in the proceedings and given that it is evident that, at present, the defendant cannot redeem. Of course, he claims in these proceedings that he should be entitled to redeem on a basis other than that flowing from the terms of the various loans and securities, but until he succeeds in those arguments, there is no present intention or capacity to redeem. Nor has the defendant yet appointed any receiver or taken other enforcement action which would justify a request for inspection pursuant to section 91.

70. It therefore seems that the purpose of the s. 91 argument in this case is to seek the documents of title for advantage in the litigation, which is not the purpose for which the section was enacted. In particular, the fact that it is sought at interlocutory stage even though it is a substantive claim in the proceedings, leads to the irresistible inference that it has been included in the notice of motion as a possible means of obtaining documents which would not otherwise be available by way of discovery or by means of the application to inspect pursuant to Order 31, rule 18.

71. As the adjudication of a litigant's entitlement to discovery and inspection are the subject of well-developed jurisprudence which is sufficient to disclose to a litigant all documents which are relevant and necessary and may give him or her a litigious advantage, the plaintiff can apply for discovery at any time. Section 91 appears to be a provision designed to ensure that a mortgagor has the right to inspect such documents of title as are necessary for him to redeem, to convey his interest, and to satisfy himself of the lawfulness of the exercise of any powers by a person purporting to be mortgagee. It is not designed to supplement the discovery process. I therefore refuse this application insofar as it is based on s. 91 of the 2009 Act.

Application under Order 50, rule 4

72. I think the defendant's submission that Order 50 is not directed at disclosure of documents but at the preservation of physical evidence, be it in the form of real or personal property, is correct. In the circumstances, I will also decline any additional relief under this heading.

Conclusion

73. I will therefore direct a further affidavit to be sworn by the defendant's solicitor dealing with the redaction of documents which I have found to be liable to inspection pursuant to Order 31, rule 18, and I will list the matter before me for mention in early course in order to hear the defendant's proposals as to a timeline for that to occur.