UNAPPROVED

THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 104
High Court Record Number: 2018/890S
Court of Appeal Record Number: 2020/30

Faherty J.
Haughton J.
Ní Raifeartaigh J.

BETWEEN/

PROMONTORIA (ARAN) LIMITED

PLAINTIFF/APPELLANT

- AND -

ANDREW SHEEHY

DEFENDANT/RESPONDENT

AND BY ORDER OF THE COURT DATED 4TH MARCH 2019,

NOEL TYNAN AND BRIAN MOLONEY

THIRD PARTIES

JUDGMENT of Mr. Justice Robert Haughton delivered on the 16th day of April 2020

Introduction

1. In an *ex tempore* judgment of Quinn J. delivered on 31 July 2019 he determined that the Plaintiff/Appellant should make discovery, and he made Orders accordingly on 8 November 2019, and his Order was perfected on 16 January 2020. From that Judgment and Order the Appellant has

appealed in respect of Category 4 only. The primary claim in the proceedings is to recover monies claimed to be due on foot of loan facilities with Ulster Bank Ireland Limited ("the Bank"), which loans together with associated security have been acquired by the Appellant. There is a pleaded claim in the alternative based on unjust enrichment restitution, and it is in respect of that claim that the Respondent sought and obtained discovery in Category 4 of all documents relating to the amount paid by the Appellant for the transfer of the loans. Discovery is resisted on the basis that the documents are said by the Appellant to be confidential and commercially sensitive. This Judgment considers the action and relevant pleas before addressing the discovery sought, the relevant law, and discussion in the context of the argument made. The discovery sought did not concern the third parties, who were not present or represented in the High Court or in this Court.

The pleadings

2. It is necessary to set these out in some detail as they establish the context in which relevance of the disputed category must be considered. While these proceedings were commenced by Summary Summons on 23 July 2018, by agreement on entry to the Commercial Court they were case managed to plenary hearing. In the Statement of Claim delivered on 21 December 2018, the Appellant seeks judgment in a sum in excess of €4.1M against the Respondent in respect of monies allegedly advanced by the Bank to the Respondent, and also to two other individuals namely the third parties. The Appellant claims to have acquired the relevant loans and associated security from the Bank.

3. It is claimed that pursuant to a request by the Respondent and the third parties for funds to assist with the purchase of a commercial investment property known as 'NeoCity Tower I and II' located in Bucharest, Romania, the Bank offered to advance monies on foot of a loan offer dated 21 February 2005 ("the 2005 Facility Letter"). Pursuant to the 2005 facility letter, the Bank offered the three borrowers a loan facility of €3M. It is claimed that the 2005 Facility Letter was accepted by the

three borrowers and that the monies were advanced by the Bank, and that the monies were used to purchase the Romanian property.

4. In paragraph 11 of the Statement of Claim it is pleaded that the 2005 Facility Letter was replaced by a loan offer letter dated 27 May 2009 ("the 2009 Facility Letter"), which expressly referred to the 2005 Facility Letter. It is claimed that the 2009 Facility Letter provided that the facility was renewable and was repayable on demand, but subject to review on or before 30 June 2009, and was to be reviewed on a yearly basis thereafter. It is claimed that the Respondent is liable "whether pursuant to contract or otherwise" to repay the monies advanced by the Bank, and that, demand having been made by letters dated 8 May 2017, the Respondent is in default. The Appellant pleads that pursuant to a Global Deed of Transfer dated 12 February 2015 between the Bank and the Appellant ("the Global Deed of Transfer"), the Appellant acquired all the right, title, interest, estate, entitlement, benefit and obligation in and under, inter alia, each finance document related to relevant assets being disposed of, and that this included underlying loan agreements and "any and all entitlements, whether pursuant to contract, in tort, in equity, in restitution or otherwise, in respect of any claims arising on foot of the moneys advanced to the Borrowers" (paragraph 6 of Statement of Claim).

5. Most pertinent to the discovery issue, in the Statement of Claim the Appellant pleads in the alternative a claim for monies had and received, and the relevant pleas in the Statement of Claim are as follows:-

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

17. The Defendant is not entitled to be unjustly enriched or otherwise benefit from moneys advanced by the Bank.

EQUITABLE LIEN

18. The moneys advanced by the Bank were used, in whole or in part, to acquire the Romanian Property and the Defendant (and the Borrowers) continued to have the benefit of and an interest in the Romanian Property. In the premises, the Plaintiff is entitled to an equitable lien over the Romanian Property (and any proceeds of sale of that property) to the extent to which monies advanced to the Borrowers to fund the purchase of that property and remain unpaid."

6. Further in the prayer in the Statement of Claim the Appellant having claimed judgment in the sum of €4,127,785.48 and damages for breach of contract and interest, then pleads the following additional claims: -

"5. A further, or in the alternative, restitution of sums advanced to the Defendant or provided for the benefit of the Defendant.

6. Damages for unjust enrichment.

7. A declaration that the Plaintiff is entitled to an equitable lien over the commercial investment property known as 'NeoCity Tower I and II' located at 30A Ermil Pangratti Street, NeoCity District 1, Bucharest, Romania and any proceeds of sale of that property."

7. In his Defence, the Respondent denies that monies were advanced to him, and pleads that they were advanced to the third parties. He also denies that by virtue of the Global Deed of Transfer the Appellant has acquired any right or entitlement or benefit that affects him, or that the Appellant has acquired any entitlement, contractual or otherwise, involving the Defendant. In paragraph 6 the Respondent asserts that the Schedule to the Global Deed of Transfer expressly states that the loan

agreement purchased was "a Facility Letter dated 27 May 2009 to which the Defendant is not a party". It is pleaded that prior to executing the 2009 Facility Letter with Mr. Moloney and Mr. Tynan the Bank were advised in advance of the execution of the Facility Letter that it would not become a party but the Bank elected to release Mr. Sheehy from the borrowing.

8. The Respondent further pleads that monies advanced pursuant to the 2005 Facility Letter were advanced to the third parties alone and used for their purposes, and accordingly the Respondent denies any liability "whether pursuant to contract or otherwise, to repay the monies advances by the Bank". The Respondent asserts that the signature on the 2005 Facility Letter was not his, and he denies that he executed the 2009 Facility Letter. In essence therefore the Respondent denies the contractual claim in its entirety.

9. In his defence the Respondent pleads to the Appellant's alternative claims as follows:

> "13. Insofar as '*the Plaintiff's claim is for restitution of the monies advanced to the Defendant as monies had and received by the Defendant, to the use of the Plaintiff* ' such claim is denied but, without prejudice to the foregoing, it is denied that the Plaintiff is entitled to maintain such a claim in circumstances where it took assignments solely of the rights accruing under a Facility Letter to which the Defendant is not a party and has suffered no loss.
>
> 14. The entitlement of the Plaintiff to take an assignment of the Facility Letter of 27 May 2009, to which the Defendant is not a party, is denied that the Plaintiff did, or was entitled to, take some generalised assignment of the nebulous reliefs pleaded as choses in action or otherwise.
>
> 15. Insofar as the Plaintiff makes an equitable claim for restitution of monies advanced, which it did not advance and for which it made no payment of substance, the Defendant will seek discovery <u>of the amount paid for the loan by the Plaintiff</u>.

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

17. The Plaintiff is bound by the equities affecting Ulster Bank insofar as it claims equitable relief and is estopped from making such a claim Ulster Bank having released the Defendant.

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

19. It is denied that the Plaintiff is entitled to an equitable lien over the property at NeoCity Tower I and II located at 30A, Ermil Pangratti Street, NeoCity, District 1, Bucharest, Romania as pleaded at paragraph 18 or at all."

[Emphasis added.]

10. In the Reply to Defence the Appellant joins issue with these pleas and repeats its entitlement "to make an equitable claim for restitution of moneys advanced to, or to the benefit of, the Defendant" (paragraph 8), denies that the Respondent is estopped from making the claim of unjust enrichment (paragraph 10), and denies that "the Plaintiff's claim for equitable relief as assignee of the Bank's

contractual rights is without 'clean hands' having regard to the conduct of the Bank, whether as alleged or otherwise" (paragraph 11).

11. Before leaving the pleadings it is appropriate to refer to some of the Replies to Particulars. Firstly in response to a request from the Respondent, the Appellants furnished "a redacted copy of the Global Deed of Transfer dated 12February 2015" and also a copy related document being "a copy of the Mortgage Sale Deed dated 16 December 2014, in redacted form." It is at least in part the Appellant's desire to retain confidentiality over the price sensitive information in these documents that has led to this appeal against discovery.

12. Further particulars furnished by the Respondent on 27 March 2019 give more insight into to the factual basis for the defence pleas. Thus it is pleaded at reply 1(c): -

> "The Bank elected to release Mr. Sheehy by way of refinancing the loan into the names of Mr. Tynan and Mr. Moloney by way of Facility Letter dated the 27th of May 2009 in the knowledge that Mr. Sheehy would refuse to be bound by same."

At 2(a) it is pleaded that –

> "The Bank advanced the monies by way of money transfer to an account operated by Mr. Tynan and Mr. Moloney."

It is further pleaded at 2(c) that –

> "To the best of the Defendant's knowledge Mr. Tynan and Mr. Moloney diverted approximately €2.1M to a company called Irish Holdings SrL, of which approximately €1.9M was used to purchase land in Romania. This is not specifically within the knowledge of the Defendant."

Asked whether it was alleged that the Respondent was on notice of the use of the monies, he responded –

> "2(d) The Defendant was not on notice of this use of the monies and did not receive notice until some months later giving rise to the proceedings entitled *Sheehy v Tynan, Moloney and Turpey, Record No. 2164P/2006*."

Asked to identify what monies were used in the acquisition of the NeoCity Buildings, the response was –

> "2(e) The Defendant believes the monies advanced were used in the acquisition of the NeoCity buildings, but does not know precisely what amounts were used for that or for other purposes."

Asked to clarify what it was that the Bank was made aware of before it advanced further monies to Messrs. Tynan and Moloney, the Respondent answered –

> "2(g) This is a matter of evidence, but the Bank was clearly aware of the issue of the forged signature as well as that fact of a partnership dispute and also that monies had been diverted by Mr. Tynan and Mr. Moloney. Notwithstanding same, the Bank proceeded to advance money to them by way of several Facilities advanced after the Facility Letter of the 21st February, 2005."

In response to the Appellant raising queries about the Respondent's denial of unjust enrichment in paragraph 16 of his Defence, and his assertions of "significant loss by the actions of Ulster Bank including by their acting in concert with Mr. Tynan and Mr. Moloney, engaging in breaches of privacy and data protection laws etc.", the Respondent particularises that–

> "4(b)… Ulster Bank advanced money to the other partners and purported to hold the Defendant liable for same, thereby damaging his credit rating when they were aware he was not prepared to borrow money with the other partners… Ulster Bank sold a loan for which the Defendant was not liable on the basis that he was liable."

And at 4(c) the Respondent pleads –

> "Ulster Bank had consistent contact with Mr. Tynan and Mr. Moloney in relation to dealing with the borrowings at issue in these proceedings and their other borrowings. At the same time Ulster Bank refused to deal with the Defendant and further refused to deal with the partnership as a collective. Ulster Bank treated the Defendant as a party liable for the loan, notwithstanding his having refused to be involved in the refinancing, but nonetheless Ulster Bank refused to deal with him while consistently dealing with the other two parties. Furthermore, Ulster Bank furnished information about the Defendant's income and assets to Mr. Tynan and/or Mr. Moloney in order to assist them in their partnership dispute."

The Request and Application for Category 4 documents

13. By letter dated 12 March 2019 the Respondent's solicitors sought discovery from the Appellant under six categories. Only Category 4 is in dispute, and this category together with the reasons given were as follows: -

> "**Category 4 All documents relating to the amount paid by the Plaintiff for the transfer of the loans allegedly entered into between Ulster Bank Ireland Limited and the Defendant.**"
>
> **Reason:** The Plaintiff at paragraph 16 of the Statement of Claim makes a number of equitable claims for restitution of monies advanced. It makes these equitable claims in respect of funds which it did not advance and for which it made no payment of substance. The Plaintiff further pleads at paragraph 17 of the Statement of Claim that the Defendant is not entitled to be unjustly enriched or otherwise benefit from monies advanced by the Bank, and claims damages for unjust enrichment. The Defendant pleads at paragraphs 13 and 16 of his Defence that the Plaintiff has suffered no loss and denies that he has not been unjustly enriched or otherwise benefitted from monies advanced by the Bank. The Defendant accordingly requires

discovery to be made with regard to the actual amounts paid by the Plaintiff, in the context of its commercial trade in distressed debt, and in particular in respect of the loan alleged to be payable by the Defendant so that the actual amount of the Plaintiff's alleged loss can be ascertained."

14. By letter dated 6 May 2019 from the Appellant's solicitors A&L Goodbody Category 4 was refused on the following basis –

"This category is refused in circumstances where it seeks documents which are extraneous to the matters in dispute between the parties. In the Defendant's voluntary discovery request, the reasons given for this category refer to the equitable claims made by the Plaintiff in the proceedings, in particular the claim for unjust enrichment. The Defendant also refers to his plea that the Plaintiff has suffered no loss and so requires discovery of the amounts paid by the Plaintiff for the relevant loans.

The Plaintiffs' claim for unjust enrichment is focussed on whether the Defendant received the monies advanced by Ulster Bank Ireland Limited and had the benefit of those monies. The Defendant has contended that he did not receive/obtain the benefit of the monies. It is clear that this issue is entirely directed to what the Defendant received and/or had the benefit of. What the Plaintiff paid for the loans is not relevant to that issue. It appears that the Defendant's plea regarding the Plaintiff's loss is a matter designed to seek discovery of commercially sensitive documents and so is inappropriate."

15. By Notice of Motion issued on 23 May 2019 the Respondent pursued discovery, and the Grounding Affidavit of Ciara Dillon sworn on that date exhibited the relevant correspondence.

16. A Replying Affidavit was sworn on 20 June 2019 by Stephen McKeever of Link ASI Limited, a service company providing loan administration and asset management services to the Appellant. Mr. McKeever repeats verbatim the objection to making discovery in respect of Category 4 set out in

A&L Goodbody's letter of 6 May 2019 set out above save that the last sentence referring to 'commercially sensitive documents' is omitted and replaced by a sentence averring that "The focus of the pleadings is on the Defendant and the benefit he obtained".

17. Following the delivery of judgment by Quinn J. on 31 July 2019 granting discovery of Category 4 and before his order was finalised Mr. McKeever swore a further affidavit dated 3 October 2019. According to paragraph 3 he made this Affidavit "in light of the unapproved judgment of Mr. Justice Quinn delivered on 31 July 2019… to address matters dealt with in the course of the discovery motion." Mr. McKeever then refers to Category 4, and at paragraph 5 deposes to the fact that the Global Deed of Transfer "transferred not only the loans the subject matter of the within proceedings but a portfolio of loans to the Plaintiff." Mr. McKeever then deposes as follows: -

> "6. I say and believe that in the course of the hearing of the discovery motion, Counsel on behalf of the Plaintiff clarified that, in the context of Category 4, the loans purchased on foot of the Global Deed of Transfer were not individually priced. Instead, the loans were purchased on the basis of a connection. I say that the connection in this instance involved four borrowers, being the Defendant (Mr Sheehy), the Third Parties (Mr Tynan and Mr Moloney) and another individual (the **Fourth Borrower**). I say and believe that the proceedings before the Court do not involve that Fourth Borrower.
>
> 7. In the event that the Court was to make an Order in the terms of Category 4, the Plaintiff has certain concerns. Firstly, the Plaintiff will not have in its possession, power or procurement documents 'relating to the amount paid by the Plaintiff for the transfer of the loans allegedly entered into between Ulster Bank Ireland Limited and the Defendant'. I say and believe that it is highly unlikely that any documents exist which directly relate to the amount paid for the transfer of the loans entered into between the Bank and the Defendant. Secondly, in the event that discovery was to be

made of the price paid in relation to the connection, this discovery would capture loans relating to the Fourth Borrower, who is not before the Court. In that context, the Plaintiff has concerns in relation to its obligations of confidentiality in respect of the Fourth Borrower, and also in relation to the Fourth Borrower's data protection entitlements."

[Emphasis added.]

It was not suggested that this affidavit was not before the trial judge before he finalised his orders.

18. This Affidavit also does not set out the nature or extent of information in the documents discovery of which is sought under Category 4, including the Global Deed of Transfer of 12 February 2015 and/or the Mortgage Sale Deed of 16 December 2014, which is said to be "commercially sensitive" in A&L Goodbody's letter refusing this category, or how this is said to be so. Nor are there any averments in either of Mr. McKeever's affidavits in relation to confidentiality, save in respect of "the Fourth Borrower", in respect of whom there is reference to "obligations of confidentiality" also a reference to that individual's data protection entitlements.

19. There is therefore a complete absence of any sworn evidence as to the basis upon which it is claimed that the Category 4 documents are confidential or commercially sensitive – there is only an assertion to this effect in A&L Goodbody's letter. Despite this absence of evidence the parties to the motion for discovery and the trial judge, appear to have proceeded upon the basis that insofar as there were documents relating to the amount paid by the Appellant to Ulster Bank Ireland Limited for the transfer of the loans in question, such documents were confidential and such information as to amount was commercially sensitive. The trial judge clearly proceeded on that assumption, and that assumption was relied upon by the parties in their written and oral submissions before this Court.

The High Court decision

20. The learned trial judge ordered discovery under, *inter alia*, in Category 4. Before outlining his reasons for so doing, it is appropriate to mention that under Category 1 the learned trial judge ordered discovery of: -

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

As previously mentioned, redacted copies of the Global Deed of Transfer and the Mortgage Sale Deed dated 16 December 2014 were furnished with Replies to Particulars, but as redacted they do not disclose any information as to the amount paid for the loans.

21. In his judgment the trial judge reviewed the relevant pleadings and argument before him and then states:

> "26. If this were simply a case of a loan purchaser suing in contract on the Facility agreement, it would be difficult to see how the price paid would be relevant, although it is sometimes contended that it has such relevance in special circumstances, (see *Eileen Courtney v OCM Emru Debtco DAC and David O'Connor* [2019] IEHC 160, discussed below). However in a case where the plaintiff itself has invoked the equitable doctrines of restitution and unjust enrichment, it is less clear that the price it paid is not relevant.
>
> 27. The defendant still has to overcome the burden at trial of establishing that the price paid by the defendant is one of the factors in assessing the relative equities of the parties, even where equitable principles are invoked, and I have some doubt about the prospect of the defendant succeeding in that position. However, on the facts of this particular case, that will

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

He rejected the contention that the question of price did not arise on the pleadings, concluding at paragraph 34 that –

> "The Plaintiff has invoked the equitable principles of restitution and unjust enrichment which give rise to the necessity to engage with the analysis of the respective equities of the parties. Whilst the onus is on the party making the request for discovery to at least refer the court to facts substantiating its allegation, in the particular circumstances of this case it is clear that the matter of the price paid for the loan has been fairly put in issue in the proceedings…".

At paragraph 36 he rejected the argument that Category 4 was "a general or wide 'trawl'". The trial judge also considered and rejected the raising of interrogatories as an alternative to discovery:

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

This was an argument raised but not pursued to any real degree on appeal.

22. The learned trial judge also addressed an argument that if there were to be discovery under Category 4 it should be done by way of an affidavit detailing the price which in the first instance should only be made available to the court of trial for it to determine in the first instance whether price information could then be relevant. Such an argument, based on the requirement of "necessity"

and, as part of that, "proportionality" was central to the argument made in the appeal before this Court. The learned trial judge disposed of it thus: -

> "38. The Plaintiff submitted that if the court were minded to order discovery of documents in this category relevant to the price, this should be done on the basis that an affidavit would be sworn detailing the price, or exhibiting documents relevant to the calculation of the price, so that this information would be available to the court and to the parties if the trial judge determines at the level of principle that the price is relevant to the claim of unjust enrichment. It submits that the price information could then be relevant only to quantum. This would in effect require the court to hold a hearing on a preliminary issue of law. No such issue has been identified or directed. Furthermore, it is not clear to me that such a question would be appropriate for trial as a preliminary issue, since the question of the relevant equities of the parties or of their predecessors, will engage an analysis of more facts than simply the price paid by the plaintiff for the loans."

The trial judge also rejected the argument that if the Court were to order discovery under Category 4 then every borrower would plead unjust enrichment, and that a judgment should be limited only to what was paid for the assignment of that particular debt. He observed that the amount of the balance due in respect of any particular debt will not necessarily be the only factor in forming the price paid–

> "39…Others will include such matters as an assessment of the value of the accompanying security or an assessment of the ability of the debtor and/or co-borrowers to pay and in a competitive bid process the final price will be a function of other considerations particular to the bidding parties. There may be cases where it is not possible to identify definitively what proportion of a purchase price for a loan portfolio is directly referable to a particular loan and this court has not been informed if this is such a case. The parties to the transaction will each

> have their own matrix or formula for calculating offers for loans or portfolios of loans. Therefore, I do not find that the matter of the purchase price will definitively inform the court in its assessment of the relative equities of the parties. However, it is not for the court at this interlocutory stage to close out such a case by refusing discovery of material which may inform the court at the plenary trial in its assessment of the relative equities of the parties."

Finally the trial judge addressed the confidentiality/commercial sensitivity arguments by use of a 'confidentiality club', as follows:

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

Appellant's Notice of Appeal and Submissions

23. In its Notice of Appeal the Appellant asserts that the trial judge erred in directing Category 4 discovery, and after reciting certain narrative raises some six grounds of appeal, it is pleaded that the trial judge erred in that :

- he incorrectly held that a refusal to order discovery of material related to price paid would amount to a determination of a preliminary issue at an interlocutory stage and would close out such an assessment at plenary hearing.
- in finding that discovery should be made because equitable reliefs are being claimed by the Appellant, and in distinguishing the discovery rules applicable to common law debt recovery and the claim advanced in unjust enrichment in circumstances where the Appellant took an assignment and stands in the shoes of the Bank.
- in finding the discovery ordered would not necessitate an extensive trawl of documentation or could not be characterised as oppressive.
- in failing to have regard to the fact that confidential information relating to the fourth borrower would be captured by Category 4, and his/her GDPR rights.
- in applying the legal principles established in *Courtney v. OCM* as the commercial interests of the Appellant will not be adequately protected by directing that no wider disclosure or use could be made of the information without further leave of the court.
- in refusing the offer of an affidavit detailing price to be made available to the trial judge on after a determination in principle of relevance to the unjust enrichment claim, and in finding that the price information related only to quantum.

24. The Appellant's written and oral submissions to this court emphasised the commercial sensitivity and confidentiality attaching to the loan sale documents that would be captured by Category 4. It was submitted that that the pleaded alternative claim was not one that centred in equity, but was a common law action in quasi-contract based on monies had and received by the Respondent from the Bank whose right to sue was now vested in the Appellant by virtue of the Global Deed of Transfer and Mortgage Sale Deed. The pleas relied upon by the Respondent in support of such

discovery were speculative and mere allegations for which there was no sufficient basis for discovery, particularly given that where documentation is confidential "the courts should exercise special care to ensure that a party is not given free access to such information without having satisfied the court that there is some basis upon which the documentation is likely to be relevant and necessary" – per McGovern J in *Flogas Ireland Ltd v Tru Gas Ltd and others* [2012] IEHC 259 (paragraph 11).

25. Secondly it was argued that the Respondent could have no better defence to the Appellant's pleaded claim than would have been available to him if the Bank were the plaintiff, and that no authority supported the pleas that suggested the Respondent would have a defence arising out of the price paid by the Appellant to acquire the loans.

26. Alternatively it was submitted, based primarily on judgment of Clarke J (as he then was) in *Independent Newspapers v Murphy* [2006] IEHC 276, that having regard to confidentiality and commercial sensitivity the trial judge erred in failing to carry out an exercise of balancing of the rights involved, and that when this is done ordering Category 4 discovery is not necessary or proportionate. It was argued that it is not certain that the trial judge would need to examine the documents in question, and that discovery under this category is not "necessary" for the trial court to determine the claims as to unjust enrichment and restitution or the defences pleaded to those claims. This, it was argued, was particularly so in light of the offer made of an affidavit that would be sworn detailing the price so that this information would be available to the court if the trial judge first determined at the level of principle whether price was relevant the claims or defences. Counsel argued that the information in the documentation sought to be discovered was only required now to enable the Respondent to seek to settle the action rather than to advance its defence, and that the Category 4 discovery would give the Respondent "unfair and disproportionate litigious advantage" (per Donnelly J in *Persona Digital Telephony Ltd Sigma Wireless Networks Ltd v Minister for Public Enterprise* [2015] 1 IR 124).

Respondent's Submissions

27. Counsel for the Respondent emphasised that discovery can be ordered notwithstanding confidentiality. It was submitted that the information in the documentation would enable the Respondent to ascertain matters critical to the unjust enrichment claim including addressing the question 'at whose expense it could be said and there was unjust enrichment', and the extent of such unfair enrichment, both arguably essential elements of an unjust enrichment claim. Counsel denied mere assertion or speculative pleading by reference to the pleadings. Counsel also relied on an acceptance by counsel for the Appellant in his oral submissions that the loan book in question was acquired by the Appellant at a price below the par value of the loans.

28. In response to the submission that Category 4 discovery was not "necessary" at this point in the proceedings, it was argued that it would be grossly unfair on the defendant to have to face into a trial, estimated to take some five weeks, without knowing values of central relevance to the alternative claim being made by the Respondent. As to the trial judge's reference in paragraph 38 to the Appellant's offer that an affidavit would be sworn dealing with price so that the information would be available to the court if and when quantum became relevant, and the trial judge's observation that this "would in effect require the court to hold a hearing on a preliminary issue of law". Counsel argued that a preliminary issue had never been suggested on their side, and that it would be more cost effective for all issues to be dealt with at the one time.

The applicable legal principles

29. Although the principles relating to discovery are well established it remains the case that in granting discovery and framing the terms of discovery the court retains a discretion. Accordingly, as the subject of this appeal is essentially discretionary the correct approach to it is that set out by the Supreme Court in *Lismore Builders Limited (in Receivership) v Bank of Ireland Finance Limited* [2013] IESC 6, where MacMenamin J. stated: -

> "[4] Although great deference will normally be granted to the views of a trial judge, this Court retains the jurisdiction of exercising its discretion in a different manner in an appropriate case. This is especially so, of course, in the event there are errors detectable in the approach adopted in the High Court. The interests of justice are fundamental. This is clear from the judgment of Geoghegan J. in *Desmond v. MGN* [2009] 1 I.R. 737."

More recently this approach was reinforced by Clarke C.J. in *Tobin v Minister for Defence* [2019] IESC 57 where he set out the principles relating to discovery and then stated:

> "7.27 As the application of the above principles is one for judges dealing with the preparation of cases and since issues as to relevance, necessity and proportionality involve an adjudication based on a detailed understanding of the case, in general decisions as to discovery should involve a significant measure of appreciation by any appellate court reviewing a decision at first instance…[W]here an order made on a consideration of affidavit evidence and pleadings is appealed, the burden of demonstrating as a probability that the decision is wrong rests on the Appellant from the original High Court order; see *Ryanair Ltd v Biligfleuge de GmbH* [2015] IESC 11 at paras.5-8."

30. Order 31, rule 12 of the rules of the Superior Courts (as amended by the Superior Courts (Discovery) 2009 – S.I. No. 93 of 2009) provides that the court should order discovery if it is satisfied that the categories of documents sought by the moving party are both relevant and necessary for the fair disposal of the action and for the saving of costs.

31. The definition of relevance is contained in the well-worn judgment of Brett LJ. in *Compagnie Financiere Commerciale du Pacifique v Peruvian Guano* (1882) 11 QBD 55, at pp.62-63, applied in this jurisdiction in *Sterling-Winthrop Group Limited v. Farbenfabriken Bayer AG* [1967] IR 97 and authoritatively adopted by Murray J. speaking for the Supreme Court in *Framus v CRH* [2004] 2 IR 20: -

> "The parties also referred to the oft-cited statement of Brett L.J…to the effect that 'every document [relating] to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary' should be discovered."

The test 'reasonable to suppose contains information' was substituted by a heightened test of probability by McCracken J. in *Hannon v. Commissioner of Public Works* [2001] IEHC 59 in the following terms:

> "(1) The court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the court to order discovery simply because there is a possibility that documents may be relevant."

This was adopted by Clarke J. in *Hartside Ltd v Heineken Ireland Ltd* [2010] IEHC 3, at para.5.1.

At p. 63 – 64 Brett LJ. went on to state that in order to determine whether documents were relevant and had to be discovered,

> "it is necessary to consider what are the questions in the action: the court must look not only at the statement of claim in the plaintiff's case but also at the statement of defence and the defendant's case."

32. In *Keating v RTE* [2013] IESC 22 the Supreme Court confirmed that the moving party must "disclose some information upon which the plea is based." It is well established that it is not permissible to make an unsubstantiated assertion and then call for discovery of documents hoping that this will unearth documents which would provide a basis for a case – a principle made clear in *Carlow/Kilkenny Radio Limited v Broadcasting Commission* [2004] 1 ILRM 161

33. With regard to necessity Fennelly J. in *Ryanair Plc. v Aer Rianta CPT* [2003] 4 IR 264 held that the crucial question is whether discovery is necessary for "disposing fairly of the cause or matter",

but the applicant does not have to show that they are "absolutely necessary". At p.277 Fennelly J stated the court should -

> "…consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of litigation. It may have regard, of course, to alternative means of proof which are open to the applicant."

34. As Clarke C.J. observed in *Tobin* –

> "6.3 Arising from this analysis, the principle of proportionality has been developed in the jurisprudence of this Court as a relevant factor in assessing whether discovery should be ordered….
>
> 6.4 The principle of proportionality has subsequently become an important criterion employed by the courts in order to avoid the imposition of excessive burdens on parties to litigation as a result of wide ranging orders for discovery."

35. The court is more circumspect when being asked to order discovery of confidential documents, and should "exercise special care to ensure that a party is not given free access to such information without having satisfied the court that there is some basis on which the documentation is likely to be relevant and necessary" (McGovern J. at paragraph11 in *Flogas Ireland Limited v Tru Gas Limited & Anor* [2012] IEHC 259).

36. Clarke J. (as he then was) in *Independent Newspapers (Ireland) Limited v Joseph Murphy Junior* [2006] IEHC 276 was concerned with discovery of confidential documents. The plaintiff's claim was to set aside a compromise (by payment of a sum of money and publishing an apology) of earlier defamation proceedings brought by Mr. Murphy, on the basis that the settlement was entered into on a false premise, namely that Mr. Murphy was *not* present at the meeting in Mr. Burke's house

at which the offending article published by the newspaper alleged that a minister received a bribe. The plaintiff now claimed that the defendant was present at the meeting, and that the earlier defamation claim was a malicious abuse of the process. The defence was that all the relevant evidence was in the public domain as a result of the Flood Tribunal, and the newspaper had the benefit of legal advice at the time of the settlement, and was therefore estopped from pursuing the claim. The newspaper appealed an order of the Master that it discovered articles prepared by its journalists, and notes or memos prepared for its lawyers prior to the compromise of the defamation proceedings. The estoppel defence raised the issue of whether the plaintiff could re-run the case that had been compromised or whether additional evidence would be required, the nature of that evidence, and whether it was available at the time. These were novel issues, on which Clarke J had this to say:

> "3.8…In the absence of authority, it would be both difficult and, indeed, inappropriate, to express any view as to the precise test or barrier which Independent may have to surmount. However, it seems to me that it can be safely concluded that there is at least a very real possibility that the question of the state of knowledge of Independent and its advisors, at the time when the settlement was entered into, may be relevant for the purposes of ascertaining whether any of the materials which are to be put before the court at the trial were or could have been available to Independent at the time of the compromise…It should be said that whether any such materials may become relevant will depend on the detail of the case, both on the facts and the law, made by the parties at the trial."

37. Concerning the unpublished journalist documents which were likely to be confidential, Clarke J stated:

> "4.3 I am satisfied that the court should only order discovery of confidential documents (particularly where the documents involved the confidence of a person or body who is not a

party to the proceedings) in circumstances where it becomes clear that the interests of justice in bringing about a fair result of the proceedings require such an order to be made.

4.4 It is clear that confidential information (which is not privileged) must be revealed if not to reveal same would produce a risk of an unfair result of proceedings. The requirements of the interests of justice would, in those circumstances, undoubtedly outweigh any duty of confidence. There is ample authority for that proposition which now may be taken to be well settled. Where, therefore, it is clear that the materials sought will be relevant, then discovery must be made notwithstanding any confidentiality.

4.5 However, it seems to me that the balancing of the rights involved also requires the application of the doctrine of proportionality. To that extent, it seems to me to be appropriate to interfere with the right of confidence to the minimum extent necessary consistent with securing that there be no risk of impairment of a fair hearing. In the unusual circumstances of this case it is far from clear (for the reasons analysed above) as to whether any of the disputed documentation will become necessary. As pointed out relevance will depend on the case which Independent makes, the facts and evidence led in support of that case and the legal submissions of the parties. The balance is, therefore, between a possible relevance and a high probability of a breach of confidence."

38. Counsel for the Appellant relied particularly on these passages, contending that the trial judge erred in principle in failing to undertake a "balancing of rights", or to apply the doctrine of proportionality in deciding whether the discovery sought was necessary. Counsel also relied particularly on the determination of Clarke J. in *Independent Newspapers* at paragraphs. 4.6 where he stated –

"4.6 In those circumstances it seems to me that it would be disproportionate to order an immediate discovery of what are undoubtedly confidential documents in circumstances where

those documents may (but only may) be relevant to the issues which will arise at the trial. The uncertainty as to the issues derives in significant part from the fact of there being a very limited jurisprudence in this area."

39. This approach has been adopted subsequently by Clarke J. in *Yap v Childrens University Hospital Temple Street* [2006] IEHC 308, and *Hartside v Heineken Ireland Limited* [2010] IEHC 3. A comparable approach appears to have been adopted by Barrett J. in *Nutrimedical BV v Nualtra Limited* [2016] IEHC 261, where he adjourned an application for discovery until such time as the question of whether the proceedings constituted an abuse of process had been determined. In that regard he was of the view that discovery was not at that point in time necessary.

40. It is also clear that the courts should be mindful of unfair litigation advantage that can arise where disclosure is ordered. In *Persona Digital Telephony Limited Sigma Wireless Networks Limited v. Minister for Public Enterprise* [2015] 1 IR 124 Donnelly J held that full disclosure of a litigation funding agreement was not necessary for the fair trial of a preliminary issue as to whether there was maintenance/champerty, and that a redacted disclosure of the document could be sufficient to determine the issue. Donnelly J. considered that the giving of detailed information about funding to an adversary was bound to convey a litigation advantage "and that ordering such a disclosure would need to be justified to a sufficient extent as to make it proportionate to confer the obvious litigation advantage that would arise in favour of the opponent by ordering such disclosure" (paragraph 64). This warranted "careful scrutiny of the necessity for production of the document for the fair disposal of the issue" (paragraph 70), and consideration of whether a redacted disclosure might be sufficient. Donnelly J. stated at paragraph 71: -

"Bearing that in mind, it can be seen that the reference to 'litigious advantage' must be understood as relating in some way to an issue between the parties, whether in the substantive

action or indeed in a truly interlocutory hearing. It could not and does not mean a litigious advantage by the gaining of knowledge of the other party's litigation tactics."

41. Since the hearing of argument before this court the parties in correspondence agreed that a recent decision of Twomey J in *Wheelock v Promontoria (Arrow) Limited and Tennant* [2020] IEHC 114, on discovery in the context of an unjust enrichment claim, should be brought to the attention of the court. However on 27 March 2020 that decision was appealed to the Court of Appeal and as it is under appeal, it is not appropriate that it be taken into account.

Decision –

Relevance, the claim based on unjust enrichment, and 'mere assertion'

42. The first question is whether the Category 4 documents sought are relevant to any issue in the proceedings. When the pleadings are considered there is an alternative claim by the Appellant for unjust enrichment and restitution, which is fully contested in paragraphs 13-19 of the Defence. It is expressly pleaded that the Appellant suffered no loss. Paragraph 15 pleads that the Appellant "made no payment of substance" for the loans/security, and that discovery "of the amount paid for the loan by the Plaintiff" will be sought. This is all put in issue in the Reply; paragraph 8 of which denies that "the Plaintiff made no payment of substance". The defence raised is effectively that in order for the Appellant to succeed in the unjust enrichment claim it must first prove an identifiable loss, and then demonstrate that the Respondent has thereby been unjustly enriched. The price paid is clearly therefore relevant to the pleaded defence on the face of the pleadings.

43. So the issue becomes whether these defence pleas are speculative from a legal perspective – in other words whether it can be argued that the amount paid by the Appellant for the loan/security is relevant to the issue of unjust enrichment or restitution because it will have a bearing on the loss that the Appellant can claim to have suffered.

44. In their written submissions the Respondent relies on the Supreme Court decision of *Corporation of Dublin v. Building and Allied Trades Union* [1996] 1 IR 468, a case which establishes that the concept of unjust enrichment is part of Irish law, and gives a description of the claim for restitution where it would be unjust for a party to retain the money or property. At p.483 Keane J (as he then was), with whom the rest of the court concurred, said: -

"It is clear that, under our law, a person can in certain circumstances be obliged to effect restitution of money or other property to another where it would be unjust for him to retain the property. Moreover, as Henchy J. noted in *East Cork Foods Limited v. O'Dwyer Steel Co.* [1978] I.R. 103, this principle no longer rests on the fiction of an implied promise to return the property which, in the days when the forms of action still ruled English law, led to its tortuous rationalisation as being 'quasi-contractual' in nature.

The modern authorities in this and other common law jurisdictions, of which *Murphy v. The Attorney General* [1982] I.R. 241 is a leading Irish example have demonstrated that unjust enrichment exists as a distinctive legal concept, separate from both contract and tort, which in the words of Deane J. in the High Court of Australia in *Pavey & Matthews Proprietary Ltd. v. Paul* (1987) 162 C.L.R. 221:—

'. . . explains why the law recognises, in a variety of distinct categories of cases, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary process of legal reasoning, of the question of whether the law should, in justice, recognise the obligation in a new and developing category of case.'

The authorities also demonstrate that, while there is seldom any problem in ascertaining whether two essential preconditions for the application of the doctrine have been met - i.e. an enrichment of the defendant at the expense of the plaintiff - considerably more difficulty has been experienced in determining when the enrichment should be regarded as "unjust" and whether there are any reasons why, even where it can be regarded as "unjust", restitution should nevertheless be denied to the

plaintiff. As to the first of these difficulties, the law, as it has developed, has avoided the dangers of "palm tree justice" by identifying whether the case belongs in a specific category which justifies so describing the enrichment: possible instances are money paid under duress or as a result of a mistake of fact or law or accompanied by a total failure of consideration. Whether the retention by the union of the entire compensation in the present case falls within such a category or not, however, it would in any event be necessary to consider whether restitution is precluded because of other factors. In the latter context, the following passage from the judgment of Henchy J. in *Murphy v. The Attorney General* [1982] I.R. 241 at p.314 is of particular significance:—

'Over the centuries the law has come to recognise, in one degree or another, that factors such as prescription (negative or positive), waiver, estoppel, laches, a statute of limitation, *res judicata* or other matters (most of which may be grouped under the heading of public policy) may debar a person from obtaining redress in the courts for injury, pecuniary or otherwise, which would be justiciable and redressable if such considerations had not intervened.'"

45. This supports the Respondent's contention that "the expense of a plaintiff" is relevant to a claim for unjust enrichment restitution. It also undermines the Appellant's argument that the alternative claim sounds in quasi-contract, and is simply to be regarded as one for monies had and received by the Respondents. It is arguably an equitable claim at least in the broad sense that central to it are principles of justice and fairness, and it is tied in with the equitable principle of restitution.

46. Further, as Keane J. notes, difficulty may arise in establishing what is "unjust" enrichment, and there may be one or more factors – as illustrated by the quote from Henchy J in *Murphy v. The Attorney General*– which might debar a person from obtaining redress. Henchy J.'s list does not seem to be exhaustive or to close off other possible considerations that could limit or debar a claim for unjust enrichment. It would seem inherent to unjust enrichment restitution claims that the trial court needs to hear evidence on, and consider, all circumstances that could be relevant to what might

give rise to injustice, and in relation to what might be considered to constitute "the expense of the plaintiff". Keane J mentions "total failure of consideration" as an example that might give rise to unjust enrichment, but in principle, and while it will be a matter for the trial judge, it is hard to see why a reduced or minimal consideration would not be relevant. Counsel also cited *Blue Haven Enterprises Ltd v. Tully and Anor* [2006] UKPC 17 to support the proposition that in unjust enrichment claims the extent of the "expense" by the claimant is a relevant consideration.

47. In this sense it is at least arguable that an unjust enrichment restitution claim either arises in equity, or that equitable principles apply, because the overall objective of the trial court will be to achieve a just and fair resolution. In the instant case it is arguable that the court will be entitled to consider all the circumstances including the evidence relating to the preparation and execution of the 2005 and 2009 Facilities and associated security, the drawdown of loan monies, the spending of those monies, the involvement of an investment company or other third parties, the relationship of the Respondent to the third parties and all relevant dealings/investments using the loan monies, the Bank demand/claims against the third parties and any settlements reached, the transactions by which the loans and security were acquired by the Appellant, including the price paid by the Appellant for the Respondents loans/security, and the general the conduct of the parties. As the Respondent argued in the High Court the matrix of facts relevant to consideration of the equitable claim of unjust enrichment should not necessarily be frozen in time at or before the Global Deed of Transfer, but may extend to all matters affecting the transfer, including the price paid.

48. I would stress, as did the trial judge, that while I find arguable the Respondent's submissions on the nature of unjust enrichment and therefore the breadth of evidence that may be relevant and admissible, the burden will still rest on the Respondent to persuade the judge at full trial that the threshold is met to establish that the price paid by the Appellant is one of the factors that bears on the substantive issues.

49. As the trial judge correctly observed, this case differs from one where a loan purchaser is simply suing in contract on the Facility security that has been transferred. In such a case it is only in special circumstances, such as arose before me in *Courtney v OCM Emru Debtco DAC and O'Connor* [2019] IEHC 160, that discovery of price will be ordered. In that case prior to sale of the loan portfolio held by NAMA, which included the plaintiff's loans, the plaintiff was given an opportunity to buy her 'connection' and offered a sum that was not accepted. The defendant acquired the facilities and having made demand sought to enforce for the full amount of the debt. In the proceedings the plaintiff sought to restrain the appointment of a receiver, and sought discovery of the price paid by the defendant for her loans in support of the admittedly novel claims that she wished to pursue – *inter alia* that defendant as assignee inherited NAMA's fiduciary or other duties to achieve the best price possible for her loans, and that breach of that duty, including sale by NAMA to the defendant at a price below that which she was prepared to pay, deprived her of her equity of redemption. As to the novelty of the claims I stated the following :

> "85. This is not to say that such claims, some of which may be novel, are stateable. That will be for another day if the defendants bring an application to dismiss *in limine*. It is a determination that as matters stand redacted parts of the loan sale deeds are fairly required to afford a proper understanding of these key documents, and clearly relevant to the case that the plaintiff seeks to make out."

50. As Clarke J. observed in *Independent Newspapers* "in the absence of authority, it would be both difficult and inappropriate, to express any view as to the precise test or barrier which Independent may have to surmount". Similarly in the instant case no decided authority was opened to the court that assists on the legal question of whether, in a claim (albeit pleaded in the alternative) by a party acquiring a loan from a bank reliant on unjust enrichment, the price paid for the loan is a factor that the court takes into account. The stance adopted by the Respondent in his defence may be novel but

it is at least arguable, and that being the case this court should go no further in its consideration of whether the defence can arise as a matter of law, or the strength or weakness of such defence.

51. On this issue the Appellant has failed to demonstrate that the trial judge erred in principle or in his approach, and I am satisfied that his reasoning was correct. In particular the trial judge was entitled to distinguish between the (wider) discovery relevant to the unjust enrichment claim and the more limited discovery that would apply if the claim sounded only in contract.

52. As to the Appellant's argument that the Category 4 discovery request is based on merely speculative pleading, this does not stand up to scrutiny. Paragraph 16 of the Statement of Claim pleads that "…the Plaintiff's claim is for restitution of the moneys advanced to the Defendant as moneys had and received by the Defendant, to the use of the Plaintiff", yet it is common case that the Bank - not the Appellant - lent the money in the first place. Whether the Respondent can have any liability on foot of either the 2005 or the 2009 Facility Agreement is put firmly in issue, and not just by way of traverse; in respect of the 2005 Facility the Respondent pleads positively that his signature was 'forged' and that the monies were advanced to the Third Parties (Messrs. Tynan and Moloney) and not to him, and that the Appellant settled with the Third Parties; in relation to the 2009 Facility the Respondent denies that he was a party, a matter on which the Bank was advised in advance. The Respondent pleads that the Appellant made "no payment of substance" to acquire the loans. While the Appellant's argument was that this was "mere assertion", at the hearing before this court, counsel accepted that the loans were acquired below 'par value' i.e. that the Appellant paid less for the acquisition of the loans than it seeks to recover from the Respondent on foot of the unjust enrichment restitution claim. In my view, therefore, the Appellant's 'mere assertion' argument has been entirely undermined.. If it is accepted, as I do for the purposes of this appeal, that the Defence raises an arguable grounds for defending the unjust enrichment claim based on the "expense to the Plaintiff", then the pleas related to the price paid by the Appellant to purchase the relevant loans cannot be said

to be raised *mala fide* solely for the purpose of seeking discovery or for some other extraneous purpose. The discovery is plainly sought to damage the Appellant's claim and to advance the defence.

53. Moreover, notwithstanding the averment in Mr. McKeever's second affidavit that it is "highly unlikely that any documents exist which directly relate to the amount paid for the transfer of the loans entered into between the Bank and the Defendant" I find that it is probable that the Appellant does hold documents with relevant information on price. The test is whether the information *may directly or indirectly* enable the Respondent to advance his defence. Such documents with price information as the Appellant may have in its possession or procurement might not directly disclose a price paid for the 2005/2009 Facilities and security (a possibility acknowledged by the trial judge) but may do so indirectly, as was the case in *Courtney* where discovery of the overall price paid for the loan portfolio was likely to indirectly enable the plaintiff to advance her case.

Confidentiality and commercial sensitivity – necessity and proportionality and the balancing of rights

54. The absence of any sworn evidence establishing that documents discoverable under Category 4 were created in circumstances of confidentiality, or are commercially sensitive, could well justify this court in not entertaining the Appellant's arguments under this heading. If it was intending to pursue such arguments I would have expected the Appellant in response to the application for discovery to have set out on affidavit to the circumstances in which confidentiality, contractual or otherwise, arose, and to have set out precisely why it was asserted that price information in such documents was commercially sensitive. The absence of such evidence hampers this court in its consideration and determination of the argument, and requires it to determine the issue on the basis of mere assertion in written and oral submissions. It could be said that this deficit means that there is no basis upon which the Appellant could satisfy the onus on it to show that the trial judge erred in principle in ordering Category 4 discovery.

55. Notwithstanding this deficit, and with some hesitation, I propose to address the arguments for a number of reasons. First the letter refusing discovery of Category 4 does refer to the documents sought as being commercially sensitive (although Mr. McKeever's affidavit does not), and Mr. McKeever's second affidavit does refer to confidentiality albeit only in the context of there being a fourth borrower in respect of the relevant loans. Secondly, and perhaps most importantly, this was no an objection taken by the Respondent, and the submissions and hearing of both parties in the High Court, and on appeal to this court, proceeded on the assumption that the documents were covered by confidentiality and are commercially sensitive. Thirdly the commercial practice of the sale and purchase of portfolios of distressed bank loans and security – particularly loans/security that became vested in NAMA but also from the so-called 'pillar' banks – through closed auction with bidder access on the basis of Non-Disclosure Agreements to virtual data rooms where due diligence can be undertaken before submitting confidential bids, is something that is widely known and publicised. I believe I can take judicial notice of the fact that information obtained from these data rooms and subsequently contained in acquisition documents is generally disclosed on a confidential basis, and that confidentiality clauses in the acquisition documents are standard. This however should not detract from the general requirement that parties objecting to discovery or disclosure on grounds of confidentiality or commercial sensitivity must set out fully on affidavit the factual the basis for such objection.

56. In the first place a full reading of the judgment of the trial judge clearly shows that he approached Category 4 on the basis that the information/documents sought was confidential in nature, and of commercial sensitivity – he adopted the assumptions made in the submissions of both parties. He also had an opportunity to consider the confidentiality related to the fourth borrower referred to by Mr. McKenzie in his second affidavit produced before the discovery order was finalised.

57. Secondly, the trial judge, while not describing the process as such, did in my view undertake a balancing exercise before ordering discovery of Category 4 in the following respects:

1) He did not regard Category 4 as a 'fishing exercise' or an excessive 'trawl' (paragraphs 35-36 of his judgment) reasoning that "It only goes to one fact"
2) He addressed the alternative possibility of price information being obtained through interrogatories, but rejected this when counsel for the Appellant was unable to confirm that it would yield the information (paragraph 37).
3) He did consider whether the making of the discovery sought would be oppressive, and decided it could not be so characterised.
4) He gave consideration to the Appellant's offer of an Affidavit to be sworn detailing the price/exhibiting relevant documentation, only to be made available to the court and the parties if the trial judge determined at the level of principle that price was relevant to unjust enrichment. He reasoned that –

> "This would in effect require the court to hold a hearing on a preliminary issue of law. No such issue has been identified or directed. Furthermore, it is not clear to me that such a question would be appropriate for trial as a preliminary issue, since the question of the relevant equities of the parties or their predecessors, will engage an analysis of more facts than simply the price paid by the plaintiff for the loans." (paragraph 38)

4) In paragraphs 39 and 40 he addresses the argument that if Category 4 was ordered then every borrower pleading unjust enrichment would be entitled to similar price information discovery.

5) He addressed the claimed commercial sensitivity noting that it does not afford the same protection from disclosure as privilege, and that it could be adequately protected by undertakings designed to ensure that no wider disclosure or use be made without further leave of the court. He therefore gave directions in paragraph 64 (quoted earlier) and ordered that inspection of Category 4 documents would be limited to the Respondent and his solicitor

having conduct of the case and counsel and he required undertakings not to use or quote the information in the documents in open court or in correspondence other than *inter partes.*

58. In my view what the trial judge was doing was balancing the rights of the respective parties – weighing on the one hand the right of the Appellant and the parties to the relevant loans to maintain confidentiality together with the right of the Appellant to protect commercial sensitivity, against on the other hand the interests of the Respondent to the fair administration of justice. This was in effect the type of exercise envisaged by Clarke J in *Independent Newspapers* even if it was not described as such in the judgment. Accordingly notwithstanding the confidentiality of the documents the trial judge was entitled to order discovery, and in my view he did so in a manner that interferes with the right to confidence and protection of commercial sensitivity in the words of Clarke J "to the minimum extent necessary consistent with securing that there will be no risk to impairment of a fair hearing."

59. The Appellant argued that the trial judge took inadequate account of the fact that ordering discovery under Category 4 would, as a matter of certainty, breach confidentiality, whereas if the court directed an affidavit with price information that would represent minimal interference yet protect the Respondent if he were to satisfy the trial judge at the level of principle that price information was relevant to the Appellant's claim of unjust enrichment. I do not accept that this criticism is valid. The trial judge did analyse and give reasons why the offer of an affidavit was not an acceptable alternative –namely that it would *effectively* lead to trial of a preliminary issue of law which had never been identified by the Appellant or directed by the court. In my view it was legitimate reasoning that fell within the trial judge's margin for appreciation. Moreover, at the appeal hearing counsel for the Respondent indicated that he would have no objection to a preliminary issue or modular trial on the Appellant's primary claim in contract to recover the monies alleged to be due, but he noted that this had never been sought and was not what the Appellant wanted. He argued that the trial judge was correct in his reasoning, and added that it would be unfair to expect the Respondent

to face into what may be an five week trial without information that is relevant to the alternative claim for unjust enrichment. I agree with that submission.

60. I would emphasise that the trial judge has a margin for appreciation in undertaking the balancing exercise and in reaching a decision on this and all elements of the discovery application. I have set out earlier the various matters that the trial judge took into account and I find no fault with his reasoning. Further the order made with the undertakings that are required of the Respondent and his lawyers also provides appropriate and proportionate protection for the confidentiality of the Third Parties and the fourth borrower, and ensures that breach of confidentiality is at the minimum level consistent with the due administration of justice at this point in the proceedings. It will be a matter for the judge at full hearing to determine to what extent the Category 4 discovered documents/information may be used at trial, and whether, for instance, part of the trial may be need to be held *in camera*.

61. I also reject the submission that the discovery order will give unfair litigious advantage to the Respondent and that it is only sought for purposes of the strengthening the Respondent's hand in negotiating a settlement. The legitimate purpose of discovery is to obtain litigious advantage, and clearly the primary reason for the Respondent seeking Category 4 documents/price information is to contest the Appellant's unjust enrichment claim. It goes to the very substance of the defence. This is very different to the circumstances which led Donnelly J to exercise caution in *Persona Digital* which concerned disclosure of a litigation funding agreement resorted to by an impecunious plaintiff in the context of a preliminary motion seeking orders that the funding arrangement was not an abuse of the process or champertous. Donnelly J. was careful to grant disclosure of the agreement in general terms but on the basis that the plaintiff could redact details such as the funding budget, the timelines for release of funds, the funder's remuneration, and the circumstances in which the funder could terminate funding - because these were not relevant to issues that would be before the court on the

substantive motion but would if disclosed could confer "a significant and tactical litigation advantage" (paragraph 64).

Conclusion

62. The Appellant has failed to demonstrate that the trial judge erred in principle in his decision to grant Category 4 discovery subject to the limitations and undertakings set out in his Order, or that the trial judge was 'probably' wrong. The discovery so ordered is relevant to advance the defence of the case pleaded in the alternative by the Appellant, and is necessary for fairly disposing of issues that arise. In that the documents may be confidential and commercially sensitive the trial judge carried out an appropriate balancing exercise in reaching his decision, and the order made is proportionate having regard to the restrictions and undertakings which adequately protect the Appellant and all of the borrowers from any wider disclosure than is necessary for the purpose of defending the proceedings. I would dismiss the appeal and affirm the judgment and order of the High Court.

As this judgment is being delivered electronically, Faherty and Ní Raifeartaigh JJ. have indicated their agreement with it.