Unapproved **No Redactions Needed**

THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 71

Court of Appeal Record Number: 2020/92

High Court Record Number: 2018/9598P

Haughton J.

Collins J.

Pilkington J.

BETWEEN/

PATRICK WHEELOCK

PLAINTIFF/APPELLANT

- AND -

PROMONTORIA (ARROW) LIMITED

AND STEPHEN TENNANT

DEFENDANTS/RESPONDENTS

JUDGMENT delivered by Mr. Justice Robert Haughton on the 12th day of March 2021

Introduction

1. This is an appeal against the judgment delivered *ex tempore* in the High Court by Twomey J. on 28 February 2020 refusing to order discovery to the appellant of the following category of documents: -

"All documents evidencing or recording the purchase price, or sum, paid by Promontoria in acquiring the Loan Facility and/or Deeds or Mortgage."

2. The context in which this discovery is sought is the claim in these proceedings by the appellant for declarations setting aside the purported appointment by the first named respondent ("Promontoria") of the second named respondent as a receiver over the appellant's property in Waterford ("the Monvoy Lands") and other reliefs including damages, and a counterclaim by Promontoria asserting that the appellant has received benefit from the advancement of certain loan monies as a result of which the appellant has received unjust enrichment at the expense of Promontoria. In essence, the appellant contends that the discovery sought is relevant and necessary for his defence of the counterclaim and for the fair disposal of the proceedings.

Background

3. In 2014 National Asset Loan Management Limited ("NALM") initiated judgment proceedings against the appellant, bearing High Court Record No. 2014/9112P ("the Judgment Proceedings"), in which Promontoria has since been substituted as plaintiff. That claim for judgment is based upon a Facility Letter dated 23 December 2011 (the "Facility Letter") issued by IBRC (formerly Anglo Irish Bank plc), for a maximum facility of €2.67 million; the Facility Letter was largely a capitalisation of previous Anglo loan facilities which had been drawn down. The Loan Facility, and two Deeds of Mortgage dated 18 July 2003 and 22 August 2008 ("the Deeds of Mortgage") were later transferred to National Asset Loan Management Limited, and subsequently acquired by Promontoria from NALM on 11 December 2015 by way of Loan Sale and Deed of Transfer.

4. The appellant has consistently maintained that the Facility Letter is falsified, as his signature thereon was forged by his former accountant, Michael O'Leary. The appellant also asserts that the

signatures purporting to be his on the Deeds of Mortgage are not in fact his signatures, and that the signatures of persons purporting to witness his signature are not genuine.

5. Following demands for payment by NALM in December 2013 and early 2014 solicitors acting on behalf of the appellant wrote to NALM on 7 February 2014, and to Hays Solicitors acting on behalf of NALM on 12 March 2014 putting NALM on notice of these matters, alleging that the Facility Letter and Deeds of Mortgage are invalid, and further asserting that Mr. O'Leary controlled funds borrowed from Anglo, and that the appellant did not have access to or use such funds.

6. As a result of the alleged fraud, the appellant instituted proceedings against Mr. O'Leary bearing High Court Record No. 2014/5751P (the "O'Leary Proceedings") in which he sought compensation from Michael O'Leary and Company and others in the sum of €7,943,445. It was pleaded in the statement of claim in the O'Leary proceedings that the Monvoy Lands were acquired by the appellant in November 1989 for £170,000, which was paid from earnings of the appellant held on his behalf by Michael O'Leary and Company. Those proceedings were ultimately compromised on 10 February 2017 on the basis that the professional indemnity insurers for Michael O'Leary and Company paid the appellant €1,500,000 inclusive of legal costs, on the express basis that this represented the full extent of the insurance policy. In that Settlement Agreement Mr. O'Leary personally consented to judgment in favour of the appellant in the sum of €2,950,000, but he was subsequently adjudicated bankrupt. As the appellant was an unsecured creditor behind NALM and others, he has received no payment or benefit from the O'Leary bankruptcy estate.

The present proceedings

7. On 2 October 2018 Promontoria appointed the second named respondent receiver over the Monvoy Lands. The appointment of the receiver precipitated the commencement of these proceedings by the appellant by Plenary Summons issued on 5 November 2018. In the statement of

claim delivered on 19 December 2018 it is pleaded that the Deeds of Mortgage are void, and that their registration as burdens over the Monvoy Lands was procured in reliance upon instruments of fraud and/or was induced by mistake, and is therefore without legal effect. Paragraph 21 notes that NALM had appointed Myles Kirby as receiver over the Monvoy Lands, but discharged him on 22 June 2015 after being advised of the falsification of the Deeds of Mortgage. Promontoria claimed to have acquired the Deeds of Mortgage on 11 December 2015. The statement of claim pleads that prior to that acquisition Promontoria, its servants or agents were aware, had actual notice, or ought to have been aware, of the falsification of the appellant's signature on the Deeds of Mortgage, and of the invalidity of the purported registration of the Deeds of Mortgage as burdens on the Monvoy Lands. It is further pleaded that the Facility Letter does not bear the genuine signature of the appellant, and that demands for payment made by Promontoria on 21 September 2018 are invalid and made at a time when Promontoria was aware of the appellant's consistent denial that he had signed the facility and his denial of liability. In the prayer the appellant claims declarations of invalidity in respect of the Deeds of Mortgage and the registered charges and the appointment of the second named respondent, and ancillary reliefs including injunctions and damages.

8. In its Defence and Counterclaim, and for the first time, Promontoria has advanced a claim seeking damages/compensation for unjust enrichment, disgorgement of profits and/or equitable compensation against the appellant. In the counterclaim it is pleaded at paragraph 27 that "the Loan Facility was a continuation of previous loan facilities… which had been advanced by Anglo to, ostensibly, the plaintiff and Mr. O'Leary" and that the monies were advanced for the purpose of the development of the Monvoy Lands and that they were applied to fund the development of housing units on the Monvoy Lands. The following pleas appear in the counterclaim:

> "30. In proceedings bearing record number 2014/5751P issued by the Plaintiff against *inter alia,* Mr O'Leary ("the O'Leary Proceedings"), the Plaintiff claimed *inter alia* an entitlement

to 50% of the profits and proceeds, less *bona fide* development expenses, derived from the development of part of the Monvoy Lands. The Plaintiff estimated the value of this element of his claim in the O'Leary Proceedings to be €4,203,183.

31. In or about February 2017 the Plaintiff compromised the O'Leary Proceedings on terms including a provision that the practice of Michael O'Leary & Company do pay the Plaintiff the sum of €1,500,000 in full and final settlement of *inter alia* the O'Leary Proceedings. The said monies were received by the Plaintiff and, following receipt thereof, the O'Leary Proceedings were struck out in accordance with the terms of settlement.

32. In the premises, the Plaintiff has benefited from the development of the Monvoy Lands, which said developments was funded in whole or in part by loan monies advanced by Anglo.

33. Further, and without prejudice to the foregoing, the loan monies advanced by Anglo were applied in a manner which increased the value of the Monvoy Lands with the result that the Monvoy Lands, and by extension, the Plaintiff, have benefitted from the advance of the said loan monies.

34. In these premises, if the Loan Facility and/or the Deeds of Mortgage are void, invalid and without legal effect, which is not admitted, the Plaintiff has received a benefit from the advancement of loan monies which he is obliged to disgorge and/or to repay

35. Further, if the Loan Facility and/or the Deeds of Mortgage are void, invalid and without legal effect, which is not admitted, there was a total failure of consideration on the part of the Plaintiff and a consequent obligation upon the Plaintiff to repay the said sums to Promontoria and/or to disgorge all benefits received by the Plaintiff as a result of the advancement of said loan monies, whether by way of resulting trust and/or constructive trust

36. Further and/or in the alternative, any such benefits received by the Plaintiff as a result of the advancement of said loan monies are held on trust for the benefit of Promontoria as successor to the interests and entitlements of Anglo.

37. Further and/or in the alternative, Promontoria claims from the Plaintiff the loan monies benefits received by the Plaintiff as a result of the advancement of said loan monies as monies had and received to the use of the Plaintiff and/or on foot of the Plaintiff's unjust enrichment which is at the expense of Promontoria."

9. Promontoria did not detail in its counterclaim "the expense of Promontoria" pleaded in para. 37. It also did not set out the amount by which it was claimed that the appellant had been unjustly enriched at Promontoria's expense. Particulars were sought on the appellant's behalf and in Replies to Particulars dated 1 March 2019 Promontoria stated –

"It is specifically pleaded that [Promontoria] claims from the Plaintiff the loan monies benefits received by him as a result of the advancement of the loan monies. The extent of the loan monies benefits will be determined by reference to the benefits received by the Plaintiff on foot of the compromise in the O'Leary proceedings."

The delivery of further particulars was ordered on consent by McDonald J. on 24 July 2019. In response to the request no. 18(d) "please state the quantum of the unjust enrichment relied upon", on 8 October 2019 Promontoria's solicitors responded "€1,500,000". This prompted the appellant to raise a request for further and better particulars, asking –

"… The plaintiff requires particulars of the quantum of unjust enrichment which is at the expense of Promontoria.

For the avoidance of doubt, the quantum of the unjust enrichment at the expense of Promontoria corresponds with the cost of acquisition of the Loan Facility and related security, being Promontoria's actual expense. The plaintiff therefore requires particulars of that sum."

To this solicitors on Promontoria's behalf responded on 11 November 2019 under Paragraph 18(d): -

"We reject the thesis subtending the particular as advanced, on the following grounds:-

(i) As pleaded in the Defence and Counterclaim, the First Named Defendant ("Promontoria") stands in the shoes of Anglo having acquired all of its right, title, interest and benefit in the Loan Facility and related security.

(ii) The Plaintiff has been compensated to the tune of a €1,500,000 insurance payment and an even larger judgment amount arising, *inter alia*, from the creation of the underlying loan facilities and related security in favour of Anglo over the relevant lands; and

(iii) The failure of the Plaintiff to account to Promontoria, as Anglo's successor, for any part of the payment received and judgment obtained, has the effect in law of the Plaintiff being unjustly enriched at the expense of our client

In the premises, the acquisition price paid by our client in respect of the portfolio of loans of which the plaintiff's loans and security formed part are irrelevant."

10. In the Reply and Defence to Counterclaim the appellant joins issue with the counterclaim, denies that he received any part of the Loan Facility (or any predecessor facilities) or benefitted from the loan monies, or that the settlement sum of €1.5M benefits the development of the Monvoy Lands. Paragraph 24 denies "… that any benefit was obtained at the expense of Promontoria or is actionable at the suit of Promontoria" and paragraph 30 pleads –

"30. Promontoria has failed, in its counterclaim, to state what cost it has incurred in reliance upon which the Counterclaim is now advanced and has failed to state how (or in what amount) the Plaintiff has been unjustly enriched at its expense. The Plaintiff will rely upon the failure of Promontoria to specify the sum which it is alleged to have lost as a result of the wrongs alleged (which are denied)."

The Discovery process

11. By letter dated 16 December 2019 the appellant's solicitors wrote to Promontoria's solicitors seeking discovery of 15 categories of documents including Category 13 in relation to the price or sum paid by Promontoria in acquiring the Loan Facility and/or Deeds of Mortgage. The reasons stated in the request are as follows: -

"Reason: The Defendants have sought equitable compensation and damages for breach of trust and/or breach of fiduciary duty. They allege that there has been a total failure of consideration, unjust enrichment and/or breach of trust. All of this is denied. When pressed for particulars the Plaintiff has particularised its alleged loss as being €1,500,000 being the sum that the Plaintiff received by way of compensation and costs from the professional indemnity insurer of his former accountant, Michael O'Leary. Without prejudice to his contention that the Defendants have no cause of action against him whatsoever, the Plaintiff will contend at the trial of the action that if Promontoria has suffered any loss (which is denied) it is limited to the purchase price, or sum, paid by Promontoria in acquiring the Loan Facility and/or Deeds of Mortgage. Accordingly, the documents sought are relevant and necessary. In maintaining its application for this category of documents the Plaintiff will rely upon the fact that Promontoria has refused to provide this information when requested by way of particulars, despite the fact that its legal representatives have previously conceded the relevance of this information in Court before Haughton J."

12. To this Promontoria's solicitors responded by letter dated 30 January, 2020, declining Category 13 –

> "Our clients do not agree to provide voluntary discovery of Category 13 as the acquisition price paid by our client in respect of the portfolio of loans, of which the plaintiff's loans and security formed part, are not relevant to the issues in dispute in these proceedings. We refer to our clients' Further and Better Replies dated 11 November 2019 which set out, in clear terms, the basis upon which our clients maintain a claim for unjust enrichment."

The appellant's solicitors replied on 7 February 2020 –

> "At the trial of the action the Plaintiff will contend that if Promontoria were in a position to maintain a claim for unjust enrichment – a claim which is vigorously rejected – the price paid by Promontoria for the loan and security interests must necessarily be relevant to the quantification of the unjust enrichment which is alleged. The fact that your client seeks to base its claim for unjust enrichment on a different basis, which we believe to be fundamentally wrong and misconceived cannot be a basis upon which to refuse discovery of the documentation sought."

13. The appellants then issued a motion seeking to compel discovery of Category 13. The affidavit grounding the application for discovery was sworn on 14 February 2020 by Declan McNulty, solicitor, and two paragraphs in particular encapsulate the essence of the appellant's claim:-

> "20. The Plaintiff disagrees fundamentally with Promontoria's position in relation to the quantification of its claim for unjust enrichment, disgorgement of profits and/or equitable compensation. The Plaintiff will maintain at the trial of the action that the sum spent by Promontoria in acquiring the Loan Facility and security interest must be relevant to the counterclaim advanced, or at a minimum must be potentially relevant.

21. Furthermore, the Plaintiff has no knowledge, or means of knowing, what expense Promontoria has actually incurred in acquiring the Loan Facility and security interest. In those circumstances it is entirely possible that the sum claimed of €1,500,000 represents a sum which bears no relationship at all to Promontoria's actual (alleged) loss and that the sum sought potentially represents a windfall sum bearing no monetary relationship to any actual unjust enrichment, disgorgement of profits and/or equitable compensation which ought properly be maintained."

14. A replying affidavit was sworn by Jeremy Erwin, solicitor, on behalf of Promontoria. At paragraph 8 he repeats the explanation given in the letter of 30 January 2020 that the appellant's loans and security "formed part of a portfolio of loans acquired by" Promontoria and asserts that this acquisition is not relevant to the issues in dispute. In paragraph 9 he avers that it is not clear why the appellant contends the documents sought "are necessary for the fair disposal of the action". He then avers:

"10. It appears from the Request that the Plaintiff 'will contend at the trial of the action that if Promontoria has suffered any loss (which is denied) it is limited to the purchase price, or sum, paid by Promontoria in acquiring the Loan Facility and/or Deeds of Mortgage'. At paragraphs 20 of his affidavit, Mr McNulty states that 'the Plaintiff disagrees fundamentally with Promontoria's position in relation to the quantification of its claim for unjust enrichment…'

11. I say and am advised that the Plaintiff is perfectly entitled to advance this legal submission at the trial of the action. However, I am advised that discovery of the documents sought at category 13 of the Request are not necessary to enable the Plaintiff advance this legal argument. The high point of Mr McNulty's affidavit on this issue appears to be that the purchase price may be 'potentially relevant' to the issues in dispute."

The High Court decision

15. In the High Court counsel for the appellant argued that Category 13 documentation was relevant and necessary because the purchase price paid by Promontoria for the loan facility and mortgage was a key ingredient in any unjust enrichment claim, as the enrichment must be at the claimant's expense. By way of example it was argued that if Promontoria acquired the appellant's loans and security for €100,000, then it would be inequitable for Promontoria to get the benefit of the entire settlement sum of €1.5M. Reliance was placed on the decision in *Promontoria (Aran) Limited v Sheehy* [2019] IEHC 613, in which disclosure of the amount paid by the plaintiff for the purchase of lands by the plaintiff from a predecessor bank was ordered, on the grounds that the proceedings in that case concerned equitable relief, including unjust enrichment, such that, while it was not normally appropriate to disclose price paid for loans in regular debt collection cases, it was appropriate to make the order in that case.

16. The trial judge rejected this, relying instead on a line of authority which he considered made it clear "… that the essence of the unjust enrichment action is whether in conscience the defendant can retain money at the expense of the owner of that money" (para. 16). He referred to the judgment of Baker J. in *Bank of Ireland Mortgage Bank v Murray* [2019] IEHC 234, where she in turn relied on a judgment in the House of Lords in *Lipkin Gorman v Karpnale* [1991] 2 AC 584, where Lord Goff stated that unjust enrichment –

> "… is founded simply on the fact that … the third party cannot in conscience retain the money – or, as we say nowadays, for the third party to retain the money would result in his unjust enrichment at the expense of the owner of the money."

The trial judge further relied on the judgment of McDonald J. in *HKR Middle East Architects Engineering LC and Ors. v English* [2019] IEHC 306, where he set out the principles applicable to

unjust enrichment as being "whether the defendant has been enriched, or whether the enrichment was at the claimant's expense and whether the enrichment was unjust". In that case McDonald J. ordered an account and enquiry to be taken of "the unpaid and lawful liabilities of" the plaintiff. Twomey J. noted in the present case that Promontoria in its counterclaim for unjust enrichment seeks an order directing the taking of all consequential and necessary accounts and enquiries and an order directing the payment of the amount found due to Promontoria on foot of same.

17. The trial judge also found particularly relevant *Bank of Cyprus UK Limited v Menelaou* [2016] 2 All ER 913, where the UK Supreme Court approved the same principles of unjust enrichment relied upon by McDonald J. Twomey J quoted the following passage at page 920 :

> "Was Melissa enriched at the expense of the Bank?
>
> According to Goff & Jones on *The Law of Unjust Enrichment* (8th edn, 2011), para 6–01, the requirement that the unjust enrichment of the defendant must have been at the expense of the claimant 'reflects the principle that the law of unjust enrichment is not concerned with the disgorgement of gains made by defendants, nor with the compensation of losses sustained by claimants, but with the reversal of transfers of value between claimants and defendants'. I agree.
>
> In my opinion the answer to the question whether Melissa was unjustly enriched at the expense of the Bank is plainly yes. The Bank was central to the scheme from start to finish. It had two charges on Rush Green Hall which secured indebtedness of the £2.2 m. It agreed to release £785,000 for the purchase of Great Oak Court in return for a charge on Great Oak Court. *It was thus thanks to the Bank that Melissa became owner of Great Oak Court, but only subject to the charge. Unfortunately the charge was void for the reasons set out above. In the result Melissa became the owner of Great Oak Court unencumbered by the charge. She was*

*therefore enriched at the expense of the Bank because the value of the property to Melissa was considerably greater than it would have been but for the avoidance of the charge and the Bank was left without the security which was central to the whole arrangement***.**" (Emphasis as added by the trial judge)

18. Following this line of authority the trial judge then decided as follows: -

"22. It seems to this Court that the key principle underlining unjust enrichment is that Mr. Wheelock should not be in a position where the value of the lands in his ownership are considerably greater to him, at the expense of the bank (Anglo Irish Bank), or in this case its successor in title (Promontoria), than it would have been but for the impugned transaction (i.e. the allegedly forged mortgage).

23. In this instance Mr. Wheelock is allegedly enriched in two ways, firstly if the mortgage is held to be void, then he becomes the owner of the Monvoy Lands security-free. Secondly, he received a settlement of €1.5 million from his former accountant which is alleged to be compensation for the forged facility letter and the forged mortgage.

24. This possible windfall for Mr. Wheelock is at the expense of Promontoria because if the mortgage and facility letter are held to be void, Promontoria lose valuable rights pursuant to those agreements.

25. In this Court's view, it is this loss which is the 'expense' of Promontoria for the purposes of determining whether an unjust enrichment is at a plaintiff's 'expense'. It is not the purchase price which it has paid for those facility letters and mortgage. Hence, the purchase price is not relevant and necessary information for the purpose of these proceedings and so discovery in this regard is not required.

26. To put the matter another way, the conscience of equity is engaged by the fact that it would be unconscionable for Mr. Wheelock to walk away with the Monvoy Lands, free of the mortgage and free of the obligation to pay back the Bank (or more accurately its successor in title, which acquired the Bank's rights) which Bank had lent the money on that security, and, it would be further unconscionable for Mr. Wheelock to retain €1.5 million in compensation from his settlement with Mr. O'Leary for, *inter alia*, being bound by a mortgage, which is then found to be void.

27. This is why in this Court's view *it would be inequitable* for Mr. Wheelock to retain that benefit of development land worth say €1 million with no obligation to pay back the loan and with no mortgage on the development land and with the benefit of having also received cash of €1.5 million.

28. This is also why *it would not be inequitable* for the purchaser of the loan and the mortgage, from the original bank, to become entitled to the development land of say €1 million or part or all of the settlement sum of €1.5 million, even if it paid only say €500,000 for that loan and security.

29. The former scenario is unconscionable, the latter scenario is as a result of an astute commercial decision made by a purchaser of the Bank's loans.

30. This is why this Court believes that the price that Promontoria paid for the loans and mortgage is not relevant and necessary for these proceedings and why the discovery order is not being granted.

31. In any case, this Court does not believe that Mr. Wheelock is unduly prejudiced by this order, since if an account is ordered by the trial judge and if Mr. Wheelock can persuade the

trial judge that it is in fact relevant and necessary to know the purchase price, that is something that the trial judge can order at that stage."

19. In short, there appeared to be two reasons given by the trial judge for refusing Category 13 discovery: the first was that Promontoria's "expense" is the loss of valuable rights that would have accrued under the Facility Letter and Deeds of Mortgage if they are held to be void, not the purchase price that it paid to acquire the Facility Letter and mortgages, and hence the purchase price was not relevant or necessary for the defence of the counterclaim; and secondly it would still be open to the appellant at trial to persuade the court that, in the context of accounts and enquiries, it is relevant and necessary to know the purchase price in which case discovery could be ordered at that stage.

Notice of Appeal

20. In its Notice of Appeal the appellant pleads that the trial judge erred in law and fact in finding that the discovery sought was not relevant to an issue, and not necessary for disposing fairly of the proceedings; that the trial judge erred in law in failing to follow the judgment of the High Court in *Promontoria (Aran) Limited v Sheehy* and in doing so failed to apply the principles identified in *Re Worldport Ireland Limited*; in finding that the price paid by Promontoria could not have any bearing on the claim for unjust enrichment and/or equitable compensation; in his finding that the only relevant consideration for the purpose of analysing Promontoria's claim was that the appellant stood to gain a "possible windfall… at the expense of Promontoria because if the mortgage and facility letter are held to be void, Promontoria lose valuable rights pursuant to those agreements"; by refusing the application for discovery in reliance upon his finding that the conscience of equity would be engaged by the allegation that the appellants stood to gain a windfall benefit and that all other considerations were irrelevant; by failing to have regard to the fact that Promontoria had been put on notice of the falsification of the appellant's signature prior to acquisition of the loan; and by finding that the appellant would suffer no prejudice from refusal of the discovery on the basis that he wold have an

opportunity to persuade the trial judge of its relevance and necessity and could then obtain that information through the ordering of an account.

Respondents Notice

21. In opposing the appeal Promontoria plead that the trial judge did not fall into "clear error" and properly exercised his discretion in that the discovery sought was not necessary for the fair disposal of the claim or Promontoria's counterclaim, and pleaded that the appeal is an attempt to re-argue the application *de novo* which should not be permitted. The appellants seek to stand over the trial judge's conclusion that the discovery was not necessary, and that the appellant would not suffer any real injustice from the refusal. Promontoria join issue with the appellant's pleas that the trial judge erred in failing to follow the decision in *Sheehy*, or that *Re. Worldport* applied, and asserted that the trial judge correctly identified that a number of relevant decisions were not cited in the judgment in *Sheehy*. Promontoria disputed that the trial judge found that "all other considerations (save for the fact that the appellant stood to gain a windfall) were irrelevant", stating "rather, the learned High Court judge found that the purchase price paid by Promontoria for the loan facility was not relevant or necessary to the determination of the question of the issue of whether the Appellant had been unjustly enriched". It was denied that the allegation that Promontoria had been put on notice of the falsification of the appellant's signature prior to acquisition of the loan rendered the discovery sought necessary for the fair disposal of the action. It was then pleaded that the trial judge correctly concluded that discovery of Category 13 could only be relevant to the taking of an account and enquiry, which would necessarily only arise following a finding of unjust enrichment. In Additional Grounds it was pleaded that, unlike in *Sheehy*, the amount of the purchase price paid by Promontoria was not put in issue in the pleadings; and further, again by contrast with the decision in *Sheehy*, in the present case the claim of unjust enrichment is not met by a particular plea concerning the question of whether Promontoria made a payment of substance. Finally there is a plea that –

"*(iv) Further, and without prejudice to the foregoing, having regard to the confidential nature and commercial sensitivity of such information, discovery of this category of documents is not proportionate to the asserted evidential deficit on the part of the plaintiff.*"

22. At the hearing of the appeal counsel for Promontoria clarified that confidentiality/commercial sensitivity is maintained, but is not deployed as a ground for refusing discovery and is only relied on to limit the disclosure to a confidentiality club in the event that the court were to order discovery of Category 13.

The appellant's submissions

23. In written and oral submissions before this court counsel for the appellant emphasised the entitlement of a party to discovery of documents containing information which may "either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary" – *per* Brett LJ. in *Compagnie Financiere du Pacifique v Peruvian Guano* (1882) 11 QBD 55. Counsel again relied on the decision in *Sheehy*, where at paragraph 34 Quinn J. in the High Court stated:

"34. 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."

24. Counsel also relied on *Re Worldport Ireland Limited [2005] IEHC 189* arguing that the three decisions referred to by the trial judge in his judgment did not satisfy the tests that would allow the trial judge to come to a different view to that of Quinn J. in *Sheehy*.

25. Counsel also argued that, unlike the circumstances considered by the UK Supreme Court in *Bank of Cyprus* , the appellant bought the Monvoy Lands in 1989, and did not draw down the Anglo

monies, and there was no transfer of value to him. He further argued that there is a distinction in the present case between Anglo/IBRC/NALM suing the appellant for unjust enrichment, and Promontoria's position, in circumstances where Anglo/IBRC advanced loans of €2.67M, but Promontoria purchased the Loan Facility and security from NALM at, (it is assumed) a reduced price. There is therefore no equivalent "expense" or loss. It was submitted that this goes not just to loss, but also to an assessment of liability for unjust enrichment.

26. Counsel also argued that the appellant will be disadvantaged going to trial if the information on the price paid by Promontoria for the Facility Letter and security is not available to it. He argued that unjust enrichment will be the central issue at trial, and that the price paid for the loan and security goes to the heart of that claim. It also would not be possible for the appellant's legal advisors to form a view in advance as to the exposure of the appellant to the unjust enrichment claim, and this fact alone would inhibit any possible discussion or negotiation.

27. Counsel also argued that there was a clear error on the part of the trial judge in not addressing the issues of relevance and necessity by reference to the pleadings, and doing so instead by reference to what he considered to be the law.

28. As to Promontoria's argument that the trial judge was correct to leave it to the judge at trial to determine whether the discovery sought was relevant at the point where accounts and enquiries as to the quantum of unjust enrichment is being considered, counsel for the appellant pointed out that no modular trial has been ordered – it is a unitary trial at which liability and quantum will fall to be determined. Thus even if the price paid by Promontoria is relevant only to a quantum issue, discovery should be ordered now. This argument was made without prejudice to the contention that the discovery sought was relevant to the liability issue.

Promontoria's submissions

29. Counsel for Promontoria argued that there was no clear error or injustice in the decision of the trial judge that would warrant this court interfering with the discretion exercised in the court below. It was argued that the discovery sought was not fundamentally required in order to contest the unjust enrichment claim. While price might be potentially irrelevant, this would only become clear on full argument, and it was therefore appropriate to leave it open to the trial judge to revisit the issue at trial. The discovery sought was not relevant or necessary for the determination of the issue – it could only be relevant to quantum.

30. Promontoria argued that its counterclaim is that the appellant was enriched by the settlement of the O'Leary Proceedings in the sum of €1.5M, and by value added to the Monvoy Lands – and that this is not enrichment by reference to any price paid by Promontoria to acquire the Facility Letter and security.

Counsel relied on the last piece of correspondence in the discovery process, the letter of 7 February 2020 from the appellant's solicitors to Promontoria's solicitors quoted fully earlier in this judgment in which they sought to insist on Category 13 discovery on the basis that it was relevant to "quantification of the unjust enrichment". Accordingly it was argued that the discovery sought was relevant only to the quantification issue and therefore the decision in the High Court, in which the trial judge at para. 31 contemplates the discovery being revisited at the accounts and enquiries stage of the trial, was correct. In essence, counsel argued that while the discovery sought might be relevant it was not necessary for the appellant to know the price paid in order to contest the counterclaim.

31. Counsel argued that under the test approved by the UK Supreme Court in *Bank of Cyprus*, it was for Promontoria to satisfy the court that the appellant had been unduly enriched, that this was at the expense of Promontoria and that the circumstances were as such to render it unjust for the appellant to retain the benefit received. It was argued that the discovery sought is not relevant or necessary for the three elements of the test, because they are matters which Promontoria as claimant

must establish. The fourth element of the test in *Bank of Cyprus* is whether there are any defences available to the appellant, such that he should not be obliged to disgorge benefits, such as, for example, a plea of *res judicata*. Such matters would, it was submitted, tend to be governed by public policy, and would not warrant the discovery sought. Counsel argued that it would be a very novel proposition if, simply because Promontoria acquired the Loan Facility and security for less than was lent by Anglo, it would give rise to a defence for an unjust enrichment claim; if it held good in the present case, it would potentially apply to the equity of redemption in all cases where debt and security has been acquired from a bank.

32. Counsel argued that the appellants submissions confused the transfer of value/benefit to the appellant with the "expense" of Promontoria. It was argued that the contours of the claim in unjust enrichment are the same whether it was made by Anglo/IBRC/NALM, or Promontoria, which acquired all lender's rights and liabilities. It was submitted that in an unjust enrichment claim the actual expense is not relevant and does not affect the key issue which is the "transfer of value" or benefit received "at the expense" of the lender. It was submitted that it was artificial to introduce the price of acquisition to the counterclaim. Counsel also relied on the fact that there is no plea in the Reply and Defence to Counterclaim that seeks to limit the value of any claim in unjust enrichment to the price paid, although counsel accepted that it was raised obliquely.

33. As to the trial judge not following the decision of Quinn J. in *Sheehy*, counsel argued that there was a difference in the underlying facts, that the issue of "necessity" was not central to that decision.

34. Finally, counsel argued that the mere fact that the discovered documentation might assist in the giving of legal advice to the appellant, or facilitate discussions between the parties, could not be a relevant consideration for the court in determining whether or not to order discovery. The appellant knows that the claim for unjust enrichment is for a sum of €1.5M, and it is for the appellant to advance any argument that may show the level of unjust enrichment to be less.

35. While the overriding question is whether this court should interfere with the exercise of discretion by the trial judge, the specific issues that arise are –

(i) is the category of discovery sought relevant;

(ii) if so, is the discovery necessary.

Relevance

36. There was no real dispute between the parties but that the test to be applied is that identified by Brett J in *Peruvian Guano,* set out above. Ryan P. in *O'Brien v. Red Flag Consulting Ltd* [2017] IECA 258, sets out at paragraph 21 sets out 12 "specific rules" distilled from the caselaw in relation to discovery, and the first two state simply:

> "1. The primary test is whether the documents are relevant to the issues in the legal proceedings between the parties. [*Stafford v Revenue Commissioners*]
>
> 2. Relevance is determined by reference to the pleadings. Order 31, r.12 specifies discovery of documents relating to any matter in question in the case. [*Hannon,* para,2]"

37. The unjust enrichment pleaded in the Counterclaim expressly relies on pleas that the appellant has benefitted "at the expense of Promontoria" (paragraph 37). The Reply and Defence to Counterclaim expressly denies that any benefit "was obtained at the expense of Promontoria" (paragraph 24) or that the appellant "has been unjustly enriched as alleged at the expense of Promontoria as alleged in paragraph 37" (paragraph 27), and pleads that "The Plaintiff will rely upon the failure of Promontoria to specify the sum of money which it is alleged to have lost as a result of the wrongs alleged" (paragraph 30).

38. Leaving aside for one moment legal debate as to what is required to prove unjust enrichment, the pleaded claim by Promontoria, which is disputed by the appellant, on its face puts in issue *the expense* incurred by Promontoria, and therefore makes relevant documentation disclosing information on the price paid by Promontoria to NALM for such rights and interest as were assigned

to it by loan sale, deed of novation and deed of transfer on 11 December, 2015. This alone *prima facie* entitles the appellant to discovery. The discovery sought is not dependant on any plea by the appellant which might be said to be manufactured in order to ground a claim for discovery.

39. Promontoria's answer to this, which was accepted by the trial judge, is to say that as a matter of law the price paid by Promontoria cannot be relevant to the claim of unjust enrichment because such a claim requires a focus on *the conscience* of the recipient of the money or any benefit received by him arising from the original lending. The appellant's response to this is that caselaw shows that to establish unjust enrichment requires that the unjust enrichment be obtained *at the expense of the claimant*, and further the remedy is equitable and requires consideration of the other factors that may have a bearing on the fairness and justice of the claim.

40. In my view the trial judge was wrong to attempt to resolve this issue of law by preferring Promontoria's legal argument at a discovery hearing, and in circumstances where it cannot be said that the law is clear or certain.

41. Claims of unjust enrichment vary greatly and are very fact dependant, and the court should be slow to postulate in advance of trial what evidence forming part of the matrix of facts will have no relevance to a decision which engages principles of equity and justice. This is particularly so in circumstances where our courts have yet to pronounce on unjust enrichment claims of the particular sort advanced in these proceedings by Promontoria viz. where there is a lending on security, and later acquisition of the debt and related security by the claimant at what may be assumed, for present purposes, to be below 'par value', and where a defence is raised that the underlying lending agreement and deeds of charge are invalid *and that the defendant did not receive the monies loaned*.

42. As I stated in *Promontoria (Aran) Ltd v Sheehy* [2020] IECA 104:

> "46. ….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 '….

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 solution…

48. I would stress, as did the trial judge, that while I find arguable [Mr.Sheehy'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 [Mr.Sheehy] to persuade the judge at full trial that the threshold is met to establish that the price paid by [Promontoria] is one of the factors that bears on the substantive issues."

43. While I accept that the three cases on unjust enrichment relied upon by Promontoria before the trial judge were not opened to Quinn J. or to this court in *Promontoria (Aran) Limited v. Sheehy,* that decision, and my judgment on appeal in this court, emphasised that in unjust enrichment cases the issue of whether an enrichment is unjust, and the issue whether there are other factors that militate against granting the remedy sought, engage potentially a wider range of facts.

44. Promontoria has not satisfied me in this appeal that there is good reason to depart from the views that I expressed in *Sheehy.* In my view the three cases referred to by the trial judge do not undermine the principle that the unjust enrichment must be *at the expense of* the claimant, or that equitable principles apply. In so far two of those cases identify 'the conscience' of the recipient of money or other benefit as the basis for unjust enrichment claims, it seems to me that it is at least arguable that this does no more than engage the equities, and that as a corollary the court must also consider any countervailing facts that may be relevant to the exercise of its equitable jurisdiction.

45. In *Bank of Ireland Mortgage Bank v. Murray and Murray* [2019] IEHC 234, where the defendants were husband and wife, joint loans and security were signed in 2003 and a further loan

was made in 2007. Only the husband defended, asserting that he did not execute the documentation. At trial Baker J found that the Bank had not satisfied her that Mr. Murray had signed the documentation and went on to consider the alternative claims against him for monies had and received/for unjust enrichment. She found that the loan monies had been paid into a joint account, the spending from which had benefitted both Mr. and Mrs. Murray.

46. Baker J. first outlines the law on 'Money had and received':

> "149. One of the earliest and much quoted formulations of the principle that money received at the expense of another is to be repaid created 'by the ties of natural justice and equity' is that of Mansfield L.J. in *Moses v MacFerlan* (1760) 2 Burrow 1005, where he described the cause of action as being one 'to recover back money, which not ought in justice to be kept', and as an action in equity that acted upon the conscience of a person who wrongly receives money at the expense of another.
>
> 150. The action is now seen also as a claim in common law, and Goff L.J. described the action for monies had and received in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, at p. 683, as a personal claim in restitution at common law, founded on the principle of unjust enrichment.
>
> 151. The judgment of the House of Lords in *Lipkin v Karpnale* [1991] 2AC 548 is instructive as it firmly roots the claim in unjust enrichment where Lord Goff set out the matter, at p. 572: '[I]t appears that in these cases the action for money had and received is not usually founded upon any wrong by the third party, such as conversion; nor is it said to be a case of waiver of tort. It is founded simply on the fact that, as Lord Mansfield said, the third party cannot in conscience retain the money - or, as we say nowadays, for the third party to retain the money would result in his unjust enrichment at the expense of the owner of the money.'"

47. As Baker J observed *Moses v Macferlan* was expressly approved by the Supreme Court in *East Cork Foods Ltd v O'Dwyer Steel Co. Ltd* [1978] 1 IR 103 and re-affirmed in *Murphy v Attorney General* [1982] IR 241[1]. Baker J proceeded:

> "153. Henchy J. also expressed the proposition that it may not always matter that the claim is to be regarded as sounding in equity or at law:
>
> 'Whether the action be framed at common law for money had and received or (as here) in equity for an account of money held as a constructive trustee for the plaintiffs, I would hold that, in the absence of countervailing circumstances (to which I shall presently refer), such money may be recovered'.
>
> 154. It does not matter for the purpose of the present case whether the action is one in equity or at common law as the defendants do not raise any equitable principles in defence of the claim and, as there is no question of priority, it is not necessary to consider the question in the context of any proprietary claim."

Three aspects of this are of note. Firstly the courts will be live to identifying 'countervailing circumstances' that may militate against providing a remedy. In this respect it must at least be open to the appellants to rely on the price at which Promontoria acquired the connection and to argue that as a countervailing circumstance.

48. Secondly, unlike the appellant in the present case, the Murrays did not raise any equitable principles in defence of the claim.

49. Thirdly, no issue arose in that case as to whether the unjust enrichment was *at the expense* of the Bank – the payment of loan monies totalling €200,000 by the Bank into the Murrays' joint

[1]Although in *Corporation of Dublin v. Building and Allied Trade Union* [1996] 1 I.R. 468, at page 485 Keane J., as had other judges before him, disagreed with the use of the doctrine in that case to set aside a court decree, stating: "However, while that statement of the law [in *Moses v. Macferlan*] was the genesis of the law of unjust enrichment as it ultimately became, there has been little or no support for the view of the court in that case that the 'ties of natural justice and equity' justified the setting aside of the decree of a court of competent jurisdiction."

account, from which they were each "shown to have had benefit", was "clear and uncontroverted evidence" (paragraph 159).

50. Later in her judgment Baker J briefly addresses 'Unjust enrichment', and at paragraph 158 refers to four constituent elements identified by Keane J in *Corporation of Dublin v. Building and Allied Trade Union* [1996] 1 I.R. 468 (*"BATU"),* at p.483 as –

> "(i) the enrichment of the defendant;
>
> (ii) at the plaintiff's expense;
>
> (iii) in circumstances in which the law requires restitution (the 'unjustness' of the enrichment); and
>
> (iv) the absence of defences or other policies to deny restitution".

This makes plain that there is a focus in the second element on the "expense" of the claimant, and also on the broader question of justice.

51. The trial judge next referred to *HKR Middle East Architects LC & Ors. v English* [2019] IEHC 306. But there McDonald J also relied on the authority of *BATU* and he cites with approval a summary by Barton J. in *Vanguard Auto Finance Ltd v. Browne* [2014] IEHC 465, at pp. 22-23 of the circumstances in which an unjust enrichment action may succeed, noting –

> "395. On p.24 of his judgment, Barton J. identified that there are two essential preconditions to the unjust enrichment remedy. There are :-
>
> (a) enrichment of the defendant at the expense of the plaintiff; and
>
> (b) that the enrichment in question is unjust."

Thus the requirement of expense of the plaintiff remains relevant.

It should also be noted that the reason McDonald J in that case gave an order for the taking of a consequential account and enquiry was that HKRME, for which the court held that certain monies were held on trust (and at whose 'expense' monies had been paid to a Guernsey account in the name

of Sunvit International Ltd, a BVI company controlled by the defendant), had not yet made or proven a claim in the proceedings.

52. As we have seen the trial judge relies on *Bank of Cyprus UK Ltd v Menelaou* [2015] 2 All ER 913, in which Clarke LJ stated –

> "23. According to Goff & Jones on *The law of Unjust Enrichment* (8th edn, 2011), para 6-01, the requirement that the unjust enrichment of the defendant must have been at the expense of the claimant 'reflects the principle that the law of unjust enrichment is not concerned with the disgorgement of gains made by defendants, nor with the compensation of losses sustained by claimants, but with the reversal of transfers of values between claimants and defendants'. I agree."

53. The trial judge considered this principle to be decisive, and that the appellant "should not be in a position where the value of the [Monvoy] lands in his ownership are considerably greater to him at the expense of the bank…or…Promontoria, that it would have been but for the impugned transaction (i.e. the allegedly force mortgage)." He considered the appellant was allegedly enriched in two ways, firstly in that if the mortgages are void he becomes owner of the Monvoy Lands security-free, and secondly by reason of the settlement of €1.5 million. He considered "the possible windfall" to be at the expense of Promontoria because if the Facility Letter and Deeds of Mortgage are held to be void, "Promontoria loses valuable rights pursuant to those agreements". This in his view (paragraph 25) was Promontoria's "expense", not the purchase price paid for the facility and security.

54. The facts in *Bank of Cyprus* concerned loans made by that bank directly to the defendant's parents, who sold the house that was security and 'downsized' to house that they put in the defendant's name – subject to a charge in the bank's favour that was found to be void. The bank was held to be entitled to be subrogated to the unpaid purchaser's lien on the house to satisfy its claim for unjust enrichment. Thus there was a close nexus between the lender and the ultimate beneficiary of the loans. The facts were materially different to the present case where Promontoria acquired the

connection and the price paid by Promontoria is (presumed to be) below the par value of the debt, and where the appellant denies receipt of the monies lent under the Facility Letter. A further material difference is that the Monvoy Lands were not acquired using funds drawn down under the Facility Letter – they were purchased by appellant from his own resources in 1989. It follows that even applying the principle of "reversal of transfers of value between claimants" to the present case, arguably there would be a different outcome to that envisaged by the trial judge.

55. While the principle enunciated in *Bank of Cyprus* might be persuasive, and it is one that might be applied in an Irish court, it represents only one view of how this case might be determined. In my view the trial judge erred in applying this principle to determine, to the extent that he did for the purposes of a discovery application, that the retention by the appellant of benefit to the Monvoy Lands and the €1.5 million "*would be inequitable"* and "*unconscionable*", and that "*it would not be inequitable*" for Promontoria to become entitled to the Monvoy Lands and the sum of €1.5 million "*as a result of an astute commercial decision made by the purchaser of the Bank's loans*", and to refuse discovery on that basis (see paragraphs 27-29 quoted earlier). An alternative view would be that "transfers of value" at issue must take into account what the claimant, Promontoria, actually paid to acquire the connection, particularly in light of its knowledge at the time of acquisition, and that it would be contrary to the principle enunciated in Goff & Jones, or inequitable, to order the appellant to "disgorge gains" exceeding the purchase price in all the circumstances.

56. Further it will also be recalled that, *per* Keane J. in *BATU,* the fourth element that requires consideration in a claim for unjust enrichment, is "whether there are any reasons why, even where it can be regarded as 'unjust', restitution should nevertheless be denied to the plaintiff" (p.483), and he cited with approval Henchy J. in *Murphy v The Attorney General* [1982] IR 241 "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 course of argument counsel for Promontoria conceded that the

discovery sought conceivably arises in this context, as a defence, while arguing that this would be a novel proposition.

Necessary

57. In *O'Brien* the Ryan P distilled the following principles that are of relevance to this issue at para 21:

> "7. Although relevance is the primary criterion, and when established in respect of documents it will follow in most cases that their discovery is necessary for the fair disposal of those issues, the question whether discovery is necessary for 'disposing fairly of the cause or matter' cannot be ignored. [*Cooper Flynn v. Radio Telefís Éireann* [2000] 3 IR 344]
>
> 8. The court should consider the necessity for the documents having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. [*Ryanair plc v Aer Rianta cpt* [2003] 4 IR 264],
>
> 12. If a party objects to discovery, the Court may reserve the question until a disputed issue in the case has first been decided if it is satisfied that the right to the discovery depends on the decision or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined first and may order accordingly. [*McCabe v Ireland* [1999] 4 IR 151, page 156]"

58. We are not concerned here with "the burden" of discovery, and hence the principles set out at 9 (proportionality in the context of extent/volume of documents), 10 (a too-wide ranging discovery becoming an obstacle to fair disposal), and 11 (oppressive discovery), have no application. The starting point is therefore that because the category 13 documents are relevant, their discovery is necessary for the fair disposal of the matter.

59. However Promontoria rely on principle 12. The essence of Promontoria's resistance is that the legal issue as to whether it is entitled to succeed in its claim to unjust enrichment can and should be

determined first, that knowing the price paid is not 'necessary' for the appellant to defend that issue, and that only if Promontoria succeeds might the discovery be ordered *if* the trial judge considers it is in fact necessary to know the purchase price at that stage when quantifying the claim. This indeed is in line with paragraph 31 of the judgment in the High Court.

60. I am far from satisfied, for the purposes of this appeal, that the purchase price is relevant and necessary only to the quantification of the claim for unjust enrichment, if that claim succeeds. In my view it is relevant and necessary to know the price information in the context of the requirement that the Promontoria show that the unjust enrichment was at *its expense* as claimant. I regard the price paid as more than a mere detail, and, potentially a matter that, as argued by counsel for the appellant, "goes to the heart of the unjust enrichment claim". I also accept the submission that it would not be conducive to a fair disposal of the matter if the appellant (and his legal team) were required to go to trial without knowing the price paid by Promontoria to acquire the loan and security.

61. While I do accept that the reason given in correspondence for requiring Category 13 refers to the quantification of Promontoria's alleged loss being "limited to the purchase price", this sentence is "without prejudice" to the earlier part of the reason that refers to Promontoria's counterclaim for "equitable compensation" and that fact that this claim is denied by the plaintiff. It cannot therefore be said that the application for Category 13 is constrained by the 'quantification' reason given. Nor can the repetition of this in paragraph 20 of the grounding affidavit of Mr. McNulty, taken in isolation, be said to limit reasons, since the reasons given in correspondence are quoted in full in paragraph 17, and paragraph 21 refers to the 'expense' of Promontoria, and this is said by Mr. McNulty, in paragraph 22 to be one of the issues that fall to be determined at trial.

62. I also agree with the submission that, as matters stand, this is a unitary trial and the High Court will be required to address all issues of liability and quantum, and the parties will be required to prepare accordingly. Unlike the Judgment Proceedings, where Promontoria did seek a trial on a preliminary issue (as to whether the security held by Promontoria ranks in priority to any claims/rights

of the appellant in Monvoy Lands – which application was refused by Twomey J by order dated 20 April 2018) there has been no application for the trial of a preliminary issue, or for a modular trial, in these proceedings.

63. In *Hartside v Heineken Ireland Ltd* [2010] IEHC 3 Clark J. (as he then was) addressed the situation where it is suggested that there is no legitimate basis upon which issue to which the documents of which discovery is sought might be relevant can properly arise. He stated at para 5.5:

> "It is, of course, clear that such questions could, in theory, arise in virtually any case. At its simplest almost all cases involve a series of sequential propositions which need to be established in order that the plaintiff concerned might succeed. Even the most basic case will involve questions of liability, causation, and loss. Questions of loss, for example, only arise when liability and causation has been established. Thus, there is a sense in which materials relevant only to the calculation of loss will only be relevant in the proceedings if the plaintiff establishes liability and a causal link between the alleged loss and the cause of action. It could not, of course, follow that it would be appropriate for the court to determine, in the words of McCracken J. in *Hannon*, "as a matter of probability" whether the document is relevant to the issue to be tried on the basis of considering whether, as a matter of probability, the plaintiff is going to get to the issue of loss by reason of surmounting the obstacle of liability and causation. Rather the proper approach to the application of the test identified by McCracken J. is that the issue of loss is an issue in the case, albeit one which may not need to be determined in the event that other issues go a particular way. Once it is probable that a document would be relevant to the calculation of loss, then its discovery must be directed (in the absence of any other good reason for not so doing) even though there might well be a risk that loss will never come to be assessed by the court at all. Loss is an issue because it is pleaded and denied. Whether it may be reached as a consequence of decisions on other issues is neither here nor there in the context of discovery. To take any other view, would be to invite the court to

attempt to resolve potentially contested issues at the preliminary stage of a discovery application. The relevant general proposition must, therefore, be that, provided that an allegation is properly made on the pleadings, then documents which are probably relevant to the resolution of that issue should be discovered even though that issue may only arise in the event that other matters are resolved in favour of the party concerned…."

64. In this court in *Mythen Construction v Allianz plc* [2020] IECA 148 Collins J. cited *Hartside* with approval, stating:

"29. In my view, the approach taken in *Hartside* is clearly correct as a matter of general principle. As Clarke J observed, to 'take any other view, would be to invite the court to attempt to resolve potentially contested issues at the preliminary stage of a discovery application.' That is not the function of the court hearing an application for discovery and if the court had to engage in such issues as a necessary preliminary to applying the established discovery rules, the discovery jurisdiction would rapidly become practically unworkable. Applications for discovery would become forums for debating and determining complex legal issues wholly unsuited for resolution within the proper parameters of such applications."

65. Counsel sought to distinguish the present case on the basis that Promontoria has pleaded a value of €1.5 million in respect of the unjust enrichment claim. One difficulty with this is that Promontoria also maintains a claim that the Loan Facility monies were used to increase the value of the Monvoy Lands with the result that the appellant has received a further benefit from the advance "which he is obliged to disgorge", and in aid of this "all consequential and necessary accounts, directions and enquiries" are sought. These claims have not been expressly waived. It is also far from clear from the exchange of particulars that Promontoria is in fact limiting its claim to the insurance monies received by the appellant in the O'Leary Proceedings, or the amount of those monies, a large part of which may have gone on paying the appellant's legal costs in those proceedings. On one reading

Promontoria in its replies to particulars is only providing particulars of what it asserts is its 'expense' for the purposes of establishing an unjust enrichment claim.

66. Apart from that, all loss by Promontoria is denied by the appellant in its Reply and Defence to Counterclaim, and it is made expressly clear from the Notice for Further and Better Particulars of 25 October 2019 that "the quantum of unjust enrichment at the expense of Promontoria corresponds with the cost of acquisition of the Loan Facility and related security, being Promontoria's actual expense. The Plaintiff therefore requires particulars of that sum." In these circumstances the dicta in *Hartside* and *Mythen* do have application, and the trial judge, and this court, should not attempt to resolve potentially contested issues at the preliminary stage of a discovery application.

Conclusion

67. While the decision on whether to grant or refuse discovery involves the exercise of discretion by the trial judge, with which this court will generally be slow to intervene, I am of the view that the trial judge in this instance erred in his approach to relevance in preferring one view of the law, where that view is contested and an alternative view was put forward will be argued before the court of trial. For this reason this court can intervene, and should do so on the grounds that the discovery sought is relevant and necessary for the fair disposal of the action.

68. In my view the Category 13 discovery is relevant and necessary for the purpose of contesting the counterclaim for unjust enrichment in circumstances where it is arguable that broader equitable principles are engaged, and where a wide spectrum of evidence is likely to be relevant to consideration and determination of the various elements of such a claim.

69. I would therefore allow this appeal and grant the discovery sought in Category 13.

Confidentiality

70. While it was submitted that the acquisition price information was confidential, Promontoria accepted that there was no evidence before the court that it was confidential or commercially

sensitive. Accordingly there is no basis for adopting the solution adopted by Clarke J. in *Hartside* where he directed that the affidavit of discovery be sworn and the documents collated, to be available to be produced when, and if, the trial judge directs. Counsel relied on confidentiality only to restrict dissemination of the price information in the event that the court should order discovery.

71. My understanding of the position adopted by counsel of the appellant was that if discovery was ordered it would not object to restrictions on the dissemination and inspection of the relevant documents/information.

72. In these circumstances, I would order that the inspection of the documents should be limited to (1) the appellant (2) his solicitor having conduct of the case and (3) his counsel, only, without further leave of the High Court. Further, undertakings in writing must be given by those parties not to use or quote the price acquisition information in open court or in any documents or electronic transmissions (other than secure *inter partes* correspondence or correspondence between solicitor and counsel), save with redaction agreed *inter partes* or with leave of the High Court. In the case of the appellant this undertaking must be given on oath in an affidavit. As these proceedings will be heard in open court, this restriction and this judgment will not limit the appellant from relying fully on the relevant information at further hearings, or at trial, subject to further direction of the High Court.

73. The undertakings just mentioned should be filed by the appellant's solicitor in this court within 14 days of electronic delivery of this judgment, and copied to the solicitors for Promontoria.

74. Thereafter the Category 13 discovery should be made by Promontoria within 4 weeks.

Costs

75. As this judgment is being delivered electronically I will indicate the costs orders that I would propose making.

76. At issue are the costs in the High Court, which were reserved, and the costs of this appeal.

77. O.99 r.2(3) provides:

"(3) The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."

78. Section 169 of the Legal Services Regulation Act, 2015 provides, so far as relevant –

"(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, the conduct of the proceedings by the parties, including –

(a)…

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

…"

79. The reservation of costs in respect of a discovery application is an order that is frequently made where there has been engagement between the parties, and issues that are contentious and properly raised require adjudication. Presumably that is why costs were reserved in the High Court, even though Promontoria was successful there.

80. As to the appeal, while it can be said that the appellant was "entirely successful", within the meaning of that term in s.169 of the Legal Services Regulation Act, 2015, in my view there is good reason within the meaning of (1)(b) as to why the court should not award the appellant his costs.

81. There remain real issues as to the relevance of the purchase price paid by Promontoria. Those issues will only be determined following a full trial in the High Court. Just as it was reasonable for the appellant to pursue discovery in the High Court, so it was reasonable for Promontoria to contest the issue before this court.

82. For these reasons I would propose not to interfere with the High Court order reserving costs, and I would propose to reserve the costs of this appeal to the trial judge. Should any party wish to

seek a different order as to costs then they should so indicate in writing to the Court of Appeal office within 14 days of the electronic delivery of this judgment, and in that event a short costs hearing will be arranged. Any party seeking such a hearing should be aware that in the event that their application is unsuccessful they are likely to be fixed with the costs of such further hearing.

83. Collins J. and Pilkington J. have indicated that they are in agreement with this judgment and the said orders.