

**THE HIGH COURT**

[2021] IEHC 739

**[2016/9072 P]**

**BETWEEN**

**KEN TYRRELL**

**PLAINTIFF**

**AND**

**DAVID WRIGHT**

**AND**

**ROPE WALK CAR PARK LTD**

**AND**

**LAUNCESTON PROPERTY FIANCE LIMITED DESIGNATED ACTVITY COMPANY**

**AND**

**PEPPER FINANCE CORPORATION DESIGNATED ACTIVITY COMPANY**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Brian O'Moore delivered on the 26th day of November, 2021.**

1. Mr. Wright seeks discovery in respect of four disputed categories. The balance of the discovery sought by him has either been agreed, or not pressed by him.
2. Before dealing with the four categories, I should deal with a preliminary objection by counsel for the Plaintiff, (Mr. Tyrrell), and the Counterclaim Defendants, which I will describe respectively as Launceston and Pepper. The objection is that Mr. Wright agreed the discovery categories on the 14th of May 2021, and cannot now seek discovery above and beyond the agreed terms. I do not accept that submission. Mr. Wright made it clear in his email of the 14th of May that, while he was prepared to accept the discovery offered, he also wanted three further categories of discovery to be provided; these three further categories were not ultimately agreed. While Mr. Wright did not (in his email of the 14th of May) state that nothing was agreed until everything was agreed, the meaning I take from the correspondence is that he was reserving the right to issue a motion seeking discovery unless a comprehensive agreement was reached on all categories to the satisfaction of all parties. This did not occur.

**A. CATEGORY 1**

"Any or all documents or correspondence including but not limited to emails, letters, text messages, internal memos, internal notes, file notes, computerised records and/or any other records digital or otherwise, regarding the facility letter dated 3 November 2006 from Anglo Irish Bank Corporation Plc, the Mortgage registered in the Registry of Deeds on the 26 March 2007, a further loan facility letter dated 23 September 2008, the Loan Sale Deed dated 28 March 2014, the Deed of Conveyance and Assignment dated 23 May 2014 and the Deed of Transfer dated 23 May 2014. Including any documents relating to the transfer or appointment of the Second Named Counterclaimed Defendant.

**Loan Sale Deed between Launceston Property Finance Designated Activity Company and Pepper Finance Corporation Designated Activity [Company] in August 2020.**

**REASON**

The First Named Defendant seeks all the documentation in relation to his banking facilities with the Counterclaimed Defendants including the transfer to the First Named Counterclaimed Defendant, the appointment of the Second Named Counterclaimed

Defendant so as to establish beyond doubt that the liability that is being claimed by the Plaintiff is the true and complete liability of the First Named Defendant alleged owes and that each and all the terms are accurately reflected in the documentation relied upon the Plaintiff. *The recent revelations in filed Affidavits and by a Forensic Accountant of the information regarding the ownership of the loans has cast doubt on the precise ownership of the loans and who may or may not be entitled to pursue an action against me. Now more than ever it is of vital important that I see full versions of the documents that are being relied upon by the Plaintiff to pursue his claim. On a detailed examination of bank statements it would appear that the loans could have transferred to Pepper Corporation Finance Designated Activity Company in or around July 2014 which requires further clarification.*"

3. I will not order this category of discovery. In my judgment on Mr. Tyrrell's application to strike out Mr. Wright's original Defence and Counterclaim, I found that the transfer of Mr. Wright's loans from Anglo Irish Bank to Launceston was beyond challenge except on very limited grounds which do not apply here. With regard to the position of Pepper, either as Launceston's servicing agent or as assignee of Launceston's interest in Mr. Wright's loans, this is not the subject of any controversy in the pleadings as they currently stand. I also note that Mr. Wright will in any event receive redacted versions "of the relevant documents by which the legal interest in the loans (and formerly the security) transferred from Launceston to Pepper" (letter from Hayes, solicitors for Mr. Tyrrell, Launceston and Pepper, dated the 11th of June 2021).

**B. CATEGORY 3**

"Any or all documents or correspondence, including but not limited to emails, letters, text messages, internal memos, internal notes, file notes, computerised records and/or any other records digital or otherwise, of any communication between the Second Named Counterclaimed Defendant and any third parties in relation to this action. In particular the following third parties Arrow Asset Management, Robert Kehoe, Nollaig Murphy, Douglas Taylor, Dempsey Solicitors, MCR Group of Companies, Hunter Estate Agents, Stephen McCarthy, BidX1, Turley Estate Agents, REA Estate Agents, Ktech Security, PricewaterhouseCoopers, the Revenue Commissioners and anyone else engaged to investigate the First Named Defendant.

**REASON**

The First Named Defendant requires all the documentation to establish his counterclaim that the properties were sold at below value. The First Named Defendant believes that the third parties listed have valuable information in respect of how and why the properties were sold at the price that was received for them. That establishes what offers were made for the properties and that the properties were properly marketed and that a realistic price was obtained for them which goes to the core of the First Named Defendant's counterclaim that he suffered a substantial loss of rent, income and properties were sold at a gross undervalue. *I do not believe there is an overburden on the parties to disclose how and who was involved with the sale process of the properties. For example, Launceston Property Finance DAC (in Voluntary Liquidation) would not have had the corporate capacity to sell the properties if it was in voluntary liquidation. Furthermore, it*

*is necessary to establish who is giving instructions to the various parties and at what time.”*

4. This category is unreasonably broad. The only issue in the pleadings which might justify some version of this category is the claim that certain properties were sold at an undervalue by Mr. Tyrrell. That claim is itself sparingly pleaded. It is to be found, just about, at certain paragraphs of the Counterclaim and, more fully, in the reliefs where the undervalue asserted by Mr. Wright is identified. It is important to note that Mr. Wright’s claim in this regard appears to rest on a disparity between the price achieved for each property and an ‘adjusted value determined from CSO figures’ for the relevant year. There is no allegation, for example, that an inadequate marketing campaign was mounted in respect of any of the properties, thereby resulting in an unsatisfactory price. While Mr. Wright did (in the reasons set out above and in his oral submissions on the motion) complain about the lack of a prominent promotional campaign, this is not part of the pleaded case at all.
5. There is one type of document relevant to the claim as pleaded which it is necessary for Mr. Wright to obtain on discovery in order to allow him to advance his claim and/or damage the defence of his opponents. This category is made up of all valuations of the relevant properties (or any of them) obtained by the defendants to the Counterclaim. However, despite the fact that such documents could fall within Category 3, they are to be discovered under Category 10.
6. I therefore propose to make no Order in respect of this category.

**C. CATEGORY 6.**

“Any or all documents or correspondence, including but not limited to emails, letters, text messages, internal memos, internal notes, file notes, computerised records and/or any other records digital or otherwise of the circumstances of the appointment of the Plaintiff as Receiver on the 22 August 2016.

**REASON**

It is important that an accurate and complete record is established on the appointment of the Plaintiff is established beyond doubt that it was in accordance with the terms of the original mortgage. The Category was refused. *I disagree with the statement that this category can be refused on the grounds that is a question of law. This issue is fundamental and goes to the core of the dispute between the parties. If the Plaintiff has not been validly appointed then any action he has taken cannot be substantiated and therefore this case cannot stand. If the Plaintiff cannot provide the document from which he derives his powers then how can he take any action.”*

7. Counsel for Mr. Tyrrell and Launceston submits that the issue of the Receiver's appointment is purely a question of law, and therefore no discovery is required. Mr. Wright, as will be seen from the reasons for which he seeks this category, considers discovery of these documents essential for his case. Among the further reasons urged by him in his oral submission is the argument that any due diligence carried out by the

receiver (or those appointing him) into his appointment is relevant and necessary in order for Mr. Wright to be able to advance his case.

8. It is worth remembering just how narrow the claim in respect of Mr. Tyrrell's appointment actually is. At paragraphs 16 and 17 of his Amended Defence, Mr. Wright pleads:-

"16. It is denied that by deed of appointment dated 22 August 2016 (the 'Deed of Appointment'), and pursuant to the terms of the Mortgage Launceston appointed the Plaintiff as receiver and manager of the assets referred to, comprised in and charge by the Mortgage including the Swan Lake Properties and Summer Cove.

17. It is denied that under the terms of the Mortgage or any mortgage that Launceston was entitled to appoint the Plaintiff as receiver and manager and the Plaintiff is put on full proof that Launceston was so entitled to appoint him as receiver."

9. In his Counterclaim, Mr. Wright further pleads at paragraph 36:-

"The Receiver and Manager was appointed under a mortgage deed which did not exist and could not have been entered into by the First Named Defendant as a result. Therefore, the Receiver and Manager was not appointed under any contract and would have been a trespasser in respect of the properties."

10. In Replies to Particulars, Mr. Wright expanded on this plea as follows (at reply 5):-

"No valid deed of Mortgage has ever been produced to enable the valid appointment of a Receiver."

11. The documents relevant to these pleas are (i) any deed of Mortgage under which Mr. Tyrrell was purportedly appointed as Receiver and Manager and (ii) documents evidencing Mr. Tyrrell's purported appointment as Receiver and Manager. While any due diligence carried out in respect of Mr. Tyrrell's appointment (and, in particular, its legality) may have some relevance to the issues in these proceedings, I do not believe that access to such documents is necessary to enable Mr. Wright to mount his defence and counterclaim. The due diligence exercise is likely to be one covered by privilege (not in itself a reason to refuse discovery, but a very clear reason to refuse inspection of the documents themselves). Much more importantly, at most the due diligence will have involved a legal analysis of the validity of Mr. Tyrrell's appointment. Whatever conclusion such analysis reached, it cannot in any way influence the Court's decision on the relevant issue in the case.

12. I will therefore order discovery of the two classes of documents listed in the preceding paragraph. Mr. Wright may well have some or all of these documents, but in the circumstances of this case I will direct that they be formally discovered to him.

**D. CATEGORY 8**

"Any or all documents or correspondence, including but not limited to emails, letters, text messages, internal memos, internal notes, file notes, computerised records and/or any

other records digital or otherwise regarding the liquidation of the First Named Counterclaimed Defendant.

**REASON**

It only [came] to the attention of the First Named Defendant that the First Named Counterclaimed defendant had gone into the voluntary liquidation. The effect of the liquidation has to be established if the Plaintiff can continue in the capacity now that a Liquidator has been appointed. What authority he has to continue with the proceedings and if he has the *locus standi* to continue to pursue this action. *The relevance is that it only came to light at the very last minute and has a hearing on who gave instructions at certain stages of the proceedings. If the First Named Counterclaimed Defendant could or had the ability to give any instructions at various stages of the proceedings."*

13. This category is not required by any aspect of the case pleaded by any of the parties. For that reason alone, I will refuse the discovery sought. I should add that, apart altogether from the critical issue of relevance, I would have refused the category because it is simply unimaginably broad.

**E. CONCLUSION**

14. I have granted Mr. Wright limited discovery in respect of the disputed categories. I will hear the parties as to the time to be given for making discovery and the question of costs on the 30th of November at 10am. The hearing will be a remote one. Of course, if the parties can agree on these matters I can be informed of this by email and the hearing need not occur.
15. I should say that I appreciate that Mr. Wright is agitated by a range of concerns about how others involved in this saga have behaved. My decision on the disputed discovery is in large measure made because of the limits of the pleaded case, which necessarily governs the discovery that any court will order. This does not mean that Mr. Wright's other concerns are without foundation. To take one example, his claim that an accountancy firm misrepresented itself to Revenue as acting for his partner (Ms. Moore) in order to access her tax returns is a disturbing one. However, this is not an issue in these proceedings. It may well be something that Mr. Wright (or Ms. Moore) will want to take up with the appropriate professional body, if they are so inclined and have the evidence to do so.