

**THE HIGH COURT**

[2021] IEHC 793  
[No. 2016/11041 P.]

**BETWEEN**

**CORNELIUS MCFADDEN**

**PLAINTIFF**

**AND**

**PENTIRE PROPERTY FINANCE DAC AND TOM KAVANAGH**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Reynolds delivered on the 16th day of December 2021**

**Introduction**

1. This is the plaintiff's application for discovery of certain specified documents as set out in the notice of motion.
2. The plaintiff has acknowledged on affidavit that he has already been furnished with most of the documents but is now seeking production, inspection and unredaction of same.
3. In the circumstances, the application is not properly speaking an application for discovery but in fact one that seeks production, inspection and unredaction of specified documents.

**Background**

4. By notice of motion dated 10th April 2018, the plaintiff initially sought discovery of the same documents which are at issue in the within application. That motion was adjourned on various occasions as it was travelling with a motion issued by the defendants seeking further and better particulars of the plaintiff's claim. Ultimately the application was struck out on 12 November 2018 for non-attendance by the plaintiff. However, in advance of the motion being struck out it is common case that the defendants' solicitor had provided the plaintiff with substantial documentation relevant to the application.
5. At the hearing of the within application, the plaintiff's principal complaint was that portions of the documents furnished are in redacted form. He now seeks an order for the production and inspection of unredacted documents and/or an order that unredacted copies of same be provided in circumstances where he contends that the documentation furnished is "deficient".

**The proceedings**

6. The properties at issue in the within proceedings were provided as security by way of a mortgage deed dated 3rd December, 2003 made between the plaintiff and Theresa McFadden of the one part and Bank of Scotland (Ireland) Limited of the other part (the 'security document'). The principal assertion made by the plaintiff in his statement of claim is as against Bank of Scotland (Ireland) Limited in circumstances where he contends that the security documentation was not completed in accordance with law and alleges as follows: -

*"Due to the actions of the bank at the time of the loan offer and mortgage the security documents were not completed in accordance with law such that it provided for a binding agreement with Bank of Scotland (Ireland) Limited nonetheless on the 20th March, 2015 Cornelius and Theresa McFadden were*

*notified that Bank of Scotland (Ireland) Limited had agreed to sell 'amounts owing in respect of facilities, facility letters, guarantees, security documents relating to the facilities to Pentire Property Finance Limited'.*

*It was further stated that the 'sale' would occur on the 20th April, 2015 and 'from the date of Sale Date, amounts owing in respect of the facilities will be owed to the purchaser and the Facility documents will be with the purchaser'. Further it was claimed that 'the Purchaser had appointed Pepper Finance Corporation (Ireland) Limited to provide portfolio and asset management services on its behalf and therefore would contact Cornelius and Theresa McFadden in due course.'*

7. The defendants deny that the security documents were procured or completed in breach or contravention of law, including all applicable statutory provisions whether under the Asset Covered Securities Act 2001, the Land and Conveyancing Law Reform Act 2009 or otherwise.
8. In addition, the plaintiff claims *inter alia* that the first named defendant is a stranger to the agreements between the plaintiff and Bank of Scotland (Ireland) Limited and is not privy to those agreements.

**The test to be applied**

9. Order 31, rule 18, provides the legal test that an applicant must meet in applications of this nature.

10. Order 31, rule 18 (2) states: -

*"An order shall not be made under this rule if and insofar as the Court shall be of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs".*

11. In considering the application, I must therefore determine whether the production and inspection of unredacted documentation is necessary to dispose fairly of the cause or matter.
12. I now turn to the individual documents at issue in the application, itemised as (a) to (f) on the face of the notice of motion.
13. At the outset, it is acknowledged by the plaintiff that he has already been furnished with documents (a) to (e) but seeks an order directing that unredacted copies be furnished to him.
14. In respect of item (f), namely "*Copy Supporting Power of Attorney Document for Form 56*", it is somewhat unclear what is being sought in this regard. However, it is notable that the plaintiff has been furnished with a copy of the relevant Form 56 which was filed in the Land Registry in relation to the sale of the property. The plaintiff, as a third party to the transaction in question, has no entitlement to seek to look behind the authority of the person(s) who executed the relevant Form 56. The Land Registry accepted the Form 56

filed on behalf of Pentire in 2015 and registered Pentire as the owner of the charges registered as burdens on the relevant folios.

15. There can be no issue but that the Register of Titles is conclusive evidence as to the title of the owner to land appearing on the Register and of any right, privilege, appurtenance or burden as appearing thereon – save in limited circumstances which do not apply in the within proceedings.
16. Turning then to the plaintiff's contention that certain documents have been furnished to him in redacted form and are therefore "deficient", it is notable that he has failed to identify any basis for this claim nor indeed has he claimed any prejudice arising from same.
17. His initial discovery application was essentially to seek evidence of a transfer of his loans and related security from Bank of Ireland Plc to the first named defendant.
18. Having been furnished with that documentation, he now takes issue with some of the terms and definitions contained in the documents and further seeks unredacted copies of same.
19. Firstly, I am satisfied that it was necessary to redact parts of the Purchase Deed, Deed of Novation, and the Deed of Assignment for reasons of commercial sensitivity and customer confidentiality.
20. In *Everyday Finance Designated Activity Company and Enda Woods and Ciaran McNamara* [2019] IEHC 605, McDonald J. in dealing with a similar application summarised the approach to be taken as follows:

*"... it seems to me that it is necessary in the interests of disposing fairly of that issue that the Defendants should see the relevant parts of those deeds which evidence the transfer of their loans and security from Allied Irish Banks to the Plaintiff. However, the cases show that the Courts have consistently taken the view that it is only those provisions evidencing the assignment of the relevant loans and the security which are relevant in this context and that it is reasonable for the balance of the documents to be redacted."*

21. McDonald J. proceeded to quote from a decision of Noonan J. in *Launceston Property Finance v. Walls* [2018] IEHC 610 where at para. 27 he states:

*"It is by now well settled that in claims of this nature involving loan portfolio sales, it is established and accepted that plaintiffs are entitled to redact documents for reasons of commercial sensitivity and privacy rights of third parties."*

22. The plaintiff in the within application has stated that he wishes to see more of the documents by way of unredaction but has failed to identify why this is necessary save and except for the bald assertion that it will serve to assist him in the "proper presentation of his case". Clearly the onus rests on the party seeking inspection to satisfy the court that

the order is required for the fair disposal of the matters at issue in the proceedings. I am satisfied the plaintiff has failed to discharge that onus of proof.

23. Whilst I acknowledge that the plaintiff has taken issue with the contents and provisions of some of the documents, those arguments are matters to more properly raised at the hearing of the proceedings.
24. In all the circumstances, I am satisfied that this is a classic case of the plaintiff seeking relief to effectively enable him to carry out a "fishing expedition" to ascertain whether he may have a cause of action and must therefore refuse the application for discovery, inspection, production, unredaction or otherwise.