

Approved

THE HIGH COURT

[2024] IEHC 586

[Record No. 2022/1975P]

BETWEEN

MATTHEW WALES

PLAINTIFF

AND

LUKE CHARLETON AND MARCUS PURCELL AND EVERYDAY FINANCE DAC

DEFENDANTS

Judgment of Mr. Justice Cregan delivered on the 31st day of July, 2024

Introduction

1. This is an application by the plaintiff for an order under Order 31 rule 18 of the Rules of the Superior Courts compelling the defendants to produce two particular documents for inspection. These are:

1. A deed of novation of receivers dated 19th July, 2019 and
2. A global deed of transfer dated 14th July, 2019.

2. Copies of both these documents (in redacted form) have been exhibited by the defendants in affidavits sworn by the defendants in an interlocutory injunction motion brought by the plaintiff against the defendants.

3. The background to this application is that the plaintiff has instituted proceedings against Everyday Finance DAC (“Everyday Finance”), and the two receivers which Everyday Finance has appointed over his property. In these proceedings he challenges the title of Everyday Finance to the debt which he incurred with Allied Irish Banks plc (“AIB”) and the

mortgage which he entered into with AIB in respect of this mortgage. He also challenges the right of the receivers to act in the manner in which they have done.

4. The defendants, in turn, have filed a defence and counterclaim. They deny the plaintiff's claims and further claim that AIB has issued separate High Court proceedings against the plaintiff for summary judgment in respect of his debt, and an order for possession. These proceedings have been remitted to plenary hearing but have not been heard yet.

5. It is clear therefore that the right and title of Everyday Finance (i) to the plaintiff's debt with AIB, and (ii) to the mortgage which the plaintiff entered into with AIB, are fully in dispute between the parties.

6. Counsel for the defendants submitted, correctly, that Everyday Finance would have to prove its title to the loan and the mortgage and its valid appointment of the receivers at the trial of the action, and that it would be necessary for Everyday Finance to produce the original of these documents at the trial of the action. However, even though the defendants accept that the plaintiff will have a right to inspect the originals of both documents at the trial, they are opposed to permitting inspection of the originals before the trial. Their reasons for refusing to do so are that these are "documents of title" and therefore do not need to be produced for inspection.

The application under Order 31 rule 18 of the Rules of the Superior Courts.

7. Order 31 rules 14, 15, 16, 17, and 18 provide as follows:

"14. The Court may at any time during the pendency of any cause or matter, order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

15. Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings, or affidavit or list of documents reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit copies thereof to be taken; and any party not complying with such notice shall not afterwards be at liberty to put any such documents in evidence on his behalf in such cause or matter, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice; in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

16. Notice to any party to produce any documents referred to in his pleadings or affidavit or list of documents shall be in the Form No 11 in Appendix C.

17. The party to whom such notice is given, shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit or list as is mentioned in rule 13, or if any of the documents referred to in such notice have been set forth by him in any such affidavit or list, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof, at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account, or books in constant use for the

purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground.

Such notice shall be in the Form No 12 in Appendix C.

18.(1) If the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit; and, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit or list of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them and that they are in the possession or power of the other party.

(2) An order shall not be made under this rule if and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.” (Emphasis added)

- 8.** I would note that Order 31 rule 15 contains a number of parts as follows:
1. the first part provides that every party to an action shall be entitled, by notice in writing, to give notice to the other party, to produce a document for inspection;
 2. the second part provides that any party who does not comply with such a notice shall not be at liberty to put any such documents into evidence in the proceedings;

3. the third part contains an exception to the second part set out above, by providing that a party who does not comply with such a notice shall not be at liberty to put any such documents into evidence “*unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice; in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.*” (Emphasis added).

9. Counsel on behalf of the defendants submitted that as both documents related to the defendants’ title, they did not have to produce the originals for inspection. Instead he said that a certified copy could be produced for inspection at this stage and that the originals would be produced at the trial of the action. It should be noted however from a review of the rules, that whilst this excuse can be used in response to a request for voluntary inspection, it does not appear to be an issue which the Court has to consider under Order 31 rule 18(2).

10. Order 31 rule 18(2) provides that “*An order shall not be made under this rule if and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.*” (Emphasis added)

11. It is clear therefore that the test which this Court has to consider is whether inspection is necessary for disposing fairly of the cause or matter or for saving costs. The test is not whether the documents relate to the defendants’ title, although that might be a factor which the Court takes into account.

12. In *Cooper Flynn v. RTE* [2000] 3 IR 344, Kelly J. adopted the principles enunciated by Browne L.J. in *Wallace Smith Trust Company v. De Loitte* [1997] 1 W.L.R. 257 at p.352, wherein he states (in part):

- “2. *The burden lies on the parties seeking inspection to show that that is necessary for the fair disposal of the action. [...]*
3. *If no element of confidentiality [...] is asserted in the documents, routinely they will be produced for inspection without the need for a r.13 hearing on the issue of necessity...*
4. *If, however, confidentiality is asserted or any other ground of objection arises, r.13 assumes relevance and it becomes necessary to decide whether inspection is necessary for the fair disposal of the action. [...]*
5. *Disclosure will be necessary if: (a) it will give "litigious advantage" to the party seeking inspection (Taylor -v- Anderton [1995] 1 WLR 447 at p.462) and (b) the information sought is not otherwise available to that party by, for example, admissions, or some other form of proceeding (e.g. interrogatories) or from some other source and (c) such order for disclosure would not be oppressive, perhaps because of the sheer volume of the documents.*
6. *If a prima facie case is made out for disclosure, then as several of the speeches in Science Research Council v. Nasse [1918] AC 1028 make plain, the court will first inspect the documents: (a) to ensure that inspection is indeed necessary (that very safeguard of itself making the court generally readier to accept that the threshold test for disclosure is satisfied) and (b) assuming it is, to see if the loss of confidentiality involved can be mitigated by: (i) blanking out parts of the documents, and/or (ii) limiting the disclosure to legal advisors only [...] Those basic principles I have sought to distil from all of the many authorities which were placed before us.”*

13. It is interesting to note that Kelly J. did not consider that the issue of whether certain documents were documents of title was a matter which should be considered under Order 31 rule 18 (2).

14. In *Maye v. Adams and Ors* [2015] IEHC 530, Kennedy J. referred to the statement of principles relating to such applications under Order 31 rule 18 given above and at paragraph 14 of her judgment Kennedy J. states as follows:

*“Order 31, Rule 18 is clearly discretionary in its terms and the jurisprudence confirms that the court has a broad discretion, which [sic] such discretion being exercised on the facts of any given case. It is also clear, from an analysis of the jurisprudence, and, on reading Order 31, Rule 18(2), that an order for inspection will not be made, unless the court is satisfied that it is necessary, either for disposing fairly of the cause or matter, or for saving costs. This was confirmed recently by Costello J. in *Lowry v Mr. Justice Moriarty* [2014] IEHC 602. The courts may, and have, taken steps to address the loss of confidentiality by redacting portions of a document or restricting disclosure in an appropriate manner.”*

15. The defendants relied on *Courtney v. OCM EMRU Debtco* [2019] IEHC 160. In that case, at para. 58 of his judgment, Haughton J. addressed the particular wording of Order 31 rule 15 which relates to the phrase “*such document relates to his own title*”.

“58. Thirdly, one aspect that recent Irish case law does not address directly, and which arises centrally in the present case, is the particular wording of Order 31, r.15, which refers to production of documents referenced in ‘...pleadings, or affidavits’, ‘...unless he shall satisfy the court that such document relates to his own title, he being a defendant to the cause or matter...’.

59. *This wording, with one difference which will be mentioned later, mirrors O. 31 r. 15 in the Rules of the Supreme Court (Ireland) 1905. Counsel for the plaintiff referred the court to an old line of authorities mentioned in the commentary on rule 15 in Wylie ‘ The Judicature Acts’ (1905) that give some indication of the provenance of this exception [...]*”

16. Haughton J. then stated at para. 73:

“73. It is difficult to discern from the decisions referred to in Wylie precisely why the old Rule 15 was framed to except from production a defendant's documents which ‘relate only to his own title’. It seems to have originated from old decisions in Chancery which favoured landowners and discouraged a challenge to the ownership where this involved any reliance on the landowner's own title documents.

[...]

The other decisions referenced by Wylie also appear to relate to documents of title to land. It may be reasonable to suppose that the exception in Rule 15 was carried into the Rules of the Superior Courts 1986 unthinkingly and without any full understanding of its raison d’être. Whatever the reason for this, with the developments in jurisprudence in relation to the production, discovery and inspection of documents, it now seems something of an anachronism.

[...]

74. Furthermore it may be questioned whether Rule 15, or the rule in Chancery that preceded it, were ever intended to apply to documents relating to the assignment of choses in action, such as debts due under facilities or other arrangements between bank and borrower – particularly the large scale loan transfers in the State that are a

feature of the last decade. Unlike a transfer of an interest in land, the assignment of a debt by A to B, of its nature involves a third party, the debtor, to whom notice of the assignment must be given, and whose former banking relationship is now with a different party.

75. For so long as the title documents exception in O. 31 r.15 remains part of a statutory instrument it represents procedural law which this court is required to apply. However in the absence of any clear countervailing argument it may be reasonable to limit its scope to documents of title to land, or at any rate not to extend its application to loan sale documents which by their very nature relate not ‘only’ to the assignees own title but also affect the title and legal obligations of the debtor.”

[...]

17. However, in *O’Connor v. Promontoria (Aran), Luke Charlton, Marcus Purcell, and Ulster Bank Ireland DAC* [2022] IEHC 616, Roberts J. stated at para. 104:

“The defendants argue that the Transfer Documents should not properly be described as ‘documents of title relating to the mortgaged property’. I believe however that in this case the Transfer Documents would correctly be described as documents of title, being the documents which evidence the transfer of title in the plaintiff’s loans and mortgages from the second defendant to the first defendant. However, as noted by Haughton J in Courtney, at para 81, ‘the loan sale deeds do ‘ something more than merely manifest the defendant’s title’. In my view, only those parts of the Transfer Documents relevant to the transfer of title in the plaintiff’s loans and mortgages require to be disclosed pursuant to a request under s. 91 of the 2009 Act as ‘documents of title relating to the mortgaged property’. In fact, in their current redacted format the Transfer Documents evidence the transfer of title, and it is for

this reason that courts have permitted such redacted documents to be used, for example, in cases of summary judgment or substitution of plaintiffs to which I have referred previously. I do not believe that a broader category of documents such as finance documents should generally be described as ‘documents of title’.”

18. I would also note that the general approach of the courts to such issues is best summarised by Baker J. In *Playboy Enterprises International Incorporated v. Entertainment Media Networks Ltd* [2015] IEHC 102, at para. 38 in which she stated:

“My view is tempered to a large extent by the general proposition I outlined above, namely that complex commercial litigation ought not to be unduly cumbersome, and the parties ought to be forthright in the production of documents which will in due course be disclosed in the course of the litigation process, whether through discovery or cross examination or other investigations. To withhold the documents at this stage when these documents are not merely relevant but also central, and a foundation stone of the plea, is not in the interests of the parties, the proper conduct of litigation, or in the interest of the cost effective processing of such litigation.”

Assessment

19. It is clear that the relevant test as to whether a court should direct inspection of a document is set out in the express terms of Order 31 rule 18(2). The test is whether inspection is necessary for disposing fairly of proceedings or for saving costs. In considering whether inspection is “necessary” the court should consider whether the document of which inspection is sought is relevant and material to the proceedings and whether it will give a litigious advantage to the party seeking inspection. If so, then it is necessary for disposing fairly of the proceedings, and it should be produced for inspection. Once that issue is decided, then there can be a debate about possible redactions based on confidentiality or commercial sensitivity or information which relates to non-parties to the proceedings.

20. In my view, the issue of whether a document is a document of title arises under Order 31 rule 15, However it does not form part of the rule in Order 31 rule 18(2). A court may, of course, consider whether the document is one of title, but it is difficult to see what weight should be given to it if any. It is, as Haughton J. observed, an anachronism.

Should the Deed of Novation be produced for inspection?

21. The question therefore which I have to decide is whether the two documents which are in dispute are necessary for dispensing fairly of the cause or action or saving costs.

22. I am satisfied that the plaintiff has raised reasonable concerns on affidavit about certain aspects of the validity and/or enforceability of this deed of novation. I am satisfied that this document is relevant and material to the proceedings and inspection of it is necessary for fairly disposing of the proceedings. I will therefore order inspection of the original deed of novation.

23. For completeness and although I do not believe it is necessary to do so under Order 31 rule 18(2), I am of the view that a deed of novation is not a document which relates to the defendants' title. I am satisfied therefore that the defendants' refusal to allow inspection of this document on this ground is without merit.

Should the Global Deed of Transfer be produced for inspection?

24. The second document to be considered is the Global Deed of Transfer whereby AIB transferred its loan and its mortgage over the plaintiff's property to the third named defendant.

25. The plaintiff has raised concerns on affidavit about the execution pages of each of those documents. The plaintiff has stated that it does not appear as if the proper company seals have been affixed to the signature page as required, and it does not appear as if the parties who signed the said documents are "authorised officers" of the bank. Thus, the

plaintiff has raised issues of concern as to why he wishes to inspect the originals of the Original Deed of Transfer of the loan and mortgage from AIB to Everyday Finance.

26. It could well be, if the defendants refuse to provide the originals of these documents for the plaintiff to inspect in advance of the trial, that a situation could arise, during the course of the trial, where the trial has to be adjourned to enable the defendants to produce witnesses who signed the documents, to prove that the appropriate seals were attached and/or to prove that the signatories had the necessary authorisation from the bank. It would not be conducive to the proper running of the trial if the trial had to be adjourned for a number of days or weeks to permit the defendants to do this. It would be wasteful of court resources and lead to an increase in costs.

27. The courts have an inherent jurisdiction to ensure that lengthy trials are properly managed. The defendants' position is that they accept the plaintiff has a right to inspect the documents but only at the trial of the action. I do not accept this submission.

28. In the circumstances, I will direct inspection of these documents prior to the trial of the action. I am of the view that inspection should be ordered of these documents before the matter is set down for trial so that if the inspection of the documents requires the plaintiff to amend his pleadings and/or to seek further and better discovery, there is time to do so.

29. For completeness, even though I do not believe that it is necessary to do so under Order 31 rule 18(2), I will consider whether this document relates to the defendants' title. In my view it does. If one asks oneself the question: how does Everyday Finance have any right or title to the plaintiff's land, the answer is that the plaintiff entered into a mortgage over the said property to AIB, and AIB subsequently assigned the mortgage to Everyday Finance. In these circumstances I am satisfied that the Global Deed of Transfer is a document which relates to the third defendant's title to the mortgage. However that is not a reason to refuse inspection.

30. For all of the above reasons I am satisfied that these documents are relevant and material to the proceedings and that an order for inspection is necessary for the fair disposal of the proceedings or for saving costs.

31. It appears that these documents are in the possession of a firm of solicitors in the UK. Arrangements will therefore have to be made to ensure that the documents are sent to the defendant's solicitors in this jurisdiction.

Redactions

32. Counsel for the plaintiff indicated that whilst he was seeking an unredacted version of Deed of Novation and also the Global Deed of Transfer, he did not object to the redaction in the Global Deed of Transfer of the names of all other borrowers to which the global transfer related. He did object however to the redaction of various clauses in the Global Deed of Transfer, and the Deed of Novation, as he submitted that he and/or the court should be able to view the terms of both deeds in their entirety to review the in legal nature and/or effect.

Conclusion

33. I will therefore direct the defendants to produce the originals of both documents for inspection. I will also discuss with counsel whether the Court should inspect the documents first, in unredacted form, before they are inspected by the plaintiff, to consider whether clauses in both documents which are currently redacted should in fact be unredacted.
