

THE HIGH COURT

[2022] IEHC 616

Record No. 2020/5065P

BETWEEN:

THOMAS O' CONNOR

Plaintiff

AND

**PROMONTORIA (ARAN) LIMITED, LUKE CHARLTON, MARCUS PURCELL
AND ULSTER BANK IRELAND DESIGNATED ACTIVITY COMPANY**

Defendants

Record No. 2021/852P

BETWEEN:

M&F FINANCE (IRELAND) LIMITED

Plaintiff

AND

**PROMONTORIA (ARAN) LIMITED, ULSTER BANK IRELAND DESIGNATED
ACTIVITY COMPANY, LUKE CHARLTON AND MARCUS PURCELL**

Defendants

JUDGMENT of Ms Justice Eileen Roberts delivered on 8 November 2022.

Introduction

1. This judgment relates to reliefs sought in two separate High Court proceedings which, although not formally consolidated, involve the same or related parties and a degree of commonality of facts. The motions seeking interlocutory relief in each case have travelled together in the Chancery List since 12 July 2021 and were heard together by this Court between 4 and 6 October 2022. This judgment is intended to deal with all issues arising in the applications made to this Court on those dates in either or both sets of proceedings.
2. Thomas O'Connor is the plaintiff in proceedings bearing record number 2020/5065P (the "**O'Connor Proceedings**"). M&F Finance (Ireland) Limited ("**M&F**") is the plaintiff in the proceedings bearing record number 2021/852P ("the **M&F Proceedings**"). M&F is a trustee company and holds a commercial property situated at 61 Adelaide Road, Dublin 2 for the benefit of Thomas O'Connor's personal pension fund.
3. The defendants in each case are the same parties, although appearing in the title to each set of proceedings in a different sequence. Ulster Bank Ireland Designated Activity Company ("**Ulster Bank**") is the bank that provided mortgage finance to the plaintiffs, which indebtedness is secured on various commercial properties owned by the plaintiffs. Promontoria (Aran) Limited ("**Promontoria**") is a limited liability company to whom it is pleaded Ulster Bank assigned its interest in the plaintiffs' loan facilities and mortgages in terms which will be set out later in detail in this judgment. Luke Charlton and Marcus Purcell are the insolvency practitioners appointed as joint receivers (the "**Receivers**") of the various properties owned by the plaintiffs which are secured in favour of Ulster Bank. There is a dispute between the parties as to the validity of the appointment of the Receivers in each case.
4. There are two motions before the Court – one in each set of proceedings. The motion in the O'Connor Proceedings was issued on the 7 October 2020. The motion in the M&F

Proceedings was issued on 27 April 2021. In each motion the plaintiff seeks injunctive relief to, among other things, restrain the appointment of the Receivers and/or the taking of any steps by the Receivers to interfere with the plaintiffs' rights over identified properties. The motion in the M&F Proceedings also seeks inspection of those documents (which have been exhibited in redacted form by the defendants) identified and pleaded as the documents giving effect to the alleged transfer of the interest in M&F's loans and security to Promontoria. The latter relief includes a request for an order pursuant to Order 50, rule 4 of the Rules of the Superior Courts, Section 91 of the Land and Conveyancing Law Reform Act 2009 and/or the Court's inherent jurisdiction permitting inspection of all documents of title whereby Ulster Bank and Promontoria assert that they are mortgagee to M&F as mortgagor. An order is also sought for inspection of all documents as are required to allow M&F to obtain legal advice as to whether Promontoria is the successor in title to Ulster Bank to the mortgagee's interest in 61 Adelaide Road, including a Global Deed of Transfer dated 12 February 2015 and all ancillary documents and agreements. The reliefs sought in the motions will be considered further in this judgment.

5. By way of summary therefore, the two separate issues before this Court relate to (a) the respective plaintiffs' request for interlocutory injunctions restraining the defendants from dealing with the plaintiffs' properties; and (b) M&F's request for production/inspection of unredacted copies of the documents (common to both sets of proceedings) by which Ulster Bank's interest in the relevant loans and security are said to have been assigned to Promontoria.
6. I propose to now outline the O'Connor Proceedings and the M&F Proceedings and to then apply the facts of each to the issues before this Court as outlined above. Because this is an interlocutory application and not the trial of the action, my analysis of each of

the O'Connor Proceedings and the M&F Proceedings is set out in summary form highlighting the main features but not every feature. The essential features of the pleas in each case are relevant to this Court's determination on both the injunction and the inspection claimed although this Court is not determining any issues of fact or law regarding the substantive claims which will be a matter for the trial judge.

The O'Connor Proceedings – facts and parties' submissions

7. The O'Connor Proceedings were commenced by Plenary Summons issued on 14 July 2020. By notice of Motion dated 7 October 2020, Thomas O'Connor seeks interlocutory injunctions, *inter alia*, restraining the defendants from dealing with the properties described in the schedule to the Plenary Summons whether as mortgagee or receiver.
8. In summary, the properties listed in the Schedule to the Plenary Summons in the O'Connor Proceedings are:
 - (a.) 13 Raglan Road, Ballsbridge, Dublin 2 ("**13 Raglan Road**")
 - (b.) 65 Grosvenor Road, Rathmines, Dublin 6 ("**65 Grosvenor Road**")
 - (c.) Apartment 18, Exchange Hall, The Exchange, Belgard Square North, Tallaght, Dublin 24
 - (d.) Unit 2, No. 4 Capel Street, Dublin 1
 - (e.) Apartment 43, Fifth Floor, Block A, Smithfield Market, Smithfield, Dublin 7 (together, the "**O'Connor Properties**").
9. 65 Grosvenor Road and 13 Raglan Road (which are both properties rented out to various residential tenants) were advertised for sale by the Receivers by public auction. This auction took place on the online platform BidX1.com on 15 July 2020 – that is, the day after the O'Connor Proceedings were issued. The existence of the O'Connor Proceedings was disclosed to all bidders. Special conditions were inserted into the contracts of sale

for each of those properties permitting the purchasers to withdraw from the sale if the O'Connor Proceedings had not been resolved within a period of three months.

10. 65 Grosvenor Road achieved an auction price of €1,612,000 and 13 Raglan Road achieved an auction price of €1,715,000. This amounts to a combined value of €3,327,000. Each purchaser of these properties has now exercised their option to rescind the relevant contract of sale. The properties are not currently on the market but the defendants wish to be able to sell them if a market opportunity arises. The Receivers continue to collect all rental on the O'Connor Properties.
11. The defendants have undertaken, pending the determination of the motion for interlocutory relief in the O'Connor Proceedings, not to complete upon any sale of the O'Connor Properties. The defendants are not willing to extend their undertaking beyond the conclusion of these interlocutory proceedings as they say that in the current uncertain economic climate, there is a very substantial risk that those properties may not achieve the same sale prices if there is a further delay beyond that time in being able to market and sell the properties. There are however no confirmed arrangements to market the O'Connor Properties right now and counsel for the defendants acknowledged that the defendants may not in fact look to sell them – however they wish to have the flexibility to do so. There is a *lis pendens* registered against those O'Connor Properties that comprise registered land. The plaintiff's solicitors have also requested that any prospective purchaser of the properties be put on notice of the O'Connor Proceedings.
12. The motion for interlocutory relief in the O'Connor Proceedings seeks (in general terms) the following reliefs:
 - An injunction prohibiting Promontoria from transferring and/or disclosing confidential banker and customer information and/or personal information or data of the plaintiff to any third party, including the Receivers.

- An injunction prohibiting Promontoria and/or Ulster Bank appointing a receiver and/or a receiver and manager over the O'Connor Properties.
- An injunction prohibiting the Receivers from acting as receiver or manager or otherwise interfering with (to include selling or leasing) the O'Connor Properties.
- An injunction in terms of the undertaking given on behalf of the Receivers on 7 July 2016.

13. In fact, it emerged at the hearing of this motion that the plaintiff is really seeking a more limited form of injunctive relief in the O'Connor Proceedings. The plaintiff wishes to restrict the disposal or attempted disposal of the O'Connor Properties or any of them. The plaintiff is not objecting to the continued collection of rent from the O'Connor Properties by the Receivers on the basis that the Receivers must of course account for all rent they collect. This is what the plaintiff describes as maintaining the status quo in relation to the O'Connor Properties. The plaintiff is not entirely consistent on what he says are acceptable actions by the Receivers. There is criticism of the poor management of the O'Connor Properties by the Receivers, for example in allowing a number of units to become vacant or to fall into disrepair (para 90 of the Statement of Claim), but it is also pleaded that the Receivers have no entitlement to manage the O'Connor Properties at all, to include collection of rents (paragraph 58 of the Statement of Claim). There is no concession that the Receivers should be allowed fees relating to their management of the O'Connor Properties – even, it would appear, in relation to the continued collection of rents.

14. It is apparent that there is no relief sought in the O'Connor Proceedings for inspection of redacted or other documents. However, the same documents are relied upon by the defendants in the O'Connor Proceedings as in the M&F Proceedings in which such

inspection of documents is sought and therefore the decision in this regard in the M&F Proceedings will apply equally to the O'Connor Proceedings.

15. In addition to the injunctive reliefs sought, the plaintiff seeks in the plenary summons dated 14 July 2020 the following:

- a declaration that the Receivers have not been validly appointed as a receiver and/or a receiver and manager in respect of the O'Connor Properties or alternatively a declaration that any such appointment is void or voidable and of no legal effect.
- a declaration that any loan or any mortgage/charge of the plaintiff has not been validly assigned or novated to Promontoria or that any such assignment or novation is null and void, contrary to public policy and illegal, or alternatively voidable and/or unenforceable.
- a declaration that he is entitled to buy out and/or redeem any secured loans for the price to be paid by Promontoria. The plaintiff seeks, if necessary, an order for specific performance by Promontoria of the said entitlement.
- damages against all defendants for misrepresentation, slander of title, trespass, breach of equitable duties, breach of fiduciary duties, breach of confidence and/or privacy and/or pursuant to the Data Protection Act 2018 (as amended) and/or other unlawful acts (including maintenance and champerty).
- restitutionary relief in respect of interest it claims was overcharged and illegally applied by the defendants and seeks all necessary accounts and inquiries and refunds in respect of same.
- disclosure of documents and information relevant to the proceedings pursuant to the inherent jurisdiction of this court – although, as outlined above, this is not sought by way of interlocutory relief.

- an order from this court inviting the parties to consider mediation and/or an order saying the proceedings to allow the parties to consider mediation.
- 16.** The Statement of Claim was not delivered until 9 July 2021, almost one year after the summons issued. It is a lengthy document running to 44 pages and seeking 31 separate reliefs including the following reliefs sought in more detail than in the plenary summons:
- Declarations as to the “validity and enforceability of all instruments whereby Promontoria allegedly acquired an interest in the Loans and Security arrangements between the plaintiff and Ulster Bank and in particular an interest in the Deed of Mortgage/Charge dated 21 January 2004”;
 - A declaration that a mortgagor is entitled to inspect all agreements and arrangements by which any party claims rights to the mortgagee’s interest whether as a matter of statute, common law and equity, or constitutional and natural justice;
 - A declaration that a mortgagee having been requested to provide inspection of documents of title pursuant to Section 91 of the Land and Conveyancing Law Reform Act 2009 may not rely on those documents by way of enforcement against a mortgagor until it has done so and that a mortgagor is entitled under Section 91 to inspect unredacted documents of a mortgagee’s title for the purpose of ascertaining their full terms meaning and effect. Declarations are also sought that a mortgagee having been validly requested to provide inspection of documents of title pursuant to Section 91 may not provide redacted documents or otherwise interfere with the mortgagee’s right to legal advice as to the validity of security or the enforceability of security against the mortgagee and that the mortgagee may not appoint a receiver until, at least, it has provided such inspection.
- 17.** The plaintiff also seeks a declaration that control of some or all of the O’Connor Properties should revert to the plaintiff pending the determination of these proceedings

and/or the determination of the precise amount of any liability of the plaintiff to Promontoria and/or Ulster Bank.

18. The statement of claim pleads that Promontoria does not engage in banking, is not a bank or credit institution, and invests in debt with the intent of litigation and enforcement. It is pleaded that the plaintiff had loans and security arrangements with Ulster Bank. The relevant three facility letters dated 18 November 2005, 27 March 2008 and 21 December 2009 are exhibited to the Affidavit of Donal O’Sullivan sworn 22 March 2021 at exhibit DOS6 and the corresponding mortgages for the O’Connor Properties comprising 13 Raglan Road and 65 Grosvenor Road are exhibited at exhibit DOS7. The relevant facility letters can be summarised from the information in that Affidavit as follows:

Facility and date	Amount	Facility type
Facility A 18/11/05 (renewal)	€1,062,500	Commercial mortgage (13 Raglan Road)
Facility B 18/11/05 (renewal)	€130,000	Commercial mortgage (South Bank Quay, D4)
Facility C 18/11/05 (renewal)	€255,000	Commercial mortgage (18 Exchange Hall Tallaght)
Facility D 18/11/05 (renewal)	€226,000	Commercial mortgage (2, No 4 Capel St)
Facility E 18/11/05 (renewal)	€378,000	Commercial mortgage (61 Adelaide Road being purchased by M&F)
Facility F 18/11/05 (renewal)	€500,000	Commercial mortgage (apt in Smithfield)
Facility G 18/11/05 (renewal)	€60,000	Overdraft – (for working capital)
Facility H 18/11/05 (new)	€171,000	Term Loan (Belgard Sq Prop syndicate)
Facility I 18/11/05 (new)	€2,000,000	Loan – for Budapest Commercial property office block
Demand Loan Facility 27/03/08	£200,000	Demand Loan – investment in Canary Wharf Syndicate

Loan facility 21/12/09	€50,000	Term Loan – Belgard Sq Development
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- 19.** The plaintiff pleads that it dealt with Ulster Bank as a bank and he never contemplated or agreed that Ulster Bank would, or could, assign or transfer, or create a trust or equitable interest or enter into any sub-participation agreement in favour of any entity in respect of the plaintiff's loans and secured assets – and particularly not an entity which was not a bank under Irish or EU law. The plaintiff claims that his express consent in writing would have been required before any transfer and/or assignment could be effected. The plaintiff also claims that had he agreed a transfer arrangement with Ulster Bank it would not have been lawful or enforceable as against the plaintiff.
- 20.** The plaintiff says he did not enter into any loan or security arrangements with Promontoria and that he, as mortgagor, sought disclosure of the title documents comprising Promontoria's interest pursuant to Section 91 of the Conveyancing and Land Reform Act 2009. In response he was furnished with the redacted copy deeds exhibited to Mr O'Sullivan's Affidavit sworn 22 March 2021. These documents – which are at the core of the claim for inspection – comprise a Mortgage Sale Deed dated 16 December 2014 (as novated on 12 February 2015), a Global Deed of Transfer dated 12 February 2015 and a Declaration of Trust dated 12 February 2015.
- 21.** The plaintiff says that because he has only been provided with heavily redacted copies of these documents he is prevented from obtaining fully informed legal advice in relation to the asserted transfer of Ulster Banks' rights in his loans and security to Promontoria. The plaintiff was advised of Ulster Bank's agreement to transfer its interest in all the plaintiff's loans to "*an affiliate of Cerberus Global Investors*" by letter dated 5 January 2015 from Ulster Bank.

22. A debt repayment proposal was requested from the plaintiff by Ulster Bank on 25 August 2015. The letter indicated that Ulster Bank was managing the plaintiff's facilities on behalf of or for the benefit of Promontoria. The plaintiff complains that he was not given the opportunity to bid against Promontoria or to redeem and/or refinance his loans including at the same price or a better price than that paid or allocated in respect of his loans in the transfer to Promontoria.
23. Amongst other arguments, the plaintiff alleges that the purported transfer to Promontoria was "*a transaction which savoured of maintenance and champerty*" and was an arrangement which contracted or farmed out litigation and encouraged litigation. He says there was a duty on Ulster Bank not to sell the loans and security in a manner which promoted litigation or to parties who engaged in litigation as a business to increase the value of loans and security for profit contrary to law and/or public policy.
24. A lot of the oral submissions by counsel for the plaintiffs at the hearing of these motions related to the issue of maintenance and champerty. It is pleaded by the plaintiffs that Promontoria is part of an international consortium which purchases portfolios or tranches of debt and security from financial institutions at a discount with a view to making a profit and that it does so for the purpose of enforcement and in contemplation of litigation. It is alleged that Promontoria acquires litigation risk and causes of action and claims (without any prior interest in such claims) for consideration and that the transaction is not a simple assignment of debt for face value. This, the plaintiff says, makes the Promontoria purchase void or unenforceable against the plaintiff as being "*an unregulated encouragement and trade in litigation contrary to law and public policy*".
25. Other arguments are advanced by the plaintiff in relation to the need for him to obtain disclosure of the price paid for or attributable to his loans. This is pleaded in the Statement of Claim by reference to an alleged duty on Ulster Bank to obtain the best achievable

price for the plaintiff's loans; to treat all bidders for bank assets fairly and equally and to treat the plaintiff on an equal footing with such bidders allowing him to bid and re-bid and providing him with sufficient information to enable him to do so; not to make a secret profit at the plaintiff's expense; to disclose valuation advice and specifically to keep the plaintiff informed about the terms of the transfer arrangements "*including the price to be paid for or value put on such transfer or assignment or novation or sub-participation*".

- 26.** It is pleaded that in the event of breach of duties owed by Ulster Bank to the plaintiff "*the price obtained ameliorated any outstanding liability of the Plaintiff in law or in the alternative in equity and informs the conditions which may be imposed by a Court to ensure conscionability and protect the plaintiff's rights including the equity of redemption a body of equitable rights including but not limited to a right of redemption*" (para 42 of the Statement of Claim). The entitlement to know the "price" paid by Promontoria for the plaintiffs' loans is a point I will return to in relation to the redaction issue.
- 27.** A challenge is also advanced by the plaintiff to the appointment of the Receivers, and to the exercise by them of any power of sale, even if validly appointed. Some technical arguments are advanced in relation to the execution of the relevant Deeds of Appointment. It is in fact accepted by the defendants that the Receivers have no power of sale under the relevant mortgage deeds. However, Ulster Bank does have such a power pursuant to section 19(1)(i) of the Conveyancing Act 1881 and the defendants say that they intend to exercise Ulster Bank's statutory right to sell the mortgaged properties as mortgagee in possession.
- 28.** The plaintiff refers to representations made on behalf of the defendants following the appointment of the Receivers. These representations are said to raise an estoppel. The

representations are said to have been made in a letter dated 7 July 2016 from the defendants' then solicitors to the plaintiff's then solicitors. The letter confirmed:

“Pending a full response from Promontoria (Aran) Limited as secured lender, we confirm that the receivers will take no steps to advance the receivership of our clients' assets (other than ongoing collection of rent). Insofar as rent is collected in respect of the assets, we confirm that it will be held by the receivers for the party or parties entitled to such rent. We will revert to you substantively as soon as possible”

- 29.** The plaintiff claims that he relied on that representation to his detriment and entered into discussions on foot of it and while he was undergoing serious medical treatment. He says this representation nurtured an expectation in him that the receivership would not progress if he entered into negotiations.
- 30.** There is also a dispute regarding the amount of interest charged to the plaintiff. It is alleged that any demand issued prior to the appointment of the Receivers in June 2016 was invalid as the amount demanded included interest overcharged. It is also claimed that the letter of demand did not issue by Ulster Bank until eight months after the alleged transfer of the plaintiff's loans to Promontoria.
- 31.** A Defence and Counterclaim has been delivered by the defendants. While raising a preliminary objection to what they claim to be an unreasonably prolix and repetitive Statement of Claim, the essence of the defendants' position (which is a very broad denial of the plaintiff's various claims) is as follows:
- 32.** The plaintiff drew down on all the facilities (referred to in para 18 of this judgment) and those facilities were secured in favour of Ulster Bank by way of first legal mortgage or charge over the O'Connor Properties.
- 33.** Each of the facility letters contains the following clause headed “SECURITISATION”:

“The Borrower hereby irrevocably and unconditionally consents to the Bank at any time or times hereafter transferring assigning disposing whether absolutely by way of security or otherwise mortgaging or charging or transferring as part of a securitisation scheme or otherwise this first legal mortgage and/or the benefit of the said Mortgage and/or any collateral or ancillary security (including without limitation any insurance policy or policies of life or endowment assurance) and the monies hereby secured (collectively ‘Transfers’ and any one a ‘Transfer’) to any third party or body including without prejudice to the generality of the foregoing any subsidiary or associated company of the Bank and to any trustee(s) or administrator(s) under any trust or administrative arrangement or a securitisation scheme entered into by the Bank (an ‘Arrangement’) on such terms as the Bank may think fit and to any consequential assurance reassurance release of or enforcement of security under a Transfer and/or Arrangement without any further consent from or notice to the Borrower or any other person whereupon all powers and discretions of the Bank (including without prejudice to the generality of the foregoing the right to determine or vary the current rate of interest from time to time payable or deemed to be payable by the Borrower on the monies hereby secured) shall be exercisable by the transferee or other beneficiary of a Transfer and/or Arrangement and the Bank may include the said Mortgagee and/or the benefit of the said Mortgage and/or any collateral or ancillary security as aforesaid and the monies hereby secured as aforesaid in any Arrangement without further consent from or notice to the Borrower.”

- 34.** The defendants say it is therefore clear that Mr. O’Connor expressly, irrevocably and unconditionally consented in writing to Ulster Bank being permitted to transfer Ulster Bank’s interest in his loans and related security and he has no basis to object to it.

- 35.** Further to a Mortgage Sale Deed dated 16 December 2014 (as novated on 12 February 2015) Ulster Bank agreed to assign its interest in the plaintiff's facilities and the legal mortgages of the O'Connor Properties to Promontoria Holding 128 B.V., or one of its newly incorporated Irish affiliates. Pursuant to a Global Deed of Transfer dated 12 February 2015 Ulster Bank agreed to assign its interest in the plaintiff's facilities and the legal mortgages of the O'Connor Properties to Promontoria.
- 36.** By Declaration of Trust dated 12 February 2015 Promontoria agreed that legal title in the lender/mortgagee's interest in the plaintiff's facilities and mortgages of the O'Connor Properties would remain vested in Ulster Bank as Promontoria's trustee.
- 37.** Therefore the defendants say that Ulster Bank retains legal title to the plaintiff's facilities and the mortgagee's legal interest in the mortgages on the O'Connor Properties as trustee for Promontoria.
- 38.** The defendants say that Promontoria is regulated by the Central Bank of Ireland as a credit servicing firm under Part V of the Central Bank Act 1997 (as amended). They say that the transfer to Promontoria fully accords with the arrangements covered and envisaged by the securitisation provisions of the plaintiff's facility letters, to which the plaintiff expressly consented.
- 39.** The defendants deny there is any legal obligation on them to give the plaintiff an opportunity to bid against Promontoria or to redeem or refinance his loans on the same terms. They deny that they were or are under any obligation to inform the plaintiff of the price paid by Promontoria, or to provide other information as sought. They deny making any secret profit or that the plaintiff was a vulnerable customer at any time. They deny being under any obligation to secure the best possible price in respect of the sale of a loan portfolio or any obligation to segregate the plaintiff's facilities and related security from other loans and related security.

40. It is denied by the defendants that the Receivers have not been validly appointed. They say they are validly appointed under a deed of appointment made on 22 June 2016 and that the relevant mortgages expressly confer on any receiver appointed by the mortgagee the power to manage the O'Connor Properties. They plead that the plaintiff's facilities were in default when the demand for repayment was made.
41. It is also denied that the acquisition of a loan portfolio by Promontoria from Ulster Bank was in any way champertous or constituted maintenance. Furthermore, in legal submissions, counsel for the defendants argued that the actual price paid was in no way relevant to whether any arrangement was in fact champertous or constituted maintenance.
42. The defendants plead that the condition of the O'Connor Properties upon the Receiver appointment was such that vacant units were unsuitable for re-letting and that in any event they would realise a higher sale value when sold with vacant possession by Ulster Bank as legal mortgagee in possession. They say the plaintiff has no legal entitlement to regain control of the O'Connor Properties.
43. In relation to the representation pleaded by the plaintiffs (and referred to in para 28 of this judgment), it is denied the plaintiff acted on this letter to his detriment. Furthermore, the defendants say that the limited assurance in that letter of representation was specifically withdrawn by letter dated 17 June 2020 from the defendants' then solicitors on the basis that all of the plaintiff's queries had been addressed in full. This letter dated 17 June 2020 put the plaintiff on notice that the receivership would be advanced, including by marketing the O'Connor Properties for sale.
44. In relation to the right to inspect all requested documents in unredacted form the defendants deny that the plaintiff has any such entitlement. The defendants say they have properly and correctly redacted certain portions of those documents for reasons of (i) commercial sensitivity, (ii) bank and/or client confidentiality, and (iii) on the basis of

irrelevance. This is a matter I will address in more detail in relation to the specific relief sought for inspection of these documents in the M&F Proceedings.

45. A counterclaim is advanced by the defendants against the plaintiff seeking judgment in the sum of €3,645,013.33 (with daily interest accruing thereon from 21 December 2021 at a rate of €118.67) and in the sum of £227,668.40 (with daily interest accruing on the same basis at £8.71). The defendants also seek injunctions restraining trespass and interference by the plaintiff with the sale of the relevant properties as well as damages, necessary accounts and costs.

The M&F Proceedings – facts and parties’ submissions

46. There is a considerable degree of commonality between the O’Connor Proceedings and the M&F Proceedings. In the interests of brevity, I will not repeat those commonalities but will focus instead on the areas of difference between the two proceedings and the motions before this Court.
47. The M&F Proceedings were issued on 11 February 2021 and concern a facility letter dated 23 March 2005 (renewing and extending an earlier facility dated 16 January 2004) pursuant to which the sum of €1,155,000 was advanced by Ulster Bank to M&F by way of commercial mortgage and an additional sum of €70,000 was advanced by way of overdraft, both of which sums were secured on property at 61 Adelaide Road, Dublin 2 by way of first legal charge and an assignment over the deposit account into which rental monies were to be lodged.
48. The M&F facility letter dated 16 January 2004 contains the same securitisation clause as the facility letters in the O’Connor Proceedings already set out at para 18 of this judgment. However, it also contains a clause which does not feature in the O’Connor

facility letters namely, clause 10 of the General Conditions, on which the plaintiff places some reliance. Clause 10 of the General Conditions provides as follows:

“10. Ulster Bank Ireland Limited shall have the right to assign or transfer or sub-participate the benefits and/or obligations of the Facility/all or any of the facilities or any part thereof to another entity within the Ulster Bank Group (that is, Ulster Bank Ireland Limited and its subsidiaries) and/or another bank or financial institution at no additional cost to the Borrower. The Bank may disclose such information about the Borrower (the Guarantor) (or any of the Subsidiaries) and/or the Facility/ies as the Bank may consider appropriate to any sub-participating bank or institution, any person with whom the Bank is associated and or any actual or potential assignee, transferee, novatee or sub-participant.”

- 49.** The plaintiff refers to the limitation in that clause 10 to assignments or transfers to *“another entity within the Ulster Bank Group... and/or another bank or financial institution”*. It says Promontoria does not satisfy that description. The securitisation clause does not appear to be so restricted. The facility letter dated 23 March 2005 by which Ulster Bank agreed to advance two loan facilities to M&F (Facility A, an overdraft in the sum of €70,000, and Facility B, a commercial mortgage in the sum of €1,155,000 (renewal)) provides at page 2 thereof that *“Terms and conditions remain as outlined in our Facility Letter dated 16 January 2004”*. The 2005 facility letter does not otherwise repeat the securitisation clause wording from the 2004 facility. It does however contain a clause 11 in the General Conditions which is in similar terms to clause 10 of the General Conditions of the 2004 facility letter set out above.
- 50.** A further factor relied on by the plaintiff in relation to the interpretation of the relevant provisions of the M&F Facility regarding assignment is that on 21 April 2015 Mr

Mulleady of Ulster Bank wrote to the plaintiff advising that in relation to the M&F loan facility,

“the existing documentation does not give the Bank the right to assign the loans to the purchaser and the Bank has disposed of the economic interest in these loans to the purchaser under a sub-participation (“Sub-Part”) agreement. In order to transfer the loan to the purchaser, we will need your consent otherwise it will remain on the Banks books but with all decisions being made by the purchaser.”

51. M&F says that it never consented to any transfer. The defendants say that the terms applicable to the M&F facilities do, in actual fact, include an express consent on the borrower’s behalf to Ulster Bank assigning the facilities and any related security. They say such an express consent was contained in the 2004 facility and expressly incorporated by confirmation in the 2005 facility letter that it was subject to the terms and conditions of the 2004 facility letter. In that regard I note that Facility B was the only facility dealt with in the 2004 letter. The defendants say that Mr Mulleady was clearly mistaken when he advised Mr O’Connor that M&F’s consent was needed to effect the transfer/assignment. Moreover, they say that a post-contractual communication from an individual, even an individual working for Ulster Bank, does not affect how the plaintiff’s contract with Ulster Bank is to be properly construed.

52. Like the O’Connor Properties, 61 Adelaide Road is a commercial property rented out to residential tenants. There are 16 apartment units with current tenants who have been in occupation for various periods – some for as long as ten years. However, unlike the O’Connor Properties, the plaintiff in the M&F Proceedings continues to collect the rental income and the Receivers have not been permitted to collect rent or engage directly with tenants, at least since April 2021. The injunction sought by M&F seeks not only to restrain the sale of 61 Adelaide Road but also to prevent the Receivers from managing

that property or collecting any rents from it. The plaintiff's replies to particulars dated 14 September 2021 state that as at that date rents of €159,084 had been collected by the plaintiff on 61 Adelaide Road and expenses of €33,206.54 had been incurred. It was stated that the monies would "*continue to be held in escrow pending resolution of the within proceedings*".

53. The plaintiff says that the direct contact by the Receivers with the tenants in 61 Adelaide Road caused considerable disruption to the tenants and, as a result, a loss of rental income. Complaint is also made in the Affidavit of Killian Conroy that this engagement took place during Covid 19 "level 5" restrictions. The plaintiff claims that he has a special relationship with these tenants and that the Receivers should be prevented from interfering with the management of this property pending the trial of the action.
54. The Receivers in the M&F Proceedings were initially appointed in July 2016 but were discharged and reappointed by Ulster Bank on 21 October 2020. There is a dispute between the parties as to whether that appointment is valid, including the sequencing of the discharge and reappointment. There is also a dispute generally about the validity of the appointment of the Receivers in either 2016 or 2020, including whether notice was properly served on M&F or whether the documentation was properly executed by the Receivers. The plaintiff says that the appointment of the Receivers was also in breach of the letter of representation from the defendants' former solicitors dated 7 July 2016 referred to previously in this judgment.
55. It is alleged that the Receivers did not in reality act as receivers after 2016 in relation to the M&F property at 61 Adelaide Road. Paragraph 9 of Mr Conroy's Affidavit sworn 27 April 2021 states that the Receivers "*previously withdrew as Receivers after 2016, i.e. they took no further action at that time*". The letter from the defendant's solicitors exhibited at exhibit KC11 to Mr Conroy's Affidavit confirms that "*we say that no active*

steps were taken in the receivership between the appointment of the joint receivers in 2016 and the appointment in 2020". However, paragraph 24 of Mr O Sullivan's Replying Affidavit states that *"Mr Conroy is mistaken when he suggests...that the Receivers withdrew as receivers after 2016. Their initial appointment continued until 21 October 2020"*. It is confirmed however at paragraph 24 of that same Affidavit that the *"first active step in the receivership"* was the appointment of property managers (ODREM) on behalf of the Receivers on 18 February 2021. There appears to have been a "For Sale" sign erected outside 61 Adelaide Road in 2019 but this was quickly removed by the Receivers when challenged by the plaintiff.

- 56.** A new letter of demand was served on M&F by Link Asset Services on 9 September 2020 seeking repayment of €615,970.23 and thereafter the Receivers were discharged and reappointed by Ulster Bank on 21 October 2020. M&F disputes the amount claimed in that demand, particularly in respect of interest applied. It was accepted at the hearing however that no payments (whether from collected rents or otherwise) have been made by M&F to the defendants since 22 April 2016. There is a dispute as to the reasons for this and the attempts made to make payments and/or frustrate the making of payments. The plaintiff has confirmed that monies collected in rent up until February 2021 are being held in reserve pending determination of the precise liability, if any, to the defendants (para 98 of the Statement of Claim). The Receivers engaged estate agents to manage the property and tenants, and their entitlement to do this is disputed by the plaintiff.
- 57.** Exhibit FW5 to the Replying Affidavit of Fergal Whyte sworn on 9 June 2021 shows that as at that date, of the 16 apartments available for rent, the Receivers had collected (through estate agents) rents totalling €4,427 between March and May 2021 and two tenants had vacated during that period.

- 58.** A counterclaim is advanced by the defendants against M&F in the sum of €628,121.68 plus ongoing interest. Additional injunctive relief requiring access to and control of the property at 61 Adelaide Road is also claimed by the defendants (but not in the motion before this Court).
- 59.** The Statement of Claim in the M&F Proceedings was delivered on 28 May 2021. The motion in the M&F Proceedings is similar to the motion in the O'Connor Proceedings. However, one distinction between the two motions is that in the M&F Proceedings the plaintiff has applied for inspection/disclosure of unredacted copies of the relevant transfer documents by which Promontoria acquired its interest in the plaintiff's debt and related security. These are the same documents under which Promontoria acquired its interest in the debt and related security of Thomas O'Connor. The M&F motion dated 27 April 2021 in relation to inspection seeks an order pursuant to Order 50, rule 4 of Rules of the Superior Courts and/or s. 91 of the Land and Conveyancing Law Reform Act 2009 and the Court's inherent jurisdiction. This issue will be considered in detail later in this judgment.
- 60.** In summary, it appears to this Court that essential differences between the O'Connor proceedings and the M&F proceedings include the following:
- (1) In the M&F proceedings there are additional arguments made relating to the ability of Ulster Bank to transfer a loan portfolio to an entity that is either not within the Ulster Bank Group and/or not another bank or financial institution. There are different clauses applicable to the M&F facility letter than to the O'Connor one. Furthermore, the correspondence received by M&F from Mr Mulleady contributes to the lack of clarity on this issue.
 - (2) In the M&F Proceedings the Receivers were discharged and reappointed and there is an argument regarding the timing and sequencing of these steps.

(3) The status quo in the M&F proceedings appears to be that the plaintiff is continuing to collect rents and the Receivers are not acting to the same extent on the ground albeit that they have made attempts to appoint property managers.

These differences are relevant for the purposes of determining whether this court should intervene by way of granting interlocutory relief in either case

This court's determination on the injunction applications:

61. The relevant principles applying to the Court's jurisdiction in respect of interlocutory injunctions are well established and set out in the judgment of O'Donnell J in *Merck Sharpe and Dohme v. Clonmel Healthcare* [2019] IESC 65, [2020] 2 IR 1 and I do not propose to set them out in detail here. In the present case, the plaintiffs must as a preliminary issue satisfy this Court that they raise a fair issue to be tried. I am satisfied that a fair issue has been raised by M&F in light of its arguments regarding the terms of its facility letter with Ulster Bank and their arguments regarding the sequencing of the discharge and reappointment of the Receivers. I am not convinced that Mr O'Connor meets this threshold based on his loan documentation and the very general claims he makes to challenge the transfer to Promontoria. However, in circumstances where Mr O'Connor, and indeed this Court, have only been provided with heavily redacted copies of the Transfer Documents, there remains a doubt as to whether some of those claims might be substantiated were those documents to be produced in a more complete form. I will not for that reason determine that Mr O'Connor has failed to meet what is accepted to be "*generally not a difficult threshold to meet*" (as per Barniville J in *O'Gara v Ulster Bank Ireland DAC* [2019] IEHC 213 at para 42).
62. In both cases therefore I will proceed to consider the balance of convenience and, in particular, the question as to whether damages would be an adequate remedy for the parties.

63. While some reliance is placed by the plaintiffs in both proceedings on the letter of representation dated 7 July 2016, I am satisfied that assurance did not subsist beyond the receipt by the plaintiff's solicitors of the letter dated 17 June 2020 which put the plaintiff on notice that the receivership would be advanced, including by marketing the O'Connor Properties for sale. That letter exhibited as LC5 to the second Affidavit of Luke Charleton confirms:

“As you are aware a significant amount of correspondence has passed between our respective offices since July 2016 in which our clients' position has been set out in full. For the avoidance of doubt the joint receivers are proceeding to advance the receivership to include marketing for sale the properties subject to their appointment”.

64. The defendants say that if they are prevented from selling the O'Connor Properties or the M&F property pending the determination of these proceedings, Promontoria may well suffer an unrecoverable loss in the form of a reduction in current market prices. While accepting that such loss is purely monetary, they say that Thomas O'Connor does not have any ability to make good on his undertaking as to damages and that in any event it is not appropriate for a non-party to proffer an undertaking on M&F's behalf. The defendants say that if the plaintiffs do not obtain interlocutory relief but subsequently succeed at trial then any future loss of rental income or loss of increase in value of the property are matters which can readily be compensated by an award of damages.

65. M&F says that damages would not be an adequate remedy for it in circumstances where the secured property is held by it as a pension trustee for Mr O'Connor and to provide income for Mr O'Connor into his retirement. M&F says that it is impossible to adequately determine the rental income that the property would generate into the future for the

remainder of Mr O'Connor's lifetime. The plaintiffs also say damages would not compensate them for interference with their constitutionally protected property rights.

66. As is often the case on injunction applications arising in receivership matters, damages may, in truth, be an adequate remedy for both parties and what this Court then needs to determine is where the least risk of injustice lies.
67. In the O'Connor proceedings, Mr O'Connor admits to being indebted and he has not made any repayments to the defendants since 22 April 2016. He has, in my view, barely made the threshold of a fair issue to be tried given the very generalised arguments he has advanced to challenge the transfer or the receivership. Were it not for the possibility that some of these arguments could be substantiated if unredacted versions of documents were provided to him, I would find that he had not met that threshold. The status quo is that the Receivers are collecting rents and they are in control of the O'Connor Properties. The O'Connor Properties are commercial properties to which Mr O'Connor has no particular emotional attachment and he is not in occupation of them. Insofar as there are constitutional property rights at play, they apply not only to property owners but also to property charge holders. Two of the O'Connor Properties have in fact already been contracted for sale by the Receivers (albeit those sales have since been rescinded by the purchasers). Mr O'Connor did not advance his application for an interlocutory injunction to prevent those sales at the time of sale. Instead, his solicitors wrote to the defendants' solicitors on 10 July 2020 noting the proposed sale by auction of the properties at 65 Grosvenor Road and 13 Raglan Road scheduled for 15 July 2020. They sought confirmation by 5pm that day that the properties be removed from sale and that if they did not receive same "*we will proceed to immediately issue and serve High Court proceedings seeking, inter alia, interlocutory injunctive relief to prevent the sale of the within properties...*". The plaintiff did not receive the confirmation requested. While

proceedings issued on 14 July 2020, the motion for interlocutory relief did not issue until 7 October 2020. In the meantime, the properties were sold by auction held on the 15 July 2020 as scheduled, albeit the purchasers in each case were put on notice of the correspondence dated 10 July 2020 and the O'Connor Proceedings. Both purchasers subsequently rescinded the contracts for sale as they were entitled to do under the relevant special conditions of sale in circumstances where the O'Connor Proceedings had not been resolved within 3 months.

- 68.** I believe it may be difficult for the Receivers to sell the O'Connor Properties in circumstances where Mr O'Connor has registered a *lis pendens* against some of those properties and where there are proceedings between the parties which would need to be disclosed to any purchaser. Nevertheless, if the properties were sold by the defendants and Mr O'Connor subsequently succeeded at trial, I am satisfied that damages would be an adequate remedy for Mr O'Connor. In all the circumstances, therefore I refuse the interlocutory relief sought by the plaintiff in the O'Connor Proceedings.
- 69.** In the M&F proceedings, I believe that stronger arguments have been raised regarding the validity of the Receivers' appointment and the transfer to Promontoria. The status quo is that M&F remain in control of the property collecting rents. While the property at 61 Adelaide Road, Dublin 2 is a commercial property, Mr O'Connor claims to have a special relationship with the tenants and some evidence of this was provided to the Court in the form of text messages. The status of that property as a dedicated pension asset is also relevant in my view given the long-term nature of pension assets and the intention that they provide income to fund retirement for the beneficiary. If such an asset was to be sold prematurely, it may not be straightforward to calculate the loss arising if M&F subsequently succeeds at trial.

70. Against this, the defendants may of course suffer a loss if they cannot sell the property at 61 Adelaide Road, Dublin 2, until the determination of these proceedings. Predicting the property market is impossible for this Court so it is not certain that a loss would arise as a result of such delay, although I accept that it could. The defendants say there is no credible undertaking as to damages which they could rely on if they succeed at trial. However, I am conscious that there is ongoing rental from this property which will be available to the defendants if they are successful and that the indebtedness of M&F is such that there should be equity remaining in the property after the discharge of that indebtedness to address any loss suffered by the defendants if they in fact suffer a loss by having to postpone the sale pending trial. I make this latter observation based on the evidence before this Court as to the level of indebtedness of M&F when balanced against the evidence as to the location of the property and the fact that it comprises 16 apartment units and that there was no evidence given of any other charges on the property.

71. I believe that the balance of convenience in relation to M&F therefore lies in favour of granting the relief it seeks to restrain the sale by the defendants of the property at 61 Adelaide Road, Dublin 2 pending the determination of these proceedings. I note that M&F is continuing to collect the rents on that property. M&F also seeks injunctive relief preventing the defendants from collecting rents or otherwise interfering with the tenants in the property. I will grant an injunction which maintains the status quo in relation to collection of rents at the property pending the trial but this is on the strict understanding that all rents collected by M&F are to be accounted for to the defendants and separately maintained and preserved by M&F so that same are available for the defendants in the event that the defendants succeed at trial and/or for the repayment of indebtedness. This is particularly the case where it appears that no mortgage repayments are being made by the plaintiff. The plaintiff has suggested that future rents should be paid into the

plaintiff's solicitors client account and this appears to be a sensible way of preserving same pending the trial. I will however hear the parties on the appropriate form of order prior to finalising same.

M&F's request for inspection of documents in unredacted form

72. The second issue which this Court must determine relates to M&F's request for inspection of documents in unredacted form. As previously outlined, the M&F motion dated 27 April 2021 seeks a number of reliefs relevant to inspection of documents and/or unredacted copies of documents which have been produced by the defendants to date. The specific reliefs sought in the M&F motion which are relevant to inspection are the following:

"1. An Order pursuant to Order 50 Rule 4 of the Rules of the Superior Courts and/or pursuant to Section 91 of the Land and Conveyancing Law Reform Act 2009 or alternatively pursuant to the inherent jurisdiction of the court permitting the Plaintiff to inspect and take copies of all documents of title whereby the First and Second Named Defendants assets that it is mortgagee of the Plaintiff as mortgagor.

2. An Order that the First and Second Named Defendants, its servants or agents, do provide inspection to the Plaintiff of all documents as are required to allow the Plaintiff to obtain legal advice as to whether the First Named Defendant is the successor in title to the Second Named Defendant, to the mortgagee's interest in respect of the lands and premises listed in the schedule herein known as 61 Adelaide Road, Dublin 6, including a Global Deed of Transfer dated 12 February 2015 and all ancillary documents and agreements.

5. An Order that the First Named Defendant and/or the Second Named as mortgagee having been validly requested to provide inspection of documents of title pursuant to Section 91 of the Land and Conveyancing Law Reform Act 2009 may not appoint a receiver

until it has provided such inspection, or that any such receiver shall cease to act until such inspection is permitted.”

- 73.** In addition to relief sought in the motion above, various other requests for inspection of documents have been made by the plaintiffs in both proceedings. For example, in the O'Connor Proceedings the plaintiff's solicitors wrote to the defendants' solicitors on 10 July 2020 requesting copies of the Loan Sale Deed and the Deed of Transfer and followed up with a later request for "*certified copies (unredacted insofar as they related to our client) of the Loan Sale Deed and the Deed of Transfer of our client's loans to your client and the Deed of Appointment of Receiver*". In the M&F Proceedings there was correspondence from the plaintiff's solicitors to Link Asset Services dated 16 September 2020 requesting the same material. This request was repeated by letter to the Receivers dated 22 February 2021. The plaintiff's solicitors also wrote to the defendants' solicitors seeking inspection under s. 91 of the Land and Conveyancing Law Reform Act 2009 and/or s. 16 of the Conveyancing Act 1881 of all documents of transfer of the mortgagee's interest in the loans and security of the plaintiff.
- 74.** Two separate Notices to Produce Documents/Notices for Inspection under Order 31, rule 16 of the Rules of the Superior Courts (dated 6 September 2022 and 28 September 2022 respectively) were served by M&F seeking inspection of the same three documents, namely the Mortgage Sale Deed dated 16 December 2014 (as novated on 12 February 2015), the Global Deed of Transfer dated 12 February 2015 and the Declaration of Trust dated 12 February 2015. The first Notice to Produce was based on the reference to and exhibiting of redacted versions of those three documents in the Affidavit of Donal O'Sullivan sworn on 19 July 2021. The second Notice to Produce related to the reference to these documents in the defendants' Defence delivered on 11 January 2022. A similar Notice to Produce was served in the O'Connor Proceedings on the 28 September 2022

(arising from the defendants' Defence) and a generic Notice to Produce Documents was served on 3 October 2022 requiring the defendants to "*produce and show to the Court, on the trial of this action, all title documentation, books, papers, letters, copies of letters and other writings and documents in your custody, possession or power containing an entry, memorandum or minute relating to the matter*".

75. In submissions, M&F's counsel stated that M&F would also be seeking discovery of unredacted versions of documents already provided in redacted form. While this Court is not addressing discovery on this application, it is nevertheless of some relevance that such an application will likely follow in both sets of proceedings and so the Court should try to ensure that any order made in this application fairly and efficiently anticipates that further discovery application if to do so now would be fair and just to the parties.
76. I am satisfied that the key request for inspection of unredacted material in the Notices served under Order 31 relates to 3 specific documents namely the Mortgage Sale Deed dated 16 December 2014 (as novated on 12 February 2015) ("**MSD**"), the Global Deed of Transfer dated 12 February 2015 ("**GDT**") and the Declaration of Trust dated 12 February 2015 ("**DT**"), together referred to as "**the Transfer Documents**". I propose therefore to deal with those documents only and not with a wider range of generic or unspecified documents, which might, for example, arise at discovery stage for consideration.
77. I do not believe that the plaintiff has a general right to obtain and inspect "*all documents as are required to allow the Plaintiff to obtain legal advice as to whether the First Named Defendant is the successor in title to the Second Named Defendant, to the mortgagee's interest in respect of the lands and premises listed in the schedule herein known as 61 Adelaide Road, Dublin 6, including a Global Deed of Transfer dated 12 February 2015 and all ancillary documents and agreements*" as referred to in paragraph 2 of its motion. Such wording is far too broad, even for a discovery request, and would have to be limited to specific

documents or categories of documents with reasons for inspection advanced in each case. I therefore refuse the relief sought in paragraph 2 of the notice of motion. As this judgment will address the entitlement to unredacted copies of the Transfer Documents, which include the GDT referenced in this paragraph of the plaintiff's motion, I do not believe the plaintiff is prejudiced at this stage by confining my consideration to the Transfer Documents.

- 78.** There is no doubt that the Transfer Documents are relied on by the defendants. They are expressly pleaded as the documents pursuant to which Promontoria acquired its interest in the plaintiffs' loans and mortgages. These are not incidental documents or documents only tangentially relevant to the establishment of context or the factual matrix – rather they are central to the proceedings and are accepted by all parties as such. As Haughton J observed in *Courtney v OCM Emru Debtco DAC* [2019] IEHC 160, [2019] 2 ILRM 166 at para 67, “*Documents referred to in pleadings and affidavits are likely to occupy a more central role – at least from the pleader or deponent’s perspective – than documents which a party is obliged to list after pleadings are closed.*” A similar point was made by Baker J in *Playboy Enterprises International Incorporated v Entertainment Media Networks* [2015] IEHC 102 at para 38 where she stated: “*To withhold the documents at this stage when these documents are not merely relevant but also central, and the 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.*”
- 79.** The defendants say that they are entitled to maintain the redactions to the Transfer Documents and that the plaintiff has made out no case that would require the production of unredacted versions.
- 80.** As Kennedy J observed in the decision of *Maye v. Adams* [2015] IEHC 530, the real issue for determination, where a redaction is challenged, is whether the information is relevant.

81. The most detailed rationale and justification advanced by the defendants in relation to the redacted material is to be found in the Replying Affidavit of Donal O’Sullivan sworn the 19 July 2021 at paragraph 15 where he states:

“I am advised by Promontoria’s solicitors, say and believe that the redactions to the aforesaid documents were made for reasons of (i) commercial sensitivity (e.g. disclosure of the confidential terms on which the purchase of those loan assets were completed could adversely impact on Promontoria’s ability to negotiate and complete future similar transactions), (ii) bank and/or client confidentiality (e.g. restrictions imposed by the Data Protection Act 2018 requiring the redaction of all personal information relating to other borrowers which do not relate to the within proceedings) and (iii) on the basis of irrelevance (e.g matters which are not relevant to the plaintiff or the subject matter of the within proceedings). Pages which have been entirely redacted have not been included in each exhibit in ease of this Honourable Court.”

82. Both parties rely on the decision in *Courtney v OCM Emru Debtco DAC* [2019] IEHC 160, [2019] 2 ILRM 166. The plaintiff relies on it because of the outcome of that decision in which the High Court ordered disclosure of redacted information on certain terms. The defendants rely on it to argue that the plaintiff in this case has failed to satisfy the burden of proof that is on the party seeking to unredact documents and they seek to distinguish the case from the present one on the specific facts. It is clear to this Court that the decision in *Courtney* is highly relevant to the issues currently before this Court for determination but I accept that there is a significant distinction between it and the facts of the present claim as set out below.

83. In *Courtney*, the plaintiff, whose debt and security had been assigned to OCM, sought, among other relief, injunctions prohibiting OCM from appointing a receiver and a

declaration that the receivers had not been validly appointed and that the purported loan transfer was invalid on several grounds, similar to those raised in the present case. She also claimed pursuant to Order 31, rule 15 of the Rules of the Superior Courts, that prior to the close of pleadings/discovery and on foot of notices to produce for inspection that she was entitled to inspect unredacted copies of the relevant loan sale agreement and loan sale deed and in particular those redacted or omitted parts of the documents that related to the price allocated to the plaintiff's connection, and the price paid generally. A motion was issued for inspection by solicitors pursuant to Order 31, rule 18 of the Rules of the Superior Courts. The defendants in that case opposed the application and sought to justify the redactions on the same basis as in the present case namely commercial sensitivity, confidentiality and lack of relevance.

84. Haughton J confirmed at paragraph 55 of his judgment that

“while the burden lies on the party seeking inspection to show that it is necessary for the fair disposal of the action, when a prima facie case for disclosure is made out it is logical that the burden should then switch to the party seeking redaction to justify that on grounds of relevance, confidentiality, commercial sensitivity, privilege or otherwise.”

At para 56, he cited with approval the following comments quoted by Snowden J in *WH Holding Ltd, West Ham United Football Club Ltd v E20 stadium LLP* [2018] EWHC 2578:

“Where material in the document is simply irrelevant, it is unlikely that there will be any point in blanking it out unless it is confidential. Blanking out part of a document always seems to excite interest in the document and the hidden contents for the other side. ... Large numbers of documents are disclosed with black lines through them in a way which makes it impossible to see what the basis of the

redaction is or whether it is appropriate. On examination too often these documents turn out to have been redacted based on an unjustifiably narrow definition of relevance. Passages redacted turn out to be material after all. ...there is no reason why the other side should not be asked to identify with precision the basis of the redaction... The right to redact is being regularly abused, and the courts should be vigilant to stop this”.

85. Haughton J said at para 57:

“these comments reflect this court’s experience of being faced with heavily redacted loan sale documents in many cases in recent years. Almost invariably the redactions have not been reviewed by lawyers, but appear, as in the present case, to be client led. This is not as it should be. Such redactions frequently cause suspicion and resentment, and their justification has absorbed considerable court time...”.

86. The decision of the court in *Courtney* (reached firstly without inspection of the unredacted versions of the documents) was that understanding the loan sale deeds as a whole was relevant to the plaintiff’s pleaded claims and this was unfairly impeded by the redactions. The court held that the redacted parts of the loan sale documents relating to price, including any price attributable to the plaintiff’s connection, were relevant to claims she had pleaded in the statement of claim and in particular a plea regarding the offer made by the plaintiff in that case to purchase her own loan, which in my view distinguishes *Courtney*’s facts from the present case. The court ordered disclosure of the redacted parts of the loan sale documents holding that same was necessary for doing justice to the plaintiff’s case. Insofar as it related to “price” I believe the court in *Courtney* was heavily influenced by the specific cause of action pleaded in that case relating to a pre-transfer offer to purchase which the plaintiff had

been invited to and had in fact made to purchase her loan. No such offer or factual circumstances arise in the present case. Haughton J stated that the court could adequately protect OCM's commercial interest by limiting the persons to whom disclosure could be made and the purpose of that disclosure and by providing that no wider disclosure or use could be made without further leave of the court. The court also ordered that information relating to third parties and information that could lead to their identification should remain redacted.

- 87.** Having later reviewed the unredacted version of the loan sale documents, Haughton J found no reason to depart from his earlier conclusions. He said at para 95 that

“there is no question but that consideration of these documents with the schedules in largely unredacted form is necessary to enable the reader to properly understand their operation. While it can be argued that many of the provisions are, taken in isolation irrelevant to any case that the plaintiff wishes to make out, the deeds as a whole are clearly relevant, and the continued redaction of certain provisions/Schedules, or the omission of Schedules, is not necessary or warranted for the protection of confidentiality or the commercial interests of OCM provided due safeguards are put in place.”

The court ordered the disclosure of less redacted copies of the loan sale deed and deed of transfer with suitable undertakings and further court direction as necessary to protect commercial sensitivity.

- 88.** Reliance was also placed by the plaintiff on the recent decision of Stack J in *Aidan Farrell v Everyday Finance DAC* [2022] IEHC 303. That case involved an application to inspect documents under Order 31, rule 18 of the Rules of the Superior Courts and, as in the present case, to inspect under s. 91 of the Land and Conveyancing Law Reform Act 2009, Order 50, rule 4 of the Rules of the Superior Courts and the inherent

jurisdiction of the court. The plaintiff in that case was challenging the transfer of his loans and mortgages to the defendant on many of the same grounds as are advanced by the plaintiffs in the M&F Proceedings and the O'Connor Proceedings.

89. In referring to the court's jurisdiction under Order 31 Stack J stated at para 46:

"...the court can scrutinise the redacted copies in order to ascertain whether it can be satisfied that the redactions made are limited to what is necessary to protect the defendant's legitimate commercial interests, and in particular information that is so commercially sensitive that the defendant is entitled to redact the documents to protect its confidentiality, and to information about third parties".

90. She referred to the decision of Barniville J in *Victoria Hall Management Ltd v. Cox* [2019] IEHC 639 where Barniville J specifically approved *Courtney* and where he held that proper explanations for the redactions made should be put on affidavit by the party seeking to apply them.

91. Having considered those decisions, Stack J stated at paragraph 50 of her judgment:

"...it seems that the submission of the defendant that the onus is on the plaintiff to demonstrate why redaction has been excessive is somewhat overstated. If redaction is done by the opposing party without the input of its solicitor, and if it appears that the basis for the redaction does not fully reflect the issues in the case, then the party seeking inspection has simply no assurance that redaction is not excessive, but, at the same time, because he or she has no idea what has been redacted, it is impossible to make a meaningful submission as to why a greater portion of the document – or indeed all of it – should be produced for inspection. In my view, the burden to demonstrate that greater disclosure is required only moves to the party seeking inspection when the redaction is done in a manner

which gives confidence to the party seeking inspection and to the court, that it has been effected only in so far as that can be justified on legitimate grounds such as commercial sensitivity and third party confidentiality.”

92. She also stated at paragraph 51:

“I have significant doubts as to whether redaction can be effected on the basis of relevance as the right to inspect only arises in relation to specific documents which the redacted party has already sought to rely on in pleadings or affidavits, or which have been discovered as being relevant and necessary. It is not clear to me why relevance is a basis for redaction, although it is a basis for resisting discovery as well as a basis for resisting inspection pursuant to Order 31. However, once it has been determined or agreed that discovery or inspection should take place, it is difficult to see how the relevance test has any bearing on the right to redact portions of a document. And I would reiterate that the deeds themselves, at least excluding the schedules to them, are brief documents which it would not be onerous to disclose in full.”

93. The defendants say that in its affidavits M&F does not identify which of the redacted portions of the text in the Transfer Documents it objects to. They point to the averment in the Affidavit of Killian Conroy sworn 27 April 2021 where he states at paragraph 20: *“[g]iven the doubts about the appointment of the receivers, it is appropriate that inspection of all documents of title should be permitted before the Defendants, or either of them, take any step pending the determination of these proceedings.”*

94. The defendants say that the plaintiff has failed to discharge the burden of responsibility to show that disclosure of the unredacted Transfer Documents is necessary for the fair disposal of the action and that they have failed to assert how sight of the unredacted

portions of the transfer documents might be material to any fact in issue in the within proceedings.

- 95.** The defendants also state that the plaintiff shows no basis as to how the disclosure sought will confer upon it a litigious advantage other than the possible tactical and commercial embarrassment of the defendants by the disclosure of commercially sensitive information. Accordingly, the defendants believe that the plaintiff has failed to discharge the burden of responsibility as to the necessity of inspection and has further failed to establish that a prima facie case has been made for inspection. They argue accordingly that the plaintiff's application for inspection / disclosure of unredacted copies of the Transfer Documents should be dismissed.
- 96.** In the present case I believe that the redactions are so extensive and unexplained that it would be unreasonable to expect the plaintiff to identify and explain which of the redacted portions of the text in the Transfer Documents they object to. There is no affidavit from a solicitor on record for the defendants explaining the redactions. The only information on affidavit justifying the redactions is the confirmation from Donal O'Sullivan, a director of Ulster Bank, in his Replying Affidavit sworn on 19 July 2021 (at para 15) that he has been "*advised by Promontoria's solicitors*" of the reasons for the redactions as being commercial sensitivity, bank and/or client confidentiality and irrelevance (as per the wording set out in full in para 81 above). This is argued by the plaintiff's counsel to be wholly inadequate. He says there is no evidence that the Promontoria solicitor referred to is the solicitor on record in these proceedings or that the solicitor on record has ever even seen the fully unredacted Transfer Documents. He says there is no evidence that the redactions have been reviewed or advised on at all by a solicitor with carriage of the proceedings.

- 97.** The table of contents of the MSD is redacted as well as the headings of redacted sections. It is therefore not possible to ascertain even the general subject matter of most of the redacted provisions. Recitals are redacted. Large sections of the definitions are redacted including parts of definitions which are unredacted. Entire pages of this document are redacted, and it is not clear how many pages as even page numbers have been redacted. Schedules are redacted save for the plaintiff's details. The redaction of schedules is less problematic as it seems clear that the remaining information most likely relates to third parties unconnected to these proceedings. The GDT is similarly redacted including a clause relevant to Governing Law. The DT also has recitals and interpretation provisions redacted. Overall, the Transfer Documents are very heavily redacted.
- 98.** In his decision in *Everyday Finance DAC v. Woods* [2019] IEHC 605, McDonald J was clear that, subject to a detailed justification being given on affidavit, a party seeking inspection was entitled to see the definitions in a deed. I agree with that position.
- 99.** In my view, this particular case can be distinguished from those cases where the courts have dealt with matters on the basis of unredacted documents. In those latter cases the scope of challenge to the documents was much narrower than in the present case and what was required to be established was the title to the loans and mortgages in question. These include applications for summary judgment such as in *Launceston Property Finance DAC v. Walls* [2018] IEHC 610 or *Promontoria (Arrow) Ltd v. Burke* [2018] IEHC 773 or procedural applications for the substitution of a plaintiff such as *IBRC v. McCaughey* [2014] IEHC 517. In this case, a wide-ranging challenge has been advanced to the validity of the Transfer Documents. The Transfer Documents themselves are central to this issue. The redactions are extensive and done in a manner which does not permit the reader to understand, even in general terms, what is behind

many of the redactions. In a dispute of this nature, this appears to create an unfairness for the plaintiff and an unsatisfactory position for the court who is to decide on the merits. The plaintiff may well not succeed on the points of challenge (many of which as I have stated earlier are generalised and wide-ranging) but these should be determined by reference to the actual terms of the Transfer Documents (subject to redaction of confidential information not necessary for the determination of the plaintiff's challenge).

100. Consistent with the general nature of what would be required in any event at the discovery stage in these proceedings (and in the hope of simplifying that process) I direct that the defendants should provide an affidavit setting out in detail the basis of each redaction that they wish to maintain having regard to my view that:

- (1) Headings should in all cases be unredacted;
- (2) Recitals, Definitions and Interpretation provisions should, in the absence of a clear explanation, be unredacted;
- (3) Third party information should be identified as such. There does not appear to be an issue with retaining those redactions.
- (4) Redactions for irrelevance alone should be minimised or dropped altogether. I believe that once a document is relevant (and indeed centrally so) it is not appropriate for large sections of it to be redacted as irrelevant, and certainly not without explanation as to why this is so.
- (5) Confidential/commercially sensitive information may be redacted by the defendants pending further inspection or directions from this court if necessary. It seems clear on the evidence before this court that the price paid for the portfolio or the price attributed to the plaintiff's loans is commercially sensitive information. At this point the defendants should be permitted to

redact that information. It will then be for the plaintiff to explain by reference to its pleaded case and the unredacted provisions of the Transfer Documents why it needs that information specifically. I am not convinced on the basis of the generalised claims canvassed to date that the actual price itself is relevant or necessary to the plaintiff's claims such as would override the obvious commercial sensitivity of that information for the defendants. I will however hear the parties further on this point if necessary once the explanatory affidavit regarding redactions has been provided by the defendants' solicitors or a deponent who has had the specific input of those solicitors on those redactions.

Section 91 of the Land and Conveyancing Law Reform Act, 2009

101. M&F seeks an order in paragraph 1 of its motion for inspection of the Transfer Documents pursuant to section 91 of the Land and Conveyancing Law Reform Act 2009 (the **2009 Act**). Furthermore, in paragraph 5 of its motion M&F seeks an order that the defendants may not appoint a receiver until they have provided such inspection, or that any such receiver shall cease to act until such inspection is permitted. I will deal with both aspects under this heading.

102. Section 91, which replaced section 16 of the Conveyancing Act 1881, provides:

“(1) Subject to subsection (2), a mortgagor, as long as the right to redeem exists, may from time to time, at reasonable times, inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the possession or power of the mortgagee.

(2) rights under subsection (1) are exercisable-

(a) on the request of the mortgagor, and

(b) on payment by the mortgagor of the mortgagee's reasonable costs and expenses in relation to the exercise.

(3) Subsection (1) has effect notwithstanding any stipulation to the contrary.”

103. The plaintiff submits that “documents of title” include all finance documents and documents of transfer by which the defendant acquired the loans. They rely on the decision of Allen J in *Charlton v. Hassett* [2021] IEHC 746 where he noted in relation to a request to inspect under s. 91(at paragraph 54):

“...it was not suggested that the deed of appointment, any supplemental deeds, or the facility letter, fell into any different category than the deed of charge. I cannot see how Mr Hassett's right to inspect the documents could properly have been contested”.

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”.

- 105.** The defendants say that s. 91 does not entitle the plaintiff to inspect and take copies of the Transfer Documents in unredacted form. I agree with the defendants on this point. It is only the provisions of the Transfer Documents which actually establish the chain and transfer of title that, in my view, are captured by an inspection request for “documents of title relating to the mortgaged property” under s. 91 of the 2009 Act.
- 106.** I believe that section 91 must be interpreted in a manner consistent with the existing legal principles which protect confidentiality, privilege, and privacy rights of parties (whether they be parties to those documents or otherwise). It is also worth noting that, unlike where documents are provided on discovery, there would appear to be no restriction on the use which a mortgagor can make of documents provided under s. 91. This supports my view that the material thus provided should be limited to those aspects that deal with title to the mortgaged property and not to other aspects including those which might be disclosed on discovery by reference to pleadings.
- 107.** In *Aidan Farrell v. Everyday Finance* [2022] IEHC 303 Stack J refused an application to inspect under s. 91. She stated at paragraph 70 as follows:

“It therefore seems that the section 91 argument in this case is to seek the documents of title for advantage in the litigation, which is not the purpose for which the section was enacted. In particular, the fact that it is sought at interlocutory stage even though it is a substantive claim in the proceedings, leads to the irresistible inference that it has been included in the notice of motion as a possible means of obtaining documents which would not otherwise be available by way of discovery or by means of the application to inspect pursuant to Order 31, rule 18.”

- 108.** Stack J stated at para 71 of her judgment “*Section 91 ...is not designed to supplement the discovery process*”.
- 109.** I believe that the production of the Transfer Documents in their current redacted form satisfies the defendants’ obligations under section 91 of the 2009 Act .
- 110.** Furthermore, I can find no basis, nor has any basis been suggested by the plaintiff, to support the contention that any delay or failure to comply with an inspection request under section 91 of the 2009 Act ought to prevent the defendant from appointing a receiver or permitting a receiver, once appointed, to continue in place. The validity of the appointment of a receiver is dependent upon compliance with the terms contained in the debenture and the capacity of the appointing company to create that debenture. Section 91 cannot in my view be interpreted as an additional mandatory requirement for the appointment of a receiver. In any event I do not find that there has been any failure to provide inspection under s. 91 of the 2009 Act and I therefore refuse an order in the terms requested in paragraph 5 of the plaintiff’s notice of motion.

Order 50, rule 4

- 111.** The plaintiff also seeks inspection pursuant to the provisions of Order 50, rule 4 of the Rules of the Superior Courts which provides as follows:

“The court, upon the application of any party to a cause or matter, and upon such terms as may be just, may make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid may authorise any person to enter upon or into any land or building in the possession of any party to such cause or matter and for all or any of the purposes aforesaid may authorise any samples to be taken or any observations to

be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence”.

- 112.** I find myself in agreement with the comments of Stack J in *Aidan Farrell v. Everyday Finance* where she stated at para 72: *“I think the defendant’s submission that Order 50 is not directed at disclosure of documents but at the preservation of physical evidence, be it in the form of real or personal property, is correct.”* I therefore refuse an order for inspection of unredacted versions of the Transfer Documents under Order 50, rule 4.
- 113.** I also refuse any order for inspection pursuant to this Court’s inherent jurisdiction in circumstances where existing rules of court in Order 31 provide for the terms on which inspection of documents should be provided to a party requesting them.

Conclusion

- 114.** For the reasons set out in this judgment, I refuse the interlocutory relief sought by the plaintiff in the O’Connor Proceedings.
- 115.** For the reasons set out in this judgment, I grant an interlocutory injunction in the M&F Proceedings restraining the sale by the defendants of the property at 61 Adelaide Road, Dublin 2 pending the determination of these proceedings. I also grant an injunction which maintains the status quo in relation to collection of rents at that property pending the trial but this is on the strict understanding that all rents collected by M&F are to be accounted for to the defendants and separately maintained and preserved by M&F so that same are available for the defendants in the event that the defendants succeed at trial and/or for the repayment of indebtedness. This court also notes the submission by counsel for the plaintiff at the hearing that the plaintiff would give an undertaking to continue to rent out vacant properties in 61 Adelaide Road.
- 116.** I refuse the relief sought in paragraph 2 of the plaintiff’s notice of motion in the M&F Proceedings as being unduly broad.

117. I direct that the defendants should provide an affidavit confirming that the unredacted Transfer Documents have been inspected by the solicitors on record in these proceedings and setting out in detail the basis of each redaction that they wish to maintain having regard to my view that:

- (1) Headings should in all cases be unredacted;
- (2) Recitals, Definitions and Interpretation provisions should, in the absence of a clear explanation, be unredacted;
- (3) Third party information should be identified as such. There does not appear to be an issue with retaining those redactions.
- (4) Redactions for irrelevance alone should be minimised or dropped altogether. I believe that once a document is relevant (and indeed centrally so) it is not appropriate for large sections of it to be redacted as irrelevant, and certainly not without explanation as to why this is so.
- (5) Confidential/commercially sensitive information may be redacted by the defendants pending further inspection or directions from this court if necessary. It seems clear on the evidence before this Court that the price paid for the portfolio or the price attributed to the plaintiff's loans is commercially sensitive information. At this point the defendants should be permitted to redact that information. It will then be for the plaintiff to explain by reference to its pleaded case and the unredacted provisions of the Transfer Documents why it needs that information specifically. I am not convinced on the basis of the generalised claims canvassed to date that the actual price itself is relevant or necessary to the plaintiff's claims such as would override the obvious commercial sensitivity of that information for the defendants. I will however hear the parties further on this point if necessary once the explanatory

affidavit regarding redactions has been provided by the defendants or their solicitors.

- 118.** Only those parts of the Transfer Documents which relate 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*". The current redacted versions appear to satisfy that requirement and no further inspection of unredacted material is necessary to satisfy the requirements of s. 91 of the 2009 Act.
- 119.** Section 91 cannot, in my view, be interpreted as an additional mandatory requirement for the appointment of a receiver. In any event I do not find that there has been any failure to provide inspection under s. 91 of the 2009 Act in this case and so I refuse an order in the terms requested in paragraph 5 of the plaintiff's notice of motion.
- 120.** I also refuse an order for inspection of unredacted material under Order 50, rule 4 or the inherent jurisdiction of this Court, for the reasons outlined.
- 121.** Conscious that there are a number of matters which remain to be finalised as part of the relevant Court Orders, I will list this matter for mention on 23 November at 10.30am and will expect at that time to be addressed on the following: (a) the manner in which the M&F rents will be retained pending trial; (b) the proposed deponent of the defendants' Affidavit and the timescale required for the preparation and exchange of same; (c) such further directions as may be required to progress matters to an early trial and (d) any submissions the parties may wish to make in relation to legal costs at this time.