

THE HIGH COURT

[2023] IEHC 507

2022 No. 2709P

BETWEEN

ANNE O'DWYER and DECLAN TAITE

PLAINTIFFS

AND

KENNY PROPERTY GROUP LIMITED, PAUL KENNY and JOHN KENNY

DEFENDANTS

JUDGMENT of Ms. Justice Eileen Roberts delivered on 15 August 2023

Introduction

1. This judgment relates to a motion heard by this court on 31 July 2023. The motion, brought on behalf of the second and third named defendants, concerns, firstly, a disputed category of discovery (the “**Discovery Application**”). The second aspect originated as a further disputed category of discovery but morphed into an application for inspection of unredacted or less redacted material. I permitted this change in the interests of efficiency and will therefore deal with the second aspect as though it were initiated from the outset as a motion to inspect (the “**Inspection Application**”).
2. I will deal with each application separately as they raise different legal considerations. However, both applications arise in the context of the same factual background and pleadings and the following general summary of the proceedings applies to both. In the

interests of brevity, I deal only with those matters directly relevant to the application before this court.

The parties and the background to this dispute

3. These proceedings relate to a car park at Grand Parade Co Cork (the “**Property**”) which is mortgaged/charged in favour of OCM EmRu Debtco DAC (“**OCM**”). The Property is owned by a partnership known as the Model Investment Partnership made up of the second and third named defendants together with two other individuals, Martin Kenny and Michael Pender (the “**Partnership**”). Martin Kenny and Michael Pender are not parties to these proceedings.
4. The Property was part of a significant portfolio owned by the Partnership. The finance for the Property was originally provided by Allied Irish Banks plc (“**AIB**”) and was charged in their favour. The liabilities of the Partnership to AIB were acquired by National Asset Loan Management DAC (“**NALM**”) pursuant to Part 6 of the National Asset Management Agency Act 2009 and in October 2014 the members of the Partnership further mortgaged and charged their interest in the Property in favour of NALM as assignee of AIB’s rights.
5. Pursuant to a loan sale deed dated 17 June 2016 (the “**Loan Sale Deed**”), it is pleaded that OCM acquired ownership of all the Partnership’s loans the subject matter of facilities originally provided by AIB and all related security, including the Property.
6. Following demand to the Partnership for repayment, OCM by deed of appointment dated 1 November 2016 appointed the plaintiffs (who are both insolvency practitioners) as joint receivers over the Partnership’s interest in the Property.
7. It is alleged in the proceedings that the first named defendant is in unlawful occupation of the Property. It is accepted that the Partnership granted the first named defendant a

lease of the Property for a term of 20 years and three months commencing 1 March 2003 (the “**Lease**”). What is in dispute however is a deed of variation (the “**Deed of Variation**”) which the defendants claim was granted by the Partnership to the first named defendant on 2 October 2011 which provided for a reduction in the annual rent for the Property from €200,000 to €114,000 and granted the first named defendant a right to extend the term of the Lease by a further 20 years to 2043.

8. It is the validity of the Deed of Variation that is at the heart of the applications before this court. It is pleaded that the original security provided by AIB contained a negative pledge clause and that no evidence has been provided that AIB consented to the Deed of Variation. More significantly for present purposes however is the plea by the plaintiffs that the Deed of Variation “*is not a genuine or valid agreement or is a sham and was not executed by the purported signatories thereto*” (para 16 of the statement of claim).
9. Detailed particulars of that plea are set out at para 16 of the statement of claim. It is pleaded that the evidence of a handwriting expert instructed by the plaintiffs strongly supports the proposition that the signature of the third named on the Deed of Variation is not genuine but “*is a forged signature written by someone else*” (para 16.1.1), and that the expert has reached the same conclusion in relation to the signature of Michael Pender (para 16.1.3). It is pleaded that the handwriting expert offers limited support to the proposition that the signature of Martin Kenny is not a genuine signature (para 16.1.2).
10. It is then pleaded at para 16.2 as follows: “*Martin Kenny and Michael Pender have confirmed that they did not sign the Purported Deed of Variation and that they were not aware of its existence or its terms*”.

11. It is alleged at para 17 that the second and third named defendants have falsely come together to assert that the Deed of Variation is valid and effective.
12. It is pleaded in para 24 of the statement of claim that Martin Kenny through his solicitors by letter dated 26 April 2022 “*did not dispute the Plaintiffs’ entitlement to rent due under the Lease in partial discharge of amounts owing to the Plaintiffs as receivers appointed to the Property*”. It is also pleaded in that same paragraph that “*Michael Pender has separately acknowledged the Plaintiffs’ entitlement to all income relating to the Property*”. It appears to this court that the averments in this paragraph 24 relate to the validity of the plaintiffs’ appointment as joint receivers rather than the validity of the Deed of Variation.
13. A notice for particulars was served by the defendants regarding the plea at para 16 of the statement of claim and this was responded to by the plaintiffs on 5 December 2022. The defendants asked that the plaintiffs identify the precise date on which Martin Kenny and Michael Pender are alleged to have provided the confirmations set out at para 16.2. In response, the plaintiffs say that Martin Kenny gave this confirmation in a letter from his solicitors dated 7 June 2022 a copy of which was enclosed with the replies. That letter states that the solicitors’ instructions from Martin Kenny is that “*[h]e did not execute the variation of 2nd October 2009 and was not aware of and did not agree its terms*”. The replies further state that the confirmation from Michael Pender was given by him by written declaration dated 15 August 2021 and a copy of that declaration was also enclosed with the replies to particulars. It confirms that to the best of his knowledge information and belief Michael Pender did not execute the Deed of Variation nor did he authorise any third party to do so on his behalf. He also states that the signature appearing on the copy of the Deed of Variation provided to him “*is not my signature*”.

14. Particulars were also raised in relation to para 24 of the statement of claim. Question 11(c) of the defendants' notice for particulars asked as follows (with reference to paragraph 24 of the statement of claim): *"Please state whether an agreement of any kind has been entered into between the plaintiffs and/or OCM, on the one hand, and Martin Kenny and/or Michael Pender, on the other hand"*. The response from the plaintiffs was that *"This does not arise from the pleadings. It is in the nature of an attempt to cross-examine the Plaintiffs about matters that are not pleaded"*.
15. In the defence of the second and third named defendants dated 16 January 2023 it is confirmed at para 2 that *"[t]he Third Defendant has clarified that he signed the Deed of Variation, thereby eliminating the sole reason provided for his joinder"*.
16. At para 19 of the defence, it is denied by the second and third named defendants that the Deed of Variation is not a genuine or valid agreement and/or is a sham and/or was not executed by the purported signatories thereto.
17. Specifically relevant to the present application, paragraph 19.4 pleads as follows:

"...If the positions of Martin Kenny and/or Michael Pender are as pleaded in sub-paragraph 16.2 (which is not admitted), the said positions of Martin Kenny are not genuine and/or bona fide in circumstances where they were procured by the Plaintiffs and/or OCM on foot of consideration transferred to Martin Kenny and/or Michael Pender in the context of arrangements or agreements reached with those parties. The Second and Third Defendants reserve the right to seek discovery of all arrangements or agreements reached between the Plaintiffs and/or OCM and Martin Kenny and/or Michael Pender."
18. A notice for particulars was raised by the plaintiffs on 27 January 2023 and replies were furnished by the second and third named defendants on 3 February 2023. Specifically,

in question 9(ii) the plaintiffs requested all material facts and grounds relied on in support of the plea that the positions of Martin Kenny and Michael Pender were procured by the plaintiffs and/or OCM on foot of consideration transferred to Martin Kenny and/or Michael Pender in the context of arrangements or agreements reached with those parties. The response provided by the second and third named defendants is in the following terms: –

“This is sufficiently pleaded. The right of the Second and Third Defendants to seek discovery of all and any agreements or understandings between the Plaintiffs/OCM on the one part and the said Martin Kenny and/or Michael Pender and / (sic) entities associated with the said Michael Pender and/or Martin Kenn (sic) is fully reserved as is the right to furnish further and better particulars following such discovery”.

19. The same response is furnished in relation to question 9(iii) and 9(iv) where the plaintiffs seek particulars of the consideration referred to, including the dates and amounts thereof and the arrangements or agreements referred to.

20. A specific question is asked in question 9(v) where the plaintiffs enquire

“Are the Second and Third Named Defendants alleging that OCM has paid Martin Kenny and Michael Pender to falsely claim that they did not sign or were not aware of the Deed of Variation? If so, please set out all material facts relied on in support of that allegation.”

The response provided by the second and third named defendants is in the following terms: –

“The plea is clear. This request is an impermissible attempt to interrogate the Second and Third Defendants regarding their claim”.

21. In the reply to defence delivered on 15 February 2023 the plaintiffs state as follows (para 13.1):

“The plea at paragraph 19.4 amounts to an unparticularised allegation of fraud. In substance it is an allegation that the plaintiffs or OCM paid Martin Kenny or Michael Pender to dishonestly assert that they were never aware of or signed the Purported Deed of Variation”.

The plaintiffs say (at para 13.3) that this plea is scandalous and fails to disclose a reasonable cause of action.

The Discovery Application

22. While the parties have agreed extensive discovery terms (a point I will return to later), the disputed category of discovery the subject of this application is category 7 of the initial request for voluntary discovery dated 27 February 2023 which is in the following terms:

“Any documents which relate to and/or refer to and/or evidence any agreement or commercial arrangement of any nature between the Plaintiffs and/or OCM of the one part and Michael Pender and/or Martin Kenny of the other part including without limitation any agreement or arrangement referring to or relating to any cooperation or lack thereof by Michael Pender and/or Martin Kenny with OCM and/or the Plaintiffs in connection with or relating to the assets and/or the loans of the Partnership including any settlement, forbearance, compromise or other agreement between the Receivers and/or OCM of the one part and Michael Pender and/or Martin Kenny of the other part”.

23. The reason advanced for this category of discovery is stated to be as follows:

“Michael Pender declined to cooperate with AIB at the time of the restructuring prior to the acquisition of the loans by NAMA. Further he declined to cooperate with NALM at the time the loans were held by NALM. Subsequently upon the appointment of the Receivers he initially declined to cooperate. The Plaintiffs now plead that Michael Pender and Martin Kenny are supporting their claim in these proceedings, while refusing to confirm whether they have entered into an agreement or arrangement with those individuals. The First Defendant and Second Defendant are aware of at least one property which has been sold by the Plaintiffs to the said Michael Pender. The Second and Third Defendants have denied the allegations pleaded regarding the evidence which the Plaintiff pleads will be given by Michael Pender and/or Martin Kenny, and have specifically alleged that the positions allegedly adopted by those parties are not genuine and/or bona fide in circumstances where they were procured by the Plaintiffs and/or OCM on foot of consideration transferred to Martin Kenny and/or Michael Pender in the context of arrangements or agreements reached with those parties. The documentation sought is therefore relevant and necessary for resolving the pleaded dispute and for saving costs.”

24. The plaintiffs’ solicitors responded in their letter dated 7 March 2023 noting that most of the reasons advanced for this category had no connection to any matters pleaded, including the alleged prior non-cooperation of Michael Pender or that at least one unidentified property had been sold by the plaintiffs to Michael Pender or an associated entity. The plaintiffs stated their belief that the claim advanced in para 19.4 of the second and third named defendants’ defence was in substance a bare assertion that the plaintiffs or OCM had paid Martin Kenny and/or Michael Pender to dishonestly assert that they were never aware of or signed the Deed of Variation. They said that no

meaningful particulars had been given of this assertion in breach of O. 19, r. 5 of the Rules of the Superior Courts. They also stated that a party is not entitled to advance a bare assertion in pleading, which is unsupported by any evidence or detail, and use it as a hook to obtain wide-ranging discovery. They denied this category was either relevant or necessary to dispose of pleaded issues. In later correspondence dated 15 March 2023 the plaintiffs maintained their refusal to make discovery of this category, relying on the confidential nature of the material sought and the fact that it was impermissible to seek discovery to challenge the credibility of witnesses.

- 25.** The solicitors for the second and third named defendants in their response dated 14 March 2023 noted that no strikeout application had been made by the plaintiffs regarding this plea and, in those circumstances, they said it was simply not open to the plaintiffs to oppose discovery on the basis that the plea in question is not well founded. They also stressed that the plaintiffs had not denied the existence of such agreements or arrangements in their Reply. They said that the second and third defendants believed and understood that such arrangements are in place and that the fact that Michael Pender and Martin Kenny are adopting a position favourable to the plaintiffs and detrimental to the defendants reinforces the second and third defendants' belief and understanding that such agreements or arrangements are in place. They said that the arrangements or agreements have been pleaded with adequate particularity having regard to the "*clandestine nature of the conduct alleged*". They denied that fraud was pleaded and said that reliance on O. 19, r.5(2) was clearly misconceived as that provision related to allegations of fraud made as between the parties to the proceedings.
- 26.** This letter also stated that the fact and terms of any such agreements or arrangements are

“centrally relevant to the independence and credibility of Michael Pender and Martin Kenny, and to their motivation, and documents going to this issue one way or the other ought to be before the Court in circumstances where the Plaintiffs have specifically relied upon the alleged positions of Michael Pender and Martin Kenny in their pleadings and clearly intend to rely on their evidence is a central plank of the case they wish to make at trial”.

27. In the affidavit of Brendan Colgan sworn on behalf of the plaintiffs on 2 June 2023 he confirmed that there was no agreement or arrangement between Martin Kenny and the plaintiffs or OCM in relation to the claims the subject of these proceedings (para 14). In relation to Michael Pender, Mr Colgan confirmed that there is a consultancy agreement in place between the plaintiffs, OCM and Mr Pender although the terms are confidential to the parties. Mr Colgan states that he has obtained Michael Pender’s consent to disclose that Michael Pender has a general obligation under the terms of the agreement to assist OCM and the plaintiffs with the legal proceedings relating to the Property. However, the consultancy agreement does not set out any requirements regarding the content of any evidence that Mr Pender may give in the context of these proceedings (para 16). Mr Colgan denies that the plaintiffs or OCM would ever require Mr Pender to give evidence that was anything other than honest.

28. In the second affidavit of Patricia O’Brien on behalf of the second and third named defendants sworn 22 June 2023 in response to Mr Colgan’s affidavit she notes at paragraph 5 that “[a]t long last” Mr Colgan confirmed the existence of a consultancy agreement between the plaintiffs, OCM and Michael Pender. She avers that this evidence

“...confirms that there was a reasonable basis from the outset for the plea at paragraph 19.4 of the Defence, in that he concedes Mr Pender has entered into a

written agreement with the Plaintiffs and OCM which must have the potential to affect Mr Pender's attitude towards giving evidence and/or providing information which is helpful to the Plaintiffs in this litigation" (para 7).

- 29.** She then alleges at para 8 that “[t]he consideration paid or payable to Mr Pender pursuant to the consultancy agreement, the precise extent of his obligations thereunder, and the benefits potentially available to him, are material to the pleaded dispute.” She states that in the absence of sight of the consultancy agreement the second and third defendants, and indeed the trial judge, will be none the wiser as to, for example, what consideration Mr Pender is entitled to, whether he is entitled to a share in the value of sums recovered from the Partnership, whether he is entitled to a bonus in relation to giving evidence in this litigation or whether part of the consideration payable to him has been held back pending the conclusion of litigation in favour of the plaintiffs.
- 30.** Ms O’Brien says in those circumstances the documents are relevant and contain information which may directly or indirectly enable the second and third defendants to damage the plaintiffs’ case or advance their own case and so should be discovered. She says an order for discovery should be made against Martin Kenny even though Mr Colgan has averred that there is no consultancy agreement in place with him. She states that Mr Colgan’s affidavit does not address the totality of the category 7 documents but simply refers to agreements or arrangements specifically in relation to the claims the subject of these proceedings. She says that Mr Colgan, as the plaintiff’s solicitor, cannot know what other documents exist regarding those other agreements or arrangements.

Analysis and decision on the Discovery Application

31. For all the reasons set out below, I refuse to make an order for discovery in the terms of category 7.
32. I do not believe that the reasons advanced by the second and third named defendants for this category are relevant to any issues in dispute on the pleadings. While these reasons may have given rise to a suspicion on the part of the second and third named defendants as to why Martin Kenny and Michael Pender are now cooperating with the receivers, this suspicion cannot of itself form the basis of a valid discovery request. An applicant is not entitled to discovery based on speculation, nor is he entitled to engage in a fishing expedition in the hope of finding some useful material.
33. In my view the allegation at para 19.4 of the defence of the second and third defendant is *de facto* an allegation of fraud against the plaintiffs and/or OCM. While the word “fraud” is not used, the substance of the allegation is one of fraud. The second and third named defendants deny that Martin Kenny and/or Michael Pender did not sign the Deed of Variation or were not aware of its terms. The defendants are of course entitled to maintain that denial. However, they go on, in para 19.4 of their defence, to then assert that Martin Kenny and Michael Pender are taking this alleged non-genuine or non-bona fide position because these positions “*were procured by the plaintiffs and/or OCM on foot of consideration transferred*” in the context of agreements or arrangements reached with Michael Pender or Martin Kenny.
34. However that plea is now described by the second and third defendants, it is in essence a plea that the plaintiffs and/or OCM have paid or promised payments or inducements to Martin Kenny and Michael Pender in return for them giving false evidence that they did not sign the Deed of Variation. To suggest that a party is paying a witness for false

evidence for the purposes of improving that party's position at trial can only be classed as a plea akin to fraud. Such a plea is a very serious allegation against OCM and the plaintiffs, who are professional insolvency practitioners. A claim of this nature must be particularised. It has not been particularised in this case, despite several requests to do so.

- 35.** The fact that this unparticularised plea has been made does not make it an issue in respect of which wide-ranging discovery of these alleged agreements or arrangements should be obtained. As noted by Collins J in *Ryan v Dengrove* [2022] IECA 155 at para 53, quoting from Abrahamson, Dwyer and Fitzpatrick, *Discovery and Disclosure* (3rd ed., 2019) at para 6-35:

“A vague, unsubstantiated assertion may not be used to justify a trawl through an opponent's documents in the hope that the allegation will crystallise into a substantial one. Moreover, a party may not make a vague or unparticularised plea of wrongdoing and then seek discovery in the hope of obtaining documents which will reveal evidence in support of that allegation”.

- 36.** Furthermore, I have no doubt both from the correspondence between solicitors, and counsel's submissions to this court, that discovery of this category is sought in order to challenge or assist in challenging the credibility of the evidence to be given by Martin Kenny and Michael Pender. It is well established that discovery will not be granted of documents which go to the credibility of a witness rather than to a substantive issue on the pleadings. The unreported decision of the Supreme Court in *Stafford v Revenue Commissioners* (27 March 1997) was recognised by both counsel as the legal authority on this point.

37. In *Stafford*, O’Flaherty J quoted a passage from Matthews and Malek on *Discovery* (at p. 100) in the following terms: –

“Discovery will not be ordered of material which would be used solely for cross-examination of a witness as to credit, since it would be oppressive if a party was obliged to disclose any document which might provide material for cross-examination as to his credibility as a witness. Interrogatories will be refused on the same ground”.

He noted referring to that passage and the case of *Kennedy v Dobson* [1895] 1 CH 334 that: –

“For my part I am perfectly prepared to adopt these authorities as representing the current position in Irish law”.

38. Counsel for the second and third named defendants sought to distinguish *Stafford* from the present case on the basis that he says that Martin Kenny and Michael Pender’s position on their signatures was specifically pleaded. He referred to comments by Hardiman J in *O’Callaghan v Mahon* [2005] IESC 9, [2006] 2 IR 32. In that case the applicant sought disclosure of all documents regarding prior oral and written statements given by a witness to the Mahon Tribunal so that the witness could be cross-examined in relation to inconsistencies between his prior statements and his oral evidence. The Supreme Court permitted discovery of this material holding that same was required in the interests of natural justice to permit the applicant to vindicate his good name before the tribunal. Counsel referred in particular to para 79 of the judgment (at p. 68), where Hardiman J held:

“... I consider that in the circumstances of this case material communicated privately to the tribunal recording or related to allegations made by the notice

party about the applicant, or an omission to make them in appropriate circumstances, have a significant and proper potential use in cross-examination of the notice party. To deprive him of them would tend to undermine “the truth eliciting processes of a confrontation which are inherent in an oral hearing”; see Kiely v. Minister for Social Welfare [1977] I.R. 267. I therefore consider that the applicant is entitled to the material which he seeks, unless its provision to him is precluded, as the tribunal claims, by confidentiality”.

- 39.** Counsel for the plaintiffs noted that the majority of the Supreme Court agreed with the judgment of Geoghegan J who noted at p. 79:

“I have read with interest the judgment of Hardiman J. and I am in complete agreement with him that the appeal should be dismissed and the order of the High Court Judge affirmed. However, I am writing a short separate judgment because I would prefer to base my own opinion on more limited grounds. This does not mean that I am necessarily disagreeing with anything said by Hardiman J. but rather, I would prefer to postpone consideration of some of the wider issues which he has raised to a case in which it was absolutely necessary to decide them”.

- 40.** In a later Supreme Court decision of *O’Callaghan v Mahon* [2007] IESC 17, [2008] 2 IR 514 Hardiman J delivered a dissenting opinion in which he stated at p. 623 as follows:

“Enough has been said, I hope, to demonstrate that the use of prior inconsistent statements in particular and material undermining credibility in general, have been recognised for centuries as an effective way of contradicting a witness; that this can be demonstrated from cases both ancient and modern; that such

statements are regarded as disclosable in criminal proceedings and as discoverable relevant and admissible in civil proceedings. As mentioned above, I would refer in addition to the remarks I made on this topic in my judgment in O'Callaghan v Mahon [2005] IESC 9, [2006] 2 I.R. 32".

- 41.** In my view the facts of the present case are very different from those which arose in *O'Callaghan*. The category 7 documents are not being sought for the purposes of enabling the second and third defendants to test the credibility of witnesses as to their prior actions or statements but rather to test the defendants' own bare assertion that the witnesses should not be believed because they are being paid to give false evidence. The fact that these witnesses will be cross examined and that there is expert evidence as to the authenticity of the signatures will enable the defendants to test the credibility of these witnesses so as to ensure a fair trial. Discovery of the category 7 documents is not necessary for that purpose. I do not accept that this documentation is relevant to a dispute disclosed on the pleadings in circumstances where there is merely a bald and unparticularised assertion of the allegation of a payment for false evidence. The fact that the statement of claim recounts that both Michael Pender and Martin Kenny are denying they signed the Deed of Variation does not in my view warrant the disclosure of all and any agreements either of them entered into with the plaintiffs or OCM regarding their financial affairs.
- 42.** I also do not agree that the disclosure of the existence of a consultancy agreement between the plaintiffs/OCM and Michael Pender establishes a reasonable basis for the plea in para 19.4 of the defence. The allegation made was not simply that there was an agreement between those parties but rather that the plaintiffs/OCM had procured through payment the giving of false testimony by Michael Pender and Martin Kenny.

- 43.** It is not a sufficient basis for discovery that the second and third named defendants are curious about the terms of the consultancy agreement with Michael Pender or any and all other agreements or arrangements he or Martin Kenny may have with OCM or the plaintiffs. Discovery applications can develop a life of their own. It is important to remain focused on what is the reason for the discovery sought and how and why the documentation requested is necessary to dispose of matters at issue in the proceedings. In the present case, the real dispute on the Deed of Variation is whether the signatures are valid. The plaintiffs have provided copies of the written confirmations they received from Michael Pender and Martin Kenny. In addition, they have provided a copy of the technical report of their handwriting expert dated 10 February 2020 which sets out the findings itemised in some detail in the statement of claim regarding the allegedly forged signatures of those men. All defendants have reserved their entitlement to engage their own handwriting experts to refute the plaintiffs' evidence. Furthermore, the signatories to the Deed of Variation will be available to give oral evidence at the trial and be cross examined by counsel.
- 44.** The question is not whether Michael Pender and/or Martin Kenny were paid to give false evidence but rather whether one or both of them in fact signed the Deed of Variation. While it may be useful for counsel to test them on cross-examination by reference to a document allegedly procuring their false testimony (if one existed), the question for the court is whether they give truthful testimony and whether or not their signatures are valid. Category 7 documents are not relevant to establishing the validity or otherwise of their signatures.
- 45.** It is also of course clear that neither Martin Kenny nor Michael Pender are parties to these proceedings. This may be precisely because they are now cooperating with the plaintiffs. It is not unusual for borrowers to cooperate with receivers. That borrower

cooperation is however a very long way from establishing that they are being paid for false evidence as alleged by the second and third defendants. The category of discovery sought would require disclosure of what is undoubtedly highly confidential documentation between those individuals and their lender. The preservation of the confidentiality of banking documents is an important matter of public interest and there is no doubt that such documentation comprises sensitive personal information for those parties to whom it relates.. As Clarke J (as he then was) noted in *Independent Newspapers v Murphy* [2006] IEHC 276, [2006] 3 IR 566 at 572, the court should only “interfere with the right of confidence to the minimum extent necessary consistent with securing that there be no risk of impairment of a fair hearing”. The need to protect the confidentiality and privacy rights of individuals is particularly relevant in a litigation context where documents are sought regarding persons who are not parties to that litigation. I fully accept that if documents are relevant, then confidentiality does not of itself provide a barrier to their disclosure. I do not believe these documents are relevant to matters at issue in these proceedings. I am reinforced in my view against disclosing those documents in light of the undoubted confidential nature of those documents.

46. Furthermore, category 7 is extremely widely drafted. It seeks copies of all and any agreements or commercial arrangements of any nature between the plaintiffs/OCM and Michael Pender and/or Martin Kenny. It also seeks copies of all documents relating to or referring to any such agreements. I see no basis on which a category which is so widely drafted, could properly be classed as necessary or one which would have the result of saving legal costs.
47. I therefore refuse to order discovery of category 7 documents.

The Inspection Application

48. The category in respect of which inspection is sought is category 9 of the voluntary discovery request. It is in the following terms:

“An unredacted or less redacted copy of the Loan Sale Deed dated 17th of June 2016 from NALM to OCM together with a copy of the Deed of Mortgage/Charge dated the 10th of July 2014 made between the Partnership of the one part and NALM of the other part referred to at line 414 in Schedule 1 thereof”

49. At the hearing of this application counsel for the second and third defendants confirmed that what was required to be inspected could be confined to the Loan Sale Deed. Accordingly that is the only aspect of the requested documentation I will consider.

50. The reason for discovery/inspection of this documentation was stated by the second and third defendants to be as follows: –

“A highly redacted copy of the said Loan Sale Deed was provided by the Plaintiffs with their Replies to Particulars. However, all references to the detail of what was included in the Loan Sale relating to the Partnership and/or the Kenny Group were redacted including all columns on page 56 Schedule 1 on the line which refers to the Kenny Group and any reference to the Kenny Group in Schedule 12 and 13 thereof. A copy of the said Loan sale deed with full information relating to any details of assets, loan accounts, and other information referred to above is required (save as to any price paid for the loans) so that the Defendants can clarify what interest in the Partnership Loans and what security was acquired by OCM. In this respect, these Defendants have placed the Plaintiffs on proof of OCM’s acquisition of the loans in their Defence. The

documentation sought is therefore relevant and necessary for resolving the pleaded dispute and for saving costs”.

51. The plaintiffs responded that this document was not relevant to any issue that is actually in dispute. They point to the fact that the second defendant in an affidavit sworn on 22 November 2022 in these proceedings, admitted the acquisition by OCM of the Partnership loans and the ancillary security. They say that the third defendant has also expressly relied on this acquisition in separate proceedings that he commenced against the receivers in 2018. Given those previous admissions, the plaintiffs say there is no real live dispute about OCM’s acquisition of the Partnership loans and security.
52. The plaintiffs also say that the redacted copy of the Loan Sale Deed sufficiently evidences OCMs title to the Partnership loans and the related security. They also say any redactions concern matters that are commercially sensitive or contain information relating to third parties.
53. In their letter dated 14 March 2023 the solicitors for the second and third named defendants noted that the pleadings require full proof of OCM’s acquisition of the loans. They say the documentation sought is therefore relevant and necessary for resolving the pleaded dispute and for saving costs.
54. At paragraph 14.6 of the defence of the second and third defendants dated 16 January 2023 the following is pleaded: –

“In response to sub-paragraph 10.5, it is denied that OCM acquired the Original Security, in circumstances where the Original Security was discharged and NALM on foot of the 2014 Security. Full proof is otherwise required of OCM’s acquisition of the pleaded loans and security.”

- 55.** At para 18.3 of the defence it is pleaded that OCM and/or the plaintiffs and/or NALM acquiesced to and/or are estopped from raising any objection to the validity of the Deed of Variation on the ground of the absence of written consent in circumstances where it is alleged NALM expressly approved the rent budget on the basis of the Deed of Variation, accepted the rent pursuant to the Deed of Variation without reservation prior to disposing of the loans, where OCM was on express or constructive notice of NALM's approval of the rent being paid and where OCM itself accepted the rent pursuant to the Deed of Variation without reservation or objection.
- 56.** In the third affidavit of Patricia O'Brien sworn 25 July 2023 on behalf of the second and third defendants, she avers that the level of redactions to the Loan Sale Deed makes it impossible to ascertain whether the assets the subject of these proceedings actually transferred to OCM (para 11). She also avers at para 13 that the content of any representation and/or warranties made by NALM to OCM and *vice versa* are clearly relevant to the dispute disclosed on the pleadings in these proceedings (para 13). These two issues are the stated reasons for requiring redactions to be lifted. The same two reasons were outlined by counsel for the defendants at the hearing of this application.
- 57.** Counsel for the plaintiffs argued that the plaintiffs are entitled to rely on the previous admissions by the second named defendant. He says that where a party has already conceded a fact, that party is not entitled to seek discovery of confidential and commercially sensitive documentation on the pretext that the fact has not been formally admitted in pleadings. Furthermore, he argues that OCM's ownership of the underlying security interests pertaining to the Property is readily apparent from an inspection of the folios - being conclusive evidence of the ownership of the registered security interests.
- 58.** Counsel for the plaintiffs also argues that the disclosure of redacted details in this litigation would be likely to significantly undermine the legitimate commercial interests

of OCM's dealing with loans it has acquired and its future dealings with prospective vendors of other loan portfolios.

- 59.** Counsel for the second and third named defendants states that there has been no admission made in the pleadings regarding the title of OCM to the Property. He also says that there has been no issue of estoppel raised by the plaintiffs on this point in their pleadings. Accordingly, this is a live issue, and this court should not view it otherwise because of averments or statements made outside the context of these proceedings.
- 60.** I accept that the pleadings in this case put the plaintiffs on proof of the transfer of the Partnership loans and related security to OCM. It will be a matter for the plaintiffs to establish that transfer to the satisfaction of the trial judge. It is however noted that the second named defendant is now seeking inspection on the basis of adopting a position which is different to one he has previously adopted in other proceedings and indeed on affidavit in these proceedings.
- 61.** Taking however the position that the second and third named defendants are entitled to inspect so much of the Loan Sale Deed as would establish the transfer of ownership to OCM, a particular complaint is made that the definition of "Excluded Asset" has been redacted. Counsel says he cannot confirm what has been transferred.
- 62.** By letter dated 13 June 2022 the plaintiff's solicitors provided a detailed letter and documentation to the solicitors for the second and third named defendants explaining the transfer of the property to OCM. Indeed, by letter dated 20 June 2022 the solicitors for the second named defendant confirmed to the solicitors for the first named defendant that:

“We are instructed that our client has now been furnished with documents which he had been seeking for some time. The documents appear to confirm the transfer from NALM to OCM Emru Debtco DAC of certain security granted to NALM.

...our Client is satisfied for your Client to pay over the rent payable pursuant to the Lease relating to the Property to the Receivers”.

- 63.** The Loan Sale Deed is heavily redacted, although not as heavily redacted as in other cases which have been dealt with by this court. It is important to understand that the Loan Sale Deed relates to entire portfolios of loans and not simply the Partnership loans and ancillary security. Furthermore, the Loan Sale Deed is not the only document which references the transfer of the Partnership loans. The Deed of Conveyance & Assignment has been provided in largely unredacted form (save for the exclusion of third-party identifying information). That Deed of Conveyance & Assignment sets out in some detail the specific assets which have been transferred, including the Property. Furthermore, the Deed of Transfer dated 21 July 2016 has also been provided in unredacted form which confirms the charges in question and identifies those specifically relating to the Partnership and the Property. I accept that the definition of Excluded Assets is a commercially sensitive one. Counsel for the plaintiffs also says that un-redacting the definition would in turn require disclosure of schedules of borrowers entirely unrelated to these proceedings.
- 64.** In light of the combined effect of the explanations and the documentation which has been provided to the second and third named defendants regarding the transfer of the Partnership loans and ancillary security, I direct that the plaintiffs confirm on affidavit that the loan and related security the subject of these proceedings does not form any part of the Excluded Assets. To the extent that any Partnership loans and/or related security form part of the Excluded Assets, they should be clearly identified. If this step

is taken, I am satisfied that the second and third named defendants will have been provided with sufficient documentation to establish the transfer of the security over the Property to OCM.

65. The second stated reason for requiring an unredacted or less redacted copy of the Loan Sale Deed relates to the pleas at para 18.3 of the defence regarding acquiescence and estoppel on the basis that the plaintiffs and/or OCM and/or NALM did not previously raise any objection to the validity of the Deed of Variation. This, Counsel says, requires the entire section of warranties and representations to be unredacted from the Loan Sale Deed. That section appears to be redacted in full. Counsel for the plaintiffs says that it is a highly confidential part of the commercial arrangements between NALM and OCM and particularly sensitive for any future loan sales. He says there is no necessity for these loan sale provisions to be disclosed to the second and third named defendant.
66. Instead, Counsel for the plaintiff highlights the discovery that the plaintiffs have agreed to provide to the second and third named defendants and in particular the discovery which is agreed to be provided at category 2. Category 2 is in very detailed terms and provides as follows:

“All documents which refer to and/or evidence;

A. The Plaintiffs’ knowledge and/or the knowledge of OCM and/or the knowledge of AIB and/or the knowledge of NALM and/or

B. The Plaintiffs’ approval, consent, acquiescence or ratification of or the approval, consent, acquiescence or ratification of NALM of:

(i) The rent payable pursuant to the Lease;

(ii) The term of the Lease;

(iii) Any variation of the rent payable pursuant to the Lease;

(iv) *Any extension of the term of the Lease; and/or*

(v) *The Deed of Variation dated 2nd October 2009.*

The documents requested under this category include, without limitation, all documents which refer to and/or evidence:

(a) *Any relevant documents which were in the NALM Data Room or which were furnished to OCM by NALM and/or received by OCM from any source prior to their acquisition of the Partnership loans and which related to the Property.*

(b) *Any invoices issued by or on behalf of the Plaintiffs, their servants or agents in respect of the rent relating to the Property.*

(c) *Any instructions given by the Plaintiffs and/or OCM to any party responsible for or undertaking the collection by or on behalf of the Plaintiffs and/or OCM of the rent payable in respect of the Property.*

(d) *Any report issued by or received by or on behalf of the Plaintiffs and/or OCM in respect of and/or referring to and/or evidencing the rent payable in respect of the Property and/or the terms of the Lease and/or the basis upon which the First Defendant was in occupation of the Property.”*

Analysis and decision on the Inspection Application

67. I have no doubt that the discovery to be made by the plaintiffs in compliance with category 2 will be sufficient to enable the second and third named defendants to fully address all of their pleas regarding estoppel/acquiescence and the terms on which OCM and its predecessors were on notice of the Deed of Variation. In those circumstances I do not believe that it is necessary for the warranties and representations contained in the

Loan Sale Deed to be disclosed. The discovery of the category 2 documents will be a bespoke exercise aimed specifically at the Property and the Deed of Variation. On that basis it will be significantly more relevant for the defendants than general representations and warranties which pertain to the portfolio loan sale as a whole. In order to avoid any possible prejudice to the second and third named defendants however I direct that when making discovery of documents in category 2, the plaintiffs should confirm in their affidavit of discovery that any Loan Sale Deed representations and warranties which impact on or are relevant to the documents discovered have been included in the documents to be discovered.

Conclusion

- 68.** For the reasons outlined in detail in this judgment I refuse the application by the second and third named defendants for discovery in the terms of category 7.
- 69.** I refuse the application by the second and third named defendants for inspection of an unredacted or less redacted copy of the Loan Sale Deed subject to the following requirements: –
 - (a) that the plaintiff's confirm on affidavit that neither the Facility Letter nor the Original Security nor the 2014 Security (all as defined and set out at para 10 of the statement of claim) nor any interest secured on the Property comprise "Excluded Assets" under the Loan Sale Deed. To the extent that any such assets comprise Excluded Assets the plaintiffs should exhibit any part of the Loan Sale Deed which establish this; and
 - (b) the plaintiff's affidavit of discovery should, in relation to category 2, include all representations and warranties set out in the Loan Sale Deed which impact on or are relevant to the discovered documentation under that category. In so far as

there are any such relevant representations and warranties same should be discovered. In so far as there are no relevant representations and warranties same should be confirmed.

- 70.** I will list this matter for mention at 10.30am on Thursday 12 October to deal with any issues arising from this judgment– including the form of Order and costs.