

THE HIGH COURT

[2023] IEHC 532

Record No. 2013/11137P

Eoin Ryan

Plaintiff

And

Bernadette (Otherwise Bernie) Purcell and John Milton

Defendants

Judgment of Mr. Justice Dignam delivered on the 25th day of September 2023.

Introduction

Matters to be decided

1. This is my judgment in relation to the defendants' motion for further and better discovery and for inspection of documents.
2. While the motion was not expressed in terms of seeking further and better discovery (it sought discovery) it was brought on the basis of the plaintiff's alleged failure to make proper discovery on foot of his agreement to make voluntary discovery and the parties approached it on that basis.
3. Initially, when the motion was brought there were a number of issues in dispute between the parties. However, by the time it came on for hearing and following a number of adjournments to facilitate the parties in narrowing the issues, the parties

agreed and confirmed to the Court, that there were only two issues which required to be determined by the Court:

- (i) Whether a Mortgage Sale Deed dated the 16th December 2014 should be discovered by the plaintiff;
- (ii) Whether inspection of the original Global Deed of Transfer dated the 12th February 2015 should be directed.

General Background

4. I propose to deal with these in turn but it would be helpful to first set out the general background to the current dispute. There is a considerable background to the proceedings, including previous Special Summons proceedings which were admitted into the Commercial Court. Much of this background is not directly relevant to the issues in this motion and I will therefore only refer to it in passing. It is in any event contained in the pleadings which I have fully considered.

5. The defendants had a number of loan facilities with First Active plc which were secured by a number of mortgages, including a mortgage over a property in Rathgar which the defendants describe as their family home ("*the Rathgar Property*"). These loans and mortgages were transferred to Ulster Bank Ireland Limited ("*Ulster Bank*") on the 15th February 2010 pursuant to a Scheme for Transfer dated the 8th October 2009 and approved by the Minister for Finance by virtue of SI No. 481/2009.

6. The defendants failed to comply with the terms of these facilities and Ulster Bank demanded repayment by letter of demand of the 18th May 2010. The defendants failed to comply with that demand. Ulster Bank then purported to appoint the plaintiff as receiver on the 20th May 2010.

7. The plaintiff, as receiver, issued the Special Summons proceedings referred to above which were ultimately compromised. These proceedings and the settlement meant that no steps were taken by the plaintiff (or Ulster Bank) to take possession of the Rathgar property until 2013.

8. Ulster Bank's interest and rights under the loans and the mortgages were purportedly transferred to Promontoria (Aran) Limited ("*PAL*") in 2015 and the plaintiff's appointment as receiver was purportedly approbated by a Deed of Novation. It is these matters which are at the heart of the defendants' motion.

9. The plaintiff claims that by a General Deed of Transfer and a Deed of Conveyance and Assignment dated the 12th February 2015, Ulster Bank transferred the defendant's loans and the mortgage in respect of the property in Rathgar respectively to PAL and that the plaintiff's appointment as receiver by Ulster Bank was novated by a Deed of Novation dated the 12th February 2015.

10. It is claimed that notice of the assignment to PAL was given to the defendants by letter of the 13th March 2015.

11. The plaintiff issued these proceedings by Plenary Summons of the 11th October 2013. An Amended Statement of Claim was delivered on the 2nd November 2018 in which the above matters were pleaded.

12. A Defence was delivered on 8th March 2019. Insofar as relevant to the current motion, the defendants deny that the plaintiff was properly or validly appointed by Ulster Bank or that his alleged appointment was properly novated and deny that Ulster Bank's interests and rights in the loans and mortgage have been transferred to PAL. It is these matters which are at the heart of the application for discovery and inspection.

Requests and Agreement re Discovery

13. By a series of letters (14th March 2019, 29th March 2019, 9th December 2019 and 20th December 2019) the defendants sought discovery and information in respect of a number of issues. As noted above, the parties are agreed as to what remains in dispute and a number of matters which were canvassed in the correspondence gradually fell away. It is therefore not necessary to deal with this correspondence in full.

14. In their letter of the 14th March 2019, the defendants sought three categories of discovery. Insofar as relevant to the issues in dispute these were:

"2. The Defendants refer to paragraph 12 of the Statement of Claim. Various documents purporting to evidence transfer of the property, the subject of these proceedings, to Promontoria (Aran) Limited are listed in this paragraph of the Statement of Claim. The Defendants require discovery of the full unredacted suite of documents on which it is purported to rely to evidence the transfer of title of the aforesaid property from Ulster Bank Ireland Limited to Promontoria (Aran) Limited.

3. *In relation to paragraphs 5 and 12 of the Statement of Claim, no documentary evidence has been furnished to the Defendants to explain how a transfer to Ulster Bank Ireland Limited (on 15th February 2010) pursuant to Statutory Instrument No. 481 of 2009, of the Defendants' property, enabled a Conveyance, dated 12th February 2015, of said property by a different set of sellers namely, Ulster Bank Ireland Limited and UB SIG (ROI) Limited and Ulster Bank Limited and UB SIG (NI) to Promontoria (Aran) Limited. The Defendants therefore require full and frank unredacted discovery of all of the documents necessary to validate this purported transfer of ownership."*

15. The reason given for seeking these categories of documents was *"to validate the lawfulness of the purported Receivership of the Plaintiff on behalf of Promontoria (Aran) Limited."*

16. Solicitors on behalf of the plaintiff, by letter of the 22nd March 2019, agreed to make discovery of, inter alia, category 2 and 3 though they pointed out that it was not appropriate for the defendants to *"pre-emptively dictate whether redactions will be made to the documents to be discovered."* They stated that the *"process to be followed is for the Plaintiff to make discovery of the relevant document and to offer such part of those documents as are relevant and necessary for inspection by the Defendants...Insofar as there is any dispute regarding redactions or inspection, that may be addressed once the affidavit of discovery has been sworn and the unredacted portions of those documents have been produced for inspection."*

17. By letter of the 29th March 2019, the defendants accepted that the plaintiff would make discovery of category (2) and looked forward to receipt of the documents and reserved their position in relation to redactions; and noted the plaintiff's willingness to make discovery of category (3) but made the point that there *"is an issue regarding how parties other than Ulster Bank Ireland Limited appear to have come on title and [the defendants] would need unequivocal clarification concerning this matter."*

18. Thus, insofar as relevant to the remaining issues between the parties, as of the 29th March, there was agreement, on foot of the defendants' request for voluntary discovery that the plaintiff would make discovery of:

1. ...;

2. The full suite of documents on which it is purported to rely to evidence the transfer of the aforesaid property from Ulster Bank Ireland Limited to Promontoria (Aran) Limited;

3. all of the documents necessary to validate this purported transfer of ownership.

19. No agreement was reached in respect of redactions, the plaintiff's solicitor having pointed out that the question of redactions is a matter to be resolved after discovery has been made. However, this gradually fell away as an issue between the parties over the course of the number of adjournments after the initial hearing.

Complaints re discovery

20. Discovery was made on the 27th November 2019 and the discovered documents were provided on the 28th November 2019.

21. By letter of the 9th December 2019 the defendants complained that proper discovery had not been made. The defendants made five specific complaints. I will refer to those that are relevant to the current motion. They stated:

"A. ...

B. The Mortgage Deed referenced in the Discovery Affidavit dated 27 November 2019 at number 7, under Category has not been furnished. By letter dated 27 February 2015 Ulster Bank Ireland Limited stated that by Mortgage Sale Deed dated 16 December 2014 it had assigned to Promontoria (Aran) Limited all rights, title etc pertaining to the alleged security herein. The Receiver Novation Deed also relies on this Deed. The omission of this Deed leaves an evidential gap and constitutes failure to comply with Discovery.

C. ...

D. In relation to Category 3 of the Discovery Affidavit, you have not replied to same. Please explain how parties other than Ulster Bank Ireland Limited appear to come on title; no clarification of this matter has been given. We agree loans and mortgages were transferred to Ulster Bank Ireland Ltd. Once again there appears to be an evidential gap in the chain of transfer. We requested this information in our letter of 29 March 2019.

E. Under Order 31 rule 15 of the Rules of the Superior Courts, take notice that we, the defendants require you to produce for our inspection the originals of the following documents at an agreed time, date and place (with appropriate redaction). We wish to obtain photocopies of said documents at the time of inspection. The following are the relevant documents (namely document number 4, 5 and 6 under Category 2 of the Affidavit of Discovery dated 27 November 2019)

4. Irish Law Deed of Conveyance and Assignment (unregistered Property) dated 12 February 2015.

5. Global Deed of Transfer dated 12 February 2015.

6. Receiver Novation dated 12 February 2015.”

22. Point B quoted above refers to the “*Mortgage Deed*”/“*Mortgage Sale Deed*” being referenced at number 7 of the discovery affidavit. Number 7 was in fact the Deed of Novation. Nothing really turns on this though. The complaint has always been understood as being that the Mortgage Sale Deed was not discovered. The number attached to the 3 documents referred to in paragraph E are taken from the schedule to the affidavit of discovery.

23. By letter of the 18th December 2019 the solicitors for the plaintiff addressed the points raised at paragraphs A – E. In relation to paragraph B, the solicitors pointed out that the document at number 7 in the affidavit of discovery was not the Mortgage Sale Deed and then went on to address the substance of the complaint, i.e. that the Mortgage Sale Deed of the 16th December 2014 was not discovered. They stated:

“Please take note that documents 4 and 5 as listed in the Schedule to the Affidavit, and redacted copies of which have been furnished to you, are the documents which operated to transfer the security and underlying loans and hence are the only documents under which title to the loans and security have passed. They are the only documents upon which PAL and the Receiver rely as having effected the transfer of the loans and mortgage to PAL. The Mortgage Sale Deed dated 16 December 2014 is the agreement or contract which bound the parties thereto to transfer the loans and security, but did not operate to so transfer at law. Therefore, the Mortgage Sale Deed is not part of the chain of title to the loans and security, and is not relevant to the Plaintiff’s right or entitlement to pursue the litigation herein.”

24. By reply of the 20th December 2019 the defendants stated, inter alia, that the plaintiff had still not complied with discovery and warned that failure to do so would lead to a motion.

25. The defendants issued this motion on the 24th January 2020. At that stage many of the matters which had been canvassed in correspondence (which I do not expressly refer to above) still remained in dispute and they are dealt with in the exchange of affidavits. However, by the time the matter came on for hearing many of those matters had been resolved or there were indications that they might be resolved between the parties. It was agreed by the parties that the Court would have to determine whether the Mortgage Sale Deed was discoverable and submissions were made on that issue. It was indicated that the question of redactions and inspection might be resolved and the matter was adjourned on a number of occasions to facilitate this process. During that process significant progress was made by the parties which undoubtedly had the effect of narrowing the issues. For example, the plaintiff, following a direction that they explain the redactions that had been made to the Global Deed of Transfer, decided to remove some redactions from documents that had been discovered or explained, to the defendants' satisfaction, what was behind the redactions and why they were applied.

26. Some agreement was also reached in relation to inspection of the originals of some of the documents, i.e. the Deed of Assignment and Conveyance and the Deed of Novation. However, no agreement was reached in respect of inspection of the original Global Deed of Transfer. Thus, the parties were agreed that this also has to be determined by the Court. Some issues also arose during this process and I refer to them below.

27. As noted above, the parties agree that the two issues which have to be determined by the Court are:

- (i) Whether the Mortgage Sale Deed is discoverable;
- (ii) Whether the original Global Deed of Transfer should be made available for inspection.

Mortgage Sale Deed

28. The defendants complain that the "*full suite of documents for which Discovery was sought have not been furnished*" because the Mortgage Sale Deed was not discovered.

29. The question of whether or not the Mortgage Sale Deed is discoverable and therefore whether the plaintiff has made proper discovery is dependent on the terms of the agreement between the parties.

30. The agreement between the parties was that the plaintiff would discover "*The full suite of documents on which it is purported to rely to evidence the transfer of the aforesaid property from Ulster Bank Ireland Limited to Promontoria (Aran) Limited*" and "*All of the documents necessary to validate this purported transfer of ownership.*"

31. The plaintiff's position is that the Mortgage Sale Deed does not fall within either of these two categories because it is not a document upon which the plaintiff relies "*to evidence the transfer*" and "*is not necessary to validate [the] purported transfer.*" It was submitted that it therefore does not fall within the categories agreed and is, in any event, not relevant because the transfer was effected by the Deed of Conveyance and Assignment (in the case of the mortgage) and by the Global Deed of Transfer (in the case of the loans).

32. The terms of the agreement in respect of discovery are, of course, somewhat unusual. It would be more usual that discovery would be made of all documents relating to or touching upon the transfer rather than of the documents upon which the plaintiff would be relying. This has the effect of the plaintiff being able to self-select the documents to be discovered. Nonetheless, that is the agreement that was reached between the parties and it seems to me that the Court must assess this application by reference to that agreement. Otherwise, the provisions in the Rules of the Superior Courts in relation to voluntary discovery would be rendered redundant.

33. Thus, I have to assess whether the Mortgage Sale Deed falls within the category of documents upon which the plaintiff relies to evidence the transfer from Ulster Bank Ireland or is a document which is necessary to validate that purported transfer and whether it is therefore discoverable; in other words, whether the plaintiff has failed to make proper discovery in accordance with the terms of the agreement to make discovery.

34. I am satisfied, notwithstanding that in light of the agreed terms of discovery, it is primarily a matter for the plaintiff to decide what documents he will rely upon and therefore should be discovered, that the Mortgage Sale Deed is discoverable on the facts of this case.

35. There is considerable merit to the points made on behalf of the plaintiff. The agreed terms are that he must discover the documents upon which he relies. By not discovering the Mortgage Sale Deed then he must be taken as asserting that he is not relying on it. Indeed, he expressly states that to be the case. If he does not discover the Mortgage Sale Deed then he is accepting that he is not relying on it as evidencing the transfer or as being necessary to validate the purported transfer and he takes the risk inherent in that, i.e. he will not be able to rely on it at trial or, if it transpires at the trial that it was necessary to validate the transfer, then he will not be able to succeed in the proceedings.

36. However, it seems to me that this point is fatally undermined by the fact that the Deed of Conveyance and Assignment and the Global Deed of Transfer, upon which he does rely and which has been discovered, cross-refer to the Mortgage Sale Deed. In the case of the Deed of Conveyance and Assignment it is simply referred to in the "Background" section where it is stated:

"B. By a Mortgage Sale Deed between the Sellers and the Buyer dated 16 December 2014 (as novated on 12 February 2015, the "Mortgage Sale Deed") the Sellers agreed to sell and Buyer agreed to buy, inter alia, all right, title, interest, benefit and obligations (both present and future) of the Sellers in and under the Mortgages for the consideration therein mentioned.

C. In consideration of the rights and obligations of the Parties pursuant to the Mortgage Sale Deed, the Parties have agreed to enter into this Deed pursuant to the terms and conditions of the Mortgage Sale Deed."

37. The Global Deed of Transfer, however, goes further and expressly imports the definitions in the Mortgage Sale Deed into the Global Deed of Transfer and thus the Mortgage Sale Deed has some effect in relation to the transfer. The Global Deed of Transfer provides:

"A. By a Mortgage Sale Deed dated 16 December 2014 (as novated on 12 February 2015, the "Mortgage Sale Deed") the Sellers agreed to sell and the Buyer agreed to purchase the Security Interests and the contractual rights of the Sellers under, the Finance Documents, including, without limitation, those documents as more particularly described in Schedule 1 hereto.

B. Terms defined in the Mortgage Sale Deed shall have the same meanings in this Deed, save where otherwise specified or where the context requires otherwise.”

38. Thus, the Deed of Conveyance and Assignment and, more particularly, the Global Deed of Transfer can not be read without referring to the terms of the Mortgage Sale Deed also and it therefore seems to me to be impossible to say that the Mortgage Sale Deed will not be relied upon to evidence the transfer or is unnecessary to establish the validity of the transfer. Of course, it is open to the plaintiff to say that he is not relying on the Mortgage Sale Deed itself as evidencing the transfer – and he has made that point - but where he relies on the Global Deed of Transfer to evidence the transfer and that Deed imports definitions from the Mortgage Sale Deed then it seems to me that the Mortgage Sale Deed must be discoverable. The plaintiff was appointed (by novation) by PAL and these documents are PAL’s documents (as the successor to First Active and Ulster Bank). They essentially chose to draft the documents by way of cross-referencing and it seems to me that the consequence of doing so is the documents must be read together and must therefore be discovered. Indeed, it is worth noting that the Deed of Novation itself provides, inter alia:

“B. The Transferor and the Transferee entered into a Mortgage Sale Deed dated 16 December 2014 (“the Mortgage Sale Deed”) pursuant to which the Transferor agreed to sell and the Transferee agreed to purchase all the rights, title, interest and benefit (past, present and future) of the Transferor in, to and under the Mortgage Assets together with the Underlying Loans and certain contractual rights of the Sellers relating to the Finance Documents, the Swaps Claims and all Ancillary Rights and Claims (as such terms are defined in the Mortgage Sale Deed) and pursuant to which the Transferor and the Transferee have agreed to enter into a novation deed in respect of the Receiver Agreements.”

39. At the hearing, Counsel for the plaintiff correctly and fairly acknowledged that insofar as there was cross-referencing the defendants would be entitled to be provided with the contents of the Mortgage Sale Deed but also made the point that the cross-referencing was very limited and was essentially confined to the definition of terms. He proposed that the plaintiff could set out the cross-referenced contents of the Mortgage Sale Deed in the body of an affidavit. I have considered this, not least because in determining any question of discovery the Court must have regard to the doctrine of

proportionality and the respective costs. However, it seems to me that this would not be an appropriate way to deal with the matter. Where I have decided that the document is discoverable it seems to me that the party seeking discovery is entitled to discovery unless discovery would be disproportionate or unduly burdensome. I am not satisfied that there is any evidence that directing the plaintiff to make discovery of the document would be disproportionate or unduly burdensome provided that to do so would not compel him to disclose commercially sensitive information or information relating to bank and/or client confidential information or irrelevant material. It seems to me that this can be addressed by appropriate redactions. Normally the question of redactions is dealt with after discovery has been made. However, in the very particular circumstances of this case, it is appropriate to deal with it now because in light of the plaintiff's suggestion the question of whether discovery should be ordered at all and whether it is proportionate to do so is intrinsically linked with redaction; furthermore, the parties have been engaging for a considerable period of time with the question of redaction of documents which have been discovered. The defendants have fairly accepted that the plaintiff is entitled to redact discovered documents on the grounds of commercial sensitivity or bank/client confidentiality.

40. The defendants placed reliance on the Notice of Assignment of the 27th February 2015 which was provided by the plaintiff in discovery, in submitting that the Mortgage Sale Deed was discoverable because Ulster Bank stated "*We give you notice that, by a Mortgage Sale Deed dated 16 December 2014, we have assigned to Promontoria (Aran) Limited (the "Buyer") all of our rights, title and interest (past, present and future) in and to your Underlying Loan Agreements including, but not limited to, those set out in the Schedule hereto...and all guarantees and security granted in respect of and/or guaranteeing and/or securing the Underlying Loan Agreements...*". In light of my decision above, it is not necessary to decide this point but in my view, the mere fact that this is stated in the Notice of Assignment can not make the Mortgage Sale Deed discoverable given the terms of the agreement in respect of voluntary discovery. It is the plaintiff's position that the transfer was not effected by way of the Mortgage Sale Deed. It will, of course, be open to the defendants to cross-examine the plaintiff on the point.

41. It seems to me, therefore, that the plaintiff should be ordered to make discovery of the Mortgage Sale Deed subject to redaction, if the defendants seek the document or a copy of it, on the grounds of commercial sensitivity, bank/client confidentiality and irrelevance (i.e. relevance to the question of the validity of the transfer). It is a matter for the plaintiff in the first instance to decide what should be redacted. If the defendants take issue with any redaction(s) I will determine the correctness or appropriateness of

same. I will also direct that the affidavit of discovery should set out the basis for each redaction, as was done in the affidavit of Mr. Kevin Carter sworn on the 12th July 2022 in respect of the redactions to the other documents.

Inspection of the original Global Deed of Transfer

42. A copy of the Global Deed of Transfer has been provided. The dispute is about inspection of the original document. The plaintiff has agreed to provide inspection of the original Deed of Assignment and Conveyance and Deed of Novation (subject to manual redactions) but opposes inspection of the original Global Deed of Transfer even with redactions.

43. Kelly J considered inspection in *Cooper Flynn v RTE & Ors [2000] 3 IR 344* The issues in that case were somewhat different but it is nonetheless of some assistance. At page 348 he set out Order 31 Rule 18 of the Rules of the Superior Courts and stated:

"Order 31, r. 18 of the Rules of the Superior Courts, 1986, provides as follows: -

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

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

As is clear from its terms, r.18 provides a mechanism whereby inspection of documents which have been included in an affidavit of discovery may be ordered. Order 18, r. 2 prohibits the court from making an order for such inspection where the court is of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs."

44. He went on at page 352 to state that *"It is clear that the court ought not to make an order of the type sought if it is not necessary for disposing fairly of the cause or matter..."* He noted there was little authority in this jurisdiction as to what is meant by the phrase *"necessary for disposing fairly of the cause or matter"* but derived considerable assistance from a number of English cases. He accepted that the principles set out in *Wallace Smith Trust Co v Deloitte [1997] 1 WLR 257* governed the proper application of Order 31, rule 18(2). In that case Simon Brown LJ said at page 271:

"2. The burden lies on the party seeking inspection to show that that is necessary for the fair disposal of the action..."

3. If no element of confidentiality...is asserted in the documents, routinely they will be produced for inspection without the need for a r.13 hearing on the issue of necessity. As Lord Scarman said in Air Canada v Secretary of State for Trade [1983] 2 AC 394 at p.444:-

"It may well be that, where there is no claim of confidentiality or public interest immunity or any objection on the ground of privilege, the courts follow a relaxed practice, allowing production on the basis of relevance. This is sensible bearing in mind the extended meaning given to relevance in Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55."

4. If, however, confidentiality is asserted or any other ground of objection arises, r. 13 assumes relevance and it becomes necessary to decide whether inspection is necessary for the fair disposal of the action...

5. Disclosure will be necessary if: (a) it will give 'litigious advantage' to the party seeking inspection (Taylor v Anderton [1995] 1 WLR 447 at p. 462 and (b) the information sought is not otherwise available to that party by, for example, admissions or some other form of proceeding (e.g. interrogatories) or from some other source (see e.g. Dolling-Baker v Merrett [1990] 1 WLR 1205 at p. 1214) and (c) such order for disclosure would not be oppressive, perhaps because of the sheer volume of the documents (see e.g. Science Research Council v Nassé [1980] AC 1028 at p. 1076 per Lord Edmund Davies).

6. If a prima facie case is made out for disclosure, then as several of the speeches in Science Research Council v Nassé make plain, the court will first inspect the documents: (a) to ensure that inspection is indeed necessary (that very safeguard of itself making the court generally readier to accept that the threshold test for disclosure is satisfied) and (b) assuming it is, to see if the loss

of confidentiality involved can be mitigated by : (i) blanking out parts of the documents, and/or (ii) limiting the disclosure to legal advisors only ... Those basic principles I have sought to distil from all of the many authorities which were placed before us. Several passages in the various judgments are relevant; it would however be wearisome and, I think, ultimately unproductive to cite them..."

45. It is not at all clear to me why the plaintiff objects to making the original Global Deed of Transfer available for inspection, subject, of course, to redactions, in circumstances where inspection of the original Deed of Conveyance and Assignment and Deed of Novation is already being facilitated. However, while this may be a relevant consideration, it is not in itself a basis for ordering inspection. It is clear from *Cooper-Flynn* that the burden of establishing that inspection is necessary falls on the defendants.

46. In *Taylor v Anderton* [1995] 1 WLR 447 at p. 462 Bingham MR considered the question of necessity. He said:

"...The crucial question is, in my judgment, the meaning of the expression 'disposing fairly of the cause or matter'. Those words direct attention to the question whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment is the test."

47. Kelly J went on to apply those principles in *Cooper Flynn*.

48. Of course, whether a party has established that inspection is necessary must be assessed by reference to the pleadings because necessity is to be judged by reference to litigious advantage or disadvantage.

49. The defendant does not raise any issue in the Defence which immediately appears to give rise to a necessity to inspect the original of the Global Deed of Transfer. She does challenge the validity of the transfer (though not by reference to the Global Deed of

Transfer) but that in itself does not give rise to a necessity to inspect the original Deed as opposed to a copy. The assessment of necessity in the context of an application for inspection is different to the assessment of necessity for a discovery application. If it were in dispute, I would be satisfied that discovery of the Global Deed of Transfer was relevant and necessary, but it does not necessarily follow that inspection of the original Deed is necessary.

50. In any event, the defendants' case that inspection of the original Global Deed of Transfer is necessary is not directly based on the pleaded case but rather on controversies that arose in relation to discovery of the Deed of Assignment and Conveyance and the Deed of Novation. They submit that these documents along with the Global Deed of Transfer form a trio of documents and they submit that because there were problems about the other documents, there may be issues about the Global Deed of Transfer and that this possibility makes it necessary to inspect the original.

51. The controversies in relation to the Deed of Conveyance and Assignment and Deed of Novation were as follows.

52. The copy of the Deed of Conveyance and Assignment which was discovered by the plaintiff was different to the Deed which was exhibited to an earlier affidavit sworn by the plaintiff (on the 5th April 2018) in that the execution pages have different signatures. This was explained by the plaintiff in an affidavit of the 2nd December 2021 where he stated that "*there are several different documents which are described as a Deed of Conveyance and Assignment and which were executed in connection with the sale and transfer of the various mortgages to PAL in February 2015. I am advised that several Deeds of Conveyance and Assignment were necessary due to the limits on block registrations of transfers in the Registry of Deeds. The Deed of Conveyance and Assignment which effected the transfer of the Defendants' mortgage was signed on behalf of PAL by Áine Kingston and on behalf of Ulster Bank Ireland Limited by Alistair Aitken.*" As noted above, the hearing was adjourned on a number of occasions to facilitate the parties to narrow the issues that were between them. During the course of this process this issue about there being a number of Deeds of Conveyance and Assignment was raised on several occasions and I directed that an affidavit be filed explaining the apparent uncertainty regarding the number of Deed in existence. This affidavit also referred to this explanation.

53. During this process an issue also arose about inspection of the original Deed of Conveyance and Assignment and the location of the original Deed and I also directed

that this be addressed on affidavit. This issue arose due to the Court being told on the 27th July 2022 (one of the adjourned dates) that the original Deed was held by the Registry of Deeds and the original could therefore not be provided for inspection. I directed that an affidavit be filed explaining the inability to retrieve the Deed from the Registry of Deeds. In fact, when the affidavit was filed, it explained that what the Court had been told on the 27th July 2022 was an error and the Deed was not in the Registry of Deeds but was held by solicitors in London. It went on to say that the original Deed had been retrieved from the London solicitors and was now held by the plaintiff's solicitors in Dublin and was available for inspection.

54. In relation to the Deed of Novation, the copy that had been discovered on the 27th November 2019 had not been signed or witnessed on behalf of PAL but the copy which had been exhibited to an affidavit of the 5th April 2018 was signed and witnessed. The plaintiff, in his affidavit of the 2nd December 2021 (referred to above), explained that the copy which had been discovered had not been executed by PAL whereas the copy in the affidavit of the 5th April 2018 had been. I understand this to mean that discovery of an earlier (unexecuted) copy had been provided in the discovery process through error. The plaintiff went on to say that he was advised that the version which was exhibited to the affidavit of the 5th April 2018 *"is the correct version and which, accordingly, I will rely upon at trial. I propose to swear a supplemental affidavit of discovery in respect of this document."*

55. Thus, there were undoubtedly issues in relation to discovery of the Deeds of Conveyance and Assignment and the Deed of Novation. However, what the defendants ask is that the Court take the view that because there were issues about these documents, there might be issues about the Global Deed of Transfer and therefore inspection of the original should be permitted. In my view, it does not follow from the fact that there were issues about those two documents that there will be or even might be issues about the Global Deed of Transfer. This falls short of discharging the burden of proving that inspection of the original is necessary in the sense set out in *Cooper Flynn*. This is particularly so where explanations which, on their face, are reasonable have been given for the issues in relation to the Deed of Conveyance and Assignment and the Deed of Novation. These can be further explored at trial but the question for the Court at this stage is whether the defendants have shown that those issues make it necessary to direct inspection of the Global Deed of Transfer and I am not satisfied that they do.

Conclusion

56. I will therefore direct that the plaintiff makes discovery of the Mortgage Sale Deed of the 16th December 2014 subject to redactions on the grounds of commercial sensitivity, bank/client confidentiality and irrelevance and that the affidavit of discovery shall set out the grounds for any such redactions.

57. I will not make an order directing inspection of the original Global Deed of Transfer.

58. Finally, I note that some of the issues that were resolved between the parties were resolved on the basis that the plaintiff would make further discovery, e.g clarification of the applicable Deed of Assignment and Conveyance. That is essential. I do not need to determine any such issue.