Neutral Citation No: [2018] NICh 2 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **COL10617** *Delivered:* **16/3/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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STEELE

Plaintiff

-v-

BANK OF SCOTLAND

First Defendant

AND

ENNIS PROPERTY FINANCE LIMITED

Second Defendant

_____

COLTON J

[1] This is an appeal brought by the plaintiff against the decision of the Master who refused an application for specific discovery, pursuant to Order 24 Rule 7 of the Rules of the Court of Judicature. The schedule of documents sought against each defendant is attached to the original summons. The documents sought have been refined somewhat in the course of the proceedings and at the hearing the plaintiff produced two tables setting out the documentation sought; Table A in respect of the first defendant and Table B in respect of the second defendant.

[2] In this ruling I propose to refer to the table and shall assign each category of documents sought with the number allocated in the schedule to the summons.

[3] I want to put on record my appreciation for the assistance of counsel Mr McCollum QC and Mr Shields for the plaintiff. Mr David Dunlop appeared for the first defendant and Mr Stephen Shaw QC and Mr Peter Hopkins appeared for the second defendant and I am obliged to them for their written and oral submissions.

[4] The legal principles relevant to an Order 24 Rule 7 application are well established and I refer to my judgment in the case of Flynn and I set out paragraphs

[17] to [22] of that judgment and I say that to this I would add that in adjudicating upon applications of this nature the court should seek to give effect to the overriding objective of the rules set out in Order 1 Rule 1(A).

[5] What then are the matters in questions or at issue in this action? At this stage the court must rely on the pleadings. In the Statement of Claim it is alleged that the plaintiff carried on business as a property developer and investor for in excess of 20 years. He owns four properties in respect of which the first defendant has provided finance. It is his case that that finance was by way of loans which were to be non-recourse, renewable and long term. He describes a close relationship of trust and confidence with senior members of staff employed by the first defendant. He describes how the first defendant indicated that it was exiting the banking market and how he entered into discussions with representatives of the first defendant about the continuation and redemption of the loans. He claims that arising from these discussions he entered into a binding settlement agreement which is evidenced by an oral agreement of 17 November 2014 and a letter of 10 February 2015. He alleges that he acted in performance of this agreement in various ways.

[6] In September 2015 the plaintiff claims he was told by the first defendant that his loans had been agreed for sale and it appears that there was an agreement for sale between the first and second defendant in July 2015 which was formalised or "restated" in November 2015. The second defendant is seeking repayment of the loan which is in excess of £7m. In the Statement of Claim the plaintiff claims an order for specific performance of a settlement agreement and a declaration that the first defendant's lending to the plaintiff was non-recourse and renewable on a long term basis. He claims damages for breach of contract, misrepresentation, negligence and misstatement by the defendants their servants and agents in and around the provision of finance facilities and he also claims equitable damages in lieu of specific performance and interest.

[7] The representatives of the defendants in their affidavits in response to various interlocutory applications have characterised the issues in the following way. I refer to paragraphs 5 to 7 of the affidavit from Karen McCree from the second defendant which really echoes the affidavit of Alasdair Hepburn on behalf of the first defendant. For the record paragraph 5 of the affidavit sets out the case made by the plaintiff. The first defendant represented to the plaintiff that his loans would be non-resource, renewable yearly on a long term basis. The second defendant was bound to recognise the legal force and effect of the representations and/or agreement made between the plaintiff and the first defendant as to the non-recourse character of the first defendant's lending to the plaintiff and the long term renewability of that lending or alternatively the second defendant is estopped from denying the binding effect of such representations and/or agreements. Notwithstanding the above there is a binding settlement agreement between the plaintiff and the first defendant and now by succession the second defendant in respect of the outstanding obligations of the plaintiff. The plaintiff has acted under

and in accordance with that settlement agreement and has complied with all terms of same and the second defendant is bound to recognise the legal force and effect of such settlement agreement or in the alternative is estopped from denying the effect of the agreement. As appears from the defence of the first defendant it denies the aforesaid allegations of the plaintiff and in particular denies that the plaintiff's loans were non-recourse and says they were governed purely by the written terms of the facility letters which were in 2002, 2007 and 2012. The first defendant denies that the plaintiff's loans were renewable on a long term basis and says that they were governed purely by the written terms of the facility letter and denies there was any legally binding settlement agreement between the plaintiff and the first defendant. As appears from the defence of the second defendant it denies the aforesaid allegations of the plaintiff and in particular denies that the settlement agreement constitutes a legally binding agreement enforceable against it or in the alternative says the plaintiff has been guilty of repudiatory breach of the settlement agreement and that such breach has been accepted by the second defendant. In the alternative the plaintiff has renounced the settlement agreement and accordingly counterclaims for all monies outstanding under the various facility letters entered into between the plaintiff and the first defendant.

[8] I consider this to be a reasonable summary of the issues but would add that the plaintiff says that in analysing the defence the court must look closely at the relationship between the plaintiff and first defendant and between the defendants. The reason why the first defendant might be encouraged to enter into the type of agreement alleged by the plaintiff, that is non-recourse renewable and long term, and the reasons why the second defendant might repudiate the settlement agreement and in particular some of this is reflected in paragraph [27] and paragraph [33] of the Statement of Claim.

[9] The first defendant filed a list of documents on 3 August 2016; the second defendant filed an amended list of documents on 13 January 2017.

[10] I propose to deal firstly with the application in respect of the first defendant. I look initially at the category of documents in respect of which there appears to be no dispute as to relevance. If I look at Table A and using the numbers in the schedule the category to which this applies are as follows and that is numbers 4, 5, 13, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 42, 45 and 46. For the avoidance of any doubt I consider that each of this category of document is discoverable and also likely to have been in existence at some stage, subject to any argument the first defendant might wish to make specifically objecting to any specified document by way of legal privilege or otherwise. In respect of each of this category of documents the first defendant has averred by way of affidavit from Alasdair Hepburn as follows:

> "All relevant documentation in respect of this category which is in the possession, custody or power

> of the first defendant has been disclosed and produced pursuant to the first defendant's list of documents dated 3 August 2016."

I consider that his response is inadequate and does not comply with the first defendant's obligations under Order 24. Firstly, by definition all documents under each such category are discoverable. There can be no qualification along the lines of all relevant documentation under each category. Secondly, the affidavit fails to identify which documents in the list are within the relevant class or category of documents. Thirdly, there is no attempt to identify within each class or category of documents which, if any documents may once have been in the possession, custody or power of the first defendant but which are no longer available and what has become of them. Indeed there are no documents identified in Schedule 2 of the list at all. Fourthly, it is clear that from an examination of the list no documents in respect of some of the class or category sought by the plaintiff have actually been identified. By way of example I refer to paragraph 13 relating to the minutes of meetings which allegedly took place to discuss the loan applications. I refer to number 20 which refers to a copy of the annual review of the loan facilities which are referred to in a letter from the first defendant. Again I refer to number 21 which relates to notes prepared in advance of or in anticipation of following arising from the meeting which refers to a meeting on 14 March 2011 and I make similar observations in relation to paragraphs 22 and 25 by way of example.

[11] Therefore in respect of each of the class of documents described above, I order that the first defendant serve an amended list which shall be verified by affidavit from a representative of the first defendant setting out whether any document or class of document described in each of the relevant paragraph numbers in the schedule has at any time been in its possession, custody or power and if not in its possession, custody or power when it was last in its possession, custody or power and what has become of it. I make it clear that it is not for this court to go behind any such affidavit once this exercise has been carried out. Any omissions or gaps can be dealt with at trial but it is necessary in my view that the first defendant approach the exercise of discovery in this way rather than simply assert that it has disclosed all relevant documentation.

[12] I turn now to the documents in respect of which there has been a challenge as to relevance and in relation to the first defendant those are numbers 2, 3, 7, 12 and 19. In relation to numbers 2 and 3 I consider that the approach taken by the second defendant in relation to discovery of the sale and purchase agreements, that is number 3 in the schedule of the first defendant, is appropriate. I consider the defendants are entitled to make the redactions and that the relevant material so far as it refers to the plaintiff has been discovered. I take the view that the first defendant should take a similar position in relation to the item at paragraph number 2, which is the sale memoranda as opposed to the sale and purchase agreement and any other supporting documentation in respect of the loan portfolio sale insofar as it

relates to or touches upon or is relevant to the plaintiff and I so order. I consider that this can be achieved by the appropriate redactions as were made in relation to the sale and purchase agreement as carried out by the second defendant. In relation to number 7 I consider that the documentation sought is discoverable. That relates to incentive bonuses for named employees and bonus schemes. The first defendant maintains that this material is not discoverable because the loans were governed by the written terms of the facility letters. But one has to look at the case that has been made and the dispute in this case and such documentation in my view would be relevant as to why the various representations allegedly made by the plaintiff were made and that certainly it is relevant to that issue. Therefore I direct that the material sought in number 7 should be provided. I take a similar view in relation to the material at number 12 which relates to the lending policy's guidance and procedures. Again the defendant says this is not discoverable essentially because the loans were governed purely by the written terms of the facility letters. I do not consider that to be an adequate response. The plaintiff disputes that. This is an issue between the parties and I agree that the material is potentially relevant to the circumstances in which the first defendant would offer the loans the plaintiff says were in fact were offered, that is non-recourse renewable or long term loans and therefore the policies would be relevant in relation to that issue. I refer to number 19 on the list. That is a request for the "delegation arrangements". In the table the plaintiff says that the defendant made the general averment about all relevant documentation in this category being provided, but when I actually check the affidavit on behalf of the first defendant that is not the case, the relevance is challenged. It seems to me that this is a relevant document and insofar as material is available it should be discovered. So therefore I make an Order 24 Rule 7 order in relation to numbers 7, 12 and 19.

[13] I turn now to the second defendant and again I refer to Table B and I have attributed the numbers in the schedule to the summons to the table. I want to deal firstly with the matters in respect of which there does not appear to be a dispute about relevance and they are numbers 8, 9 and 10. I make it clear that in case there is a dispute about relevance I am satisfied that the plaintiff has met the Order 24 Rule 7 test. I consider the documentation meets the relevancy test and that there is sufficient evidence that the documents existed at some point and that their disclosure is necessary for disposing fairly of the cause or matter. In relation to numbers 8, 9 and 10 I note that the second defendant has taken a similar approach as the first defendant by simply averring that all relevant documentation in respect of this category has been disclosed. I repeat what I said about the first defendant in relation to the proper approach that should be adopted in relation to this matter. I should indicate that in considering this matter I have had regard to the affidavit from Mr Cathal Doran of 5 May 2017 in which he further elaborated on how discovery was dealt with by the second defendant in this case. He says that to the best of his knowledge as per Ms McCree's affidavit dated 17 January "no further documents pertaining to these categories are in the possession, custody or power of our client save for those documents over which privilege is claimed pursuant to

paragraph 2 of our client's amended list of documents dated 13 January 2017". Again, I do not consider this is an appropriate way of dealing with the plaintiff's request. It may well be the case that there are no further documents to be provided, but in order to comply with its obligations I take the view that the second defendant should set out in the normal Order 24 Rule 7 terms what documents it has in relation to the categories I have identified and that they should not be qualified by simply saying it provided all relevant documents. So I will adopt a similar approach in relation to those categories of documents as I did in respect of the first defendant.

[14] Again in relation to any privilege claimed it is important that the documents in respect of which privilege is claimed are properly identified so that the parties can understand the nature of the document and the basis for claiming privilege as opposed to a general assertion. So therefore in respect of each of the categories of documents described in numbers 8, 9 and 10 I direct that the second defendant serves an amended list which shall be verified by affidavit by a representative of the second defendant setting out whether any document or class of document described at each of the above paragraphs in the schedule to the summons has at any time been in its possession, custody or power and if not now in its possession, custody or power when it was last in its possession, custody or power and what has become of it pursuant to Order 24 Rule 7. I consider that is the proper way to deal with the plaintiff's request in this matter.

[15] I now then refer to numbers 3, 4, 5, 6 and 7 in respect of which the second defendant has challenged the plaintiff's entitlement to the material. In relation to 3, 4 and 5 I direct that the second defendant should provide the discovery sought under Order 24 Rule 7. I consider that the plaintiff has made a case for relevance in respect of the categories sought. The first relates of the disposal plans of the second defendant and I take the view that this does relate to the issues in the case and in particular the reasons why the second defendant would repudiate the agreement. I take a similar view in relation to 4 which are the financial plans the second defendant has for the properties, that is the plaintiff's properties. Then in relation to 5 the due diligence processes and reviews carried out by the second defendant in relation solely to the plaintiff's facilities prior to the purchase loans. I consider this is relevant to the questions that arise in this case and in particular the extent or knowledge of the part of the second defendant concerning the lending to the plaintiff and the consideration or analysis of those issues by the second defendant. So I therefore make an order under Order 24 Rule 7 in respect of 3, 4 and 5. In relation to 6 and 7 I do not propose to make an order. I consider that the second defendant has made a proper case for the redactions set out in the documents. The second defendant has disclosed the material which is relevant to the issues in my view and indeed the type of material sought in the parts which have been redacted are more likely to be contained in 3, 4 and 5 in respect of which I have granted disclosure. I make no order in relation to 6 and 7 which are the sale and purchase agreement and the purchase deed.

[16] That finally leaves the request for electronic searches of the e-mails in respect of the individuals and also diary entries for the relevant persons in respect of which the defendants have simply said that all relevant material has been disclosed. I take the view this material is discoverable. It may well be that all such documents have been disclosed, but it is not possible for me with any certainly to identify that from the affidavits that have been sworn or the lists that have been filed and I consider that each of the defendants should make an affidavit under Order 24 Rule 7 in relation to this material and of course for the avoidance of doubt that is solely insofar as it relates to the plaintiff. That is the electronic search and also the diaries. It may well be that no such diaries exist or if they did exist they are no longer in the possession, custody or power of the defendants or they are simply not available. But I consider that the plaintiff is entitled to have a list of documents verified by affidavit in respect of these matters. Obviously the matter of discovery can be kept under review as the trial proceeds, but it is clear from my ruling that the appeal is allowed, at least in part, and I order accordingly.