Neutral Citation No: [2018] NICA 48	*Ref:* **TRE10765**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **19/10/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM
THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION

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2015 No.107841

ALASTAIR STEELE

Plaintiff/Respondent;

and

BANK OF SCOTLAND

First Defendant/Appellant;

and

ENNIS PROPERTY FINANCE LIMITED

Second Defendant/Appellant.

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Before: TREACY LJ & SIR RONALD WEATHERUP

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TREACY LJ ***(Delivering the judgment of the court)***

Introduction

[1] The first and second-named defendant/appellants' seek to appeal the judgment and order of Colton J allowing the plaintiff's appeal against Master Hardstaff's refusal of his applications for specific discovery pursuant to Order 24 rule 7 of the Rules of the Court of Judicature (NI) 1980 ("RsCJ"). The applications by both defendant/appellants' are dated 5 July 2018 and are made pursuant to Order 59, rules 14 & 15 of RsCJ and section 35 of the Judicature (NI) Act 1978 for leave to appeal the order herein of Colton J filed on 5 July 2018 ("the order") pursuant to the judgment of the Court handed down orally on 16 March 2018 and delivered in writing on 27 May 2018 ("the judgment"); and

(a) If such leave is granted, appeal to this Honourable Court seeking to set aside in part the said decision and the order.

[2] Mr Jonathan Dunlop appeared for the first defendant ('the Bank'). Mr Stephen Shaw QC and Mr Peter Hopkins appeared for the second defendant ('Ennis'). Mr Liam McCollum QC and Mr Richard Shields appeared for the plaintiff. We are grateful to all counsel for their focussed written and oral submissions.

[3] Both defendants were refused leave to appeal by Colton J and renew their application before this court. It is common case that leave to appeal should only be granted when the applicant demonstrates an arguable case with a reasonable prospect of success that the trial judge has gone plainly wrong [see *Flynn v CC* 2018 NICA 3 per Morgan LCJ at para [19]].

[4] The legal principles relevant to an Order 24 Rule 7 application are well established and were not in dispute. They are helpfully summarised by Colton J in *Flynn v CC* 2016 [NIQB] 24 at paras and [17] to [22]]. At para 4 of his judgment in this case he acknowledged in 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) [see also the section of the COA judgment in *Flynn* [2018] NICA 3 entitled "discovery principles" at para 25 *et seq.* and, in particular, paras [28] – [29]].

[5] In the present case the impugned order required the first defendant bank by one of its officers to make and file an affidavit stating whether any of the specified documents are or have been in its possession, custody or power and to discover same to the plaintiff, or if not now in its possession, custody or power stating the current whereabouts of the documents and how they left the Banks possession. So far as the bank is concerned they seek to appeal in respect of two groupings of documents which were the subject of the trial judge's order:

(a) Categories 4,5,13,16,17-18,20-36,38-40,42,45, and 46 from this first defendant only and categories 1 and 2 from both defendants; and (b) Categories 2,7,12 and 19

[6] Mr Shaw QC in his oral submissions before us made it clear at the outset of his submissions that the focus of his appeal was in respect of the order made by the trial judge in respect of **categories 3 and 4**.

The matters in question or at issue in this action

[7] The relevance of the documents sought must be decided by reference to the pleaded issues. 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.

[8] 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.

[9] The defence of the first defendant 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. The defence of the second defendant 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 on or about 16th May 2016. 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.

[10] The trial judge noted the plaintiff's contention 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 are reflected in paragraph [27] and paragraph [33] of the Statement of Claim. It is part of the plaintiff's claim that the defendants are both acting in wilful and deliberate breach of contract so as to enable the second defendant to profit by obtaining control of the relevant properties,

notwithstanding the plaintiff's legal and equitable rights, and material to this it is said are the incentives upon the defendant to so act.

The First Defendant's appeal

[11] The bank put forward three grounds of challenge in respect of the categories of documents set out at para [5](a) above: (i) that the trial judge was wrong to order specific discovery in light of the affidavit of Alastair Hepburn of 20 February 2017; he averred that all 'relevant' documents within each class had been discovered and since discovery only extends to relevant documents the affidavit "was conclusive and complete"; (ii) that the trial judge was wrong to require the first defendant to identify those documents for which it was claiming privilege; and (iii) that the judge's order in respect of email and diary discovery is vague, uncertain and inconsistent.

[12] We agree with the plaintiff that in light of the pleaded issues the affidavit relied upon adopts an unacceptably constrained or narrow conception of relevance. This is evidenced in a number of paragraphs such as para 25 where he deposes:

> "I am advised and believe that the matters and issues are set out in paras 5-7 above. As noted in paragraph 6, the first defendant maintains that the plaintiff's loans were governed purely by the written terms of the facility letters. As such, documentation relating to or details of BOSI lending policies guidance and procedures during 2001-2015 are irrelevant and have no bearing on the determination of the issues in these proceedings" (underlining added).

This distinctive formulation is to be found in a number of paragraphs. It, in our view, plainly introduces an unjustified qualification to the concept of relevance by reference to the *defendant's* case. The point may be emphasised by the fact that in other paras a different formulation is used. For example in para 17 the first sentence referring to the matters and issues set out in paras 5-7 is replicated but not the qualification by reference to the impugned qualification referred to herein.

[13] A defendant in the faithful discharge of his discovery obligations cannot assess or qualify relevance by reference to its own case (ie that the loans were governed purely by the facility letters). To do so is as Mr McCollum QC contended an obviously flawed approach.

[14] The trial judge noted at para [10] of his decision that there appeared to be no dispute as to the relevance of **Categories 4,5,13,16,17-18,20-36,38-40,42,45, and 46** . He observed that in respect of each of these categories of documents Alasdair Hepburn averred:

> "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."

For the reasons adumbrated above the deponent appears to have approached the task of discovery by reference to a flawed concept of relevance qualified by reference to the defendant's own (partisan) case. This may explain why the deponent averred in effect that there were *no* documents from any of the categories, acknowledged to be relevant, to be disclosed as all relevant documents had been disclosed and produced pursuant to the first defendant's list. We consider that this response is plainly inadequate and does not comply with the first defendant's obligations under Order 24. The affidavit fails to identify which documents in the list are within the relevant class or category of documents. Nor is there any 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. In fact there are *no* documents identified in Schedule 2 of the list at all. And, as the trial judge pointed out "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".

[15] In light of what we have said above we affirm the judge's order in respect of those categories of document. Likewise as to documents arising from electronic searches of all emails making reference to the plaintiff in respect of the persons set out in the plaintiff's schedule and relevant diary entries for the above persons in 2001-2016 we affirm the judge's order. The grounds relied on by the first defendant to support its challenge to this aspect of discovery is nothing more than a brief unparticularised and unsupported assertion that the requests are overly wide, vague and uncertain. The first defendant has not articulated why it feels the order in respect of defined persons' emails and diary entries insofar as they refer to the plaintiff is vague and uncertain. It does not appear that these claims featured in argument before Colton J who records in respect of these requests at para [16] "..the defendants have simply said that all relevant material has been disclosed".

Categories 2,7,12 and 19

[16] The first defendant in its skeleton argument has advanced no real detail for this aspect of its appeal other than a submission without elaboration that the trial judge erred in deciding that these documents were relevant to the pleaded issues, failed to consider Order 24 Rule 9 or the relevant legal principles at all or, alternatively, that if he did he erred in concluding that discovery of these documents is necessary for disposing fairly of the cause or matter or for saving costs.

[17] On any fair reading of the judgment it is clear that the trial judge did consider Order 24 Rule 9. For example at para [4] he sets out the "well established" relevant legal principles by reference to his earlier judgment in Flynn. Para 20 of that earlier judgment expressly records that Order 24 Rule 7 must be read in conjunction with Order 24 Rule 9,which he then sets out.

[18] The categories of discovery under this head are: sale memorandum and supporting documentation in respect of the loan portfolio sale known as Project Poseidon, insofar as relevant to the plaintiff (**2);** details of all employee incentive and bonus schemes in existence at the relevant time (**7**); BOSI lending policies guidance and procedures for the period 2001-2015 (**12**); copy "Delegation Arrangements" referred to in email of 11 Feb 2005 from Hugh Donnelly (**19**).

[19] These documents are plainly discoverable in circumstances where the following material issues arise: (i) the question of what was recorded, known and communicated within the first defendant or to the second defendant loan purchaser; (ii) the question of whether bank personnel were financially incentivised to make the type of representations and arrangements alleged, [see judgment of Weatherup LJ in Walsh v Bank of Scotland [2013] NI QB 26 at para 14]; (iii) what the lending policies and guidance were at the material time; (iv) the extent to which a key senior person had delegation arrangements in respect of his dealings.

[20] As the plaintiff pointed out one of the tasks before the court trying this action, where there will be dispute about whether an agreement was reached, what agreement was reached, what were the material terms of the agreement, will be to seek and understand and interpret the "factual matrix" within which the parties acted [see *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989,987. The court was referred to the following passage where Lord Wilberforce said [995-996]:

> "No contracts are made in a vacuum; there is always a setting in which they have been placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes

> knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

[21] For the above reasons and also for the reasons set out at para 12 of the judgment below we also reject the appeal in respect of these categories of documents.

Appeal of Second Defendant

[22] As noted earlier in this judgment this defendant focussed its oral submissions on categories 3 and 4. Category 3 in respect of Ennis in the plaintiff's schedule sought discovery of "any disposal plan that the second defendant has for the plaintiff's assets/the properties. Category 4 sought "any financial plans that the second defendant has for the properties" ("**the disposal/financial plans").** Para 15 of the judgment below records that the judge took the view that these documents did relate to an issue in the case namely "… why the second defendant would repudiate the agreement". An innocent party faced with a repudiatory breach, can either treat the contract as continuing ('affirmation' of the contract) or he can bring it to an end by acceptance of the repudiation. In the Statement of Claim the plaintiff does not allege that Ennis repudiated the Settlement Agreement by breach. It is Ennis alleges that the plaintiff repudiated the agreement by his breach. In these circumstances we accept that the disposal/financial plans cannot have any relevance in these proceedings to "the reasons why the second defendant would repudiate the agreement" since this is not a pleaded issue. Either the plaintiff is guilty of repudiatory breach of the Settlement Agreement or he is not. If he is, Ennis is entitled to accept that repudiatory breach. Either Ennis has validly accepted the repudiatory breach or it has not. If it has in law effectively accepted the breach, then the Settlement Agreement has been repudiated. We accept that the reasons why Ennis may have wished to accept the repudiatory breach are irrelevant to the pleaded issue. As Mr Shaw QC put it in his skeleton argument determination of those reasons has no impact upon the pleaded issue of any repudiation of the Settlement Agreement nor on the determination of these proceedings. For those reasons and to that extent only the appeal of the second defendant is allowed.