[2019] IEHC 656

THE HIGH COURT

[2014 No. 5126 P.]

BETWEEN

SHANE LITTLE AND NICOLA LITTLE

PLAINTIFFS

AND

IRISH BANK RESOLUTION CORPORATION LIMITED
(IN SPECIAL LIQUIDATION)
AND
LAUNCESTON PROPERTY FINANCE LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 8th day of October, 2019

Introduction

1. The plaintiffs seek an order pursuant to Order 31 of the Rules of the Superior Courts ("*RSC*") directing the second named defendant ("*Launceston*") to make available for inspection in unredacted form:-

   (i) The loan sale agreement dated 28th March, 2014, between the first named defendant ("*IBRC*"), the special liquidator of IBRC and Launceston ("*loan sale agreement*"); and

   (ii) The deed of transfer dated 23rd May, 2014 ("*loan sale deed*") between those same parties; ("*the documents*").

2. The documents were listed in an affidavit of discovery sworn on behalf of Launceston on 29th May, 2017, ("*the affidavit of discovery*") and are the subject of a notice to produce pursuant to O. 31(16) of the RSC dated March 2018. The redactions undertaken are enormous and render an understanding of the documents difficult for those who do not have the benefit of an explanation about the content or information behind the redactions. The defendants assert in a general way that the detail behind the redactions are not relevant to the subject of these proceedings.

Background

3. The plaintiffs allege that Irish Nationwide Building Society ("*INBS*"), which had its loans transferred to IBRC in 2011, breached a written commitment in 2004 to replace a bridging loan with a long-term loan. This breach allegedly exposed the plaintiffs to excessive interest and obliged them to sell the property to pay off the loan when demanded. Relying upon the representation from INBS, the first named plaintiff borrowed further from INBS in 2004 and 2007. These loans were transferred in 2014 to Launceston after the commencement of these proceedings in June 2014. Launceston has delivered a defence and counterclaim seeking recovery of the 2004 and 2007 loans. It denies that the plaintiffs have a right to set off their claim against the sums which were due to INBS and are now owed to Launceston.

4. The plaintiffs contend that it is fundamental to appreciate the terms and conditions for the transfer of their loans to Launceston and to know whether their loans were taken by Launceston with actual or potential knowledge of their existing claims against INBS.

The redaction
Reason for redactions

5. Solicitors for IBRC had advised the solicitors for Launceston in June 2017 that the redactions which IBRC made to the documents "*are confidential and do not relate to the loan facilities previously held by the plaintiffs with IBRC*". Launceston relies on a contractual obligation owed to IBRC to maintain the confidentiality of the redacted provisions.

Original explanation for redactions

6. The explanation in the affidavit of discovery for the redactions was that in general the documents "*contain information which is commercially sensitive and confidential information relating to loans that are not the subject matter of the within proceedings*". The deponent also referred to advice, which was neither explained nor exhibited, that the redacted segments are irrelevant to the claims of the plaintiff.

Summary of the furnished copy redacted documents

7. In the redacted loan sale deed copied to the plaintiffs' solicitors:-

(i) eleven of the eighteen headings in the contents page were covered in black ("*blanked*") immediately opposite the paragraph number;

(ii) the second page only had a blanked rectangular-like paragraph with no other writing;

(iii) a majority of the definitions spread over thirteen pages were completely blanked or had significant portions of the definitions blanked;

(iv) the operative clause 2.1 and subparas. 2.3.6, 2.3.7 and 2.4 were blanked;

(v) the entirety of clause 3 was blanked including the heading;

(vi) all of clause 4 (save for the headings "*Actions on the signing date*" and "*Vendor action on or following the signing date"* with a provision that the vendor will deliver an "*appropriate notice*" to "*all relevant borrowers*") was blanked;

(vii) Clauses 5 to 10, including the headings over twelve pages (save for much of subclause 9.6 entitled "*Transfer of title to the assets*") had each of its subparagraphs redacted to a large extent;

(viii) the apparent operative part of clause 11 with the heading "*Actions required by vendor on purchaser*" and further subclauses were heavily redacted in a manner that could arouse suspicions about the potential relevance of one or more of those provisions to the claims of the plaintiffs. An example is subclause 11.12 that refreshingly has a non-redacted heading "*Purchaser indemnity*" but the subclause is then blanked. The following fourteen pages with the remainder of clause 11 and all

of clauses 12 to 18.5, including headings, are blanked save for clause 16.2, which I comment upon immediately after this summary.

(ix) Subclauses 18.5 to 18.15 appear to be boilerplate-type provisions even though four specific subclauses are blanked without any hint as to why they are irrelevant or confidential when the other boilerplate subclauses are not considered irrelevant or commercially sensitive;

(x) the schedules of assets and borrowers which only identify the loans of the first named plaintiff appear to be properly blanked;

(xi) the three pages before the execution page to the loan sale deed have blanked boxes of paragraphs without any indication as to what they may contain.

8. The following two comments by the Court are made to demonstrate the apparent idiosyncratic nature of the redacting. Firstly counsel for the plaintiffs explained a potential relevance of the definition of "*Data Room*" for information which may have been made available to Launceston about the claims of the plaintiffs. Curiously the definition of "*Data Room*" is not blanked while no provision which uses that definition is uncovered or explained as to why it is blanked. Secondly, IBRC also chose not to blank clause 16.2 which provides that the parties will pay their own costs for preparing and implementing the terms of the documentation; subclause 16.2 appears like an oasis in a desert of blanking. The Court cannot understand the relevance of clause 16.2 to the plaintiffs' claims without assistance from one or other of the parties. Nothing other than a general reason is given for choosing to blank and one is at a loss to understand why some apparently irrelevant provisions are then not blanked. Hence the Court is presently reluctant to interpret the massively redacted loan sale agreement in the context of the plaintiffs' claims. Similar comments about other choices for redacting could be made (see para 7 (ix) above also).

9. The deed of transfer was not so heavily redacted but there was no explanation in the affidavit of discovery as to why significant redactions were made to clause 1.3 and the half page following the boilerplate provisions ending with clause 9.4. Further, it is hard, if not impossible, to understand the claim of irrelevance and commercial sensitivity concerning the deed of transfer to the claims of the plaintiffs without having an explanation as to what is contained in the definitions used in the loan sale deed and the blanked provisions of the deed of transfer.

10. The difficulty in understanding the above summary prepared by the Court is probably less than the difficulties which any reader will experience in seeking assurance from the generic averment in the affidavit of discovery that all blanked provisions and headings are irrelevant and/or confidential.

Uniform redactions

11. It emerged during the first day of hearing of this motion on 11th December, 2018, that redactions had been carried out in a "uniform" manner by a then unidentified person engaged by IBRC. In other words, IBRC appeared to have redacted many similar provisions in other loan transfer documents which fall within the terms of discovery orders whether directed to IBRC or a transferee of loans from IBRC.

Proposal of inspection and terms

12. At the first hearing of the motion, IBRC was afforded an opportunity to consider a proposal for inspection by the plaintiffs' solicitor of the documents, subject to such conditions as IBRC might suggest, including that (i) the solicitor would attend in the presence of other representatives for the defendants and (ii) the same solicitor would undertake to maintain the confidentiality of information gleaned from the documents which could be less redacted. IBRC was also given liberty to consider filing a further affidavit to explain the redactions.

13. On the 19th December, 2018, the Court was informed that IBRC declined the suggestion to offer facilities for the plaintiffs' solicitor to inspect even some of the redacted provisions upon terms and the Court acceded to the request for IBRC to elaborate upon affidavit about the reasons for the redactions.

Focus of the plaintiff

14. The solicitors for the plaintiffs, by letter dated 18th January, 2019, addressed to Launceston's solicitors, set out eight specific requests and clarified that information relating to the loans of parties other than those of the plaintiffs are not relevant to these proceedings. The request focussed on any term or information made available to Launceston which could be relevant to the plaintiffs' claims in these proceedings.

Explanation for the redactions

15. On 30th January, 2019, a partner in the firm of solicitors who had acted for IBRC in preparing the documents but do not act for IBRC in these proceedings, ("*MT*") swore an affidavit which at paras. 9 and 10 sought to assure the following:-

    (i) The redactions in the documents "*are confidential between* [IBRC] *and* [Launceston] *and/or are not relevant to the claims being made by the plaintiff in the proceedings";*

    (ii) "*There are no other clauses relevant to the claims to set off being made by the plaintiffs in this action which have been redacted";*

    (iii) The "*data site*" defined in the documents had *"copies of the loan facility letters, that were being sold, any security documents attaching to the facilities being sold and confirmation of the balances …"* while explaining that "*typically, little or no correspondence relating to any borrower were included in the data site*".

    (iv) There are no sections of the documents "*which specifically refer to the plaintiffs' other complaints including complaints made prior to the commencement of the proceedings"* on 6th January, 2014;

(v) "*The sections of the loan sale deed which address responsibilities in respect of existing obligations on the part of* [INBS] *and/or IBRC have all been provided to the plaintiffs in the redacted loan sale deed already provided*";

(vi) The only definition in the documents "*relevant to the transfer of the plaintiffs' loan"* that had been redacted was identified and exhibited to that affidavit;

(vii) There is no reference to the subject of these proceedings in the indemnity provisions of the documents;

(viii) The non-redacted part of schedule 1, which listed the four loans of the plaintiffs, had included a figure which is only relevant to IBRC and Launceston and is not relevant to the claims of the plaintiffs in these proceedings;

(ix) The "*intentionally left blank*" statement on the contents index page of the loan sale deed which listed sections meant that those clauses were irrelevant to these proceedings.

Preparation for hearing on 12th March, 2019

16. The plaintiffs' solicitor in his affidavit sworn on 6th February, 2019, noted that MT had not identified the person in IBRC who had originally made the redactions which was a question posed on 11th December, 2018, as potentially relevant to the assessment by the Court of the consideration given to the making of reactions by IBRC. The plaintiffs' solicitor also referred to the failure of MT "*to aver that all terms relevant to and/or relating to the claim herein are not redacted as requested in that letter*" of the 18th January, 2019. The affidavit further took issue with the general use of the word "*typically*" in relation to the data site and the absence of any explanation for specific redactions given by MT.

17. MT in a supplemental affidavit sworn on 25th February, 2019, averred that he was the person who had made the original redactions and confirmed again "*that all terms relevant to and/or relating to the plaintiffs' claim*" had been provided in unredacted form.

The law on redaction

Entitlement to "*cover up*"

18. "*It has long been the practice that a party is entitled to seal up or cover up parts of a document which he claims to be irrelevant*." This is a statement by Hoffman L.J. in *GE Capital Corporate Finance Group Ltd v. Bankers Trust* [1995] 2 All ER 993 at 995-996; [1995] 1 WLR 172 at 174 ("*GE Capital*"), which is relied upon to redact documents listed in an affidavit as to documents. Recent case law indicates an increasing regularity of extensive as opposed to minimal redaction of documents working on the basis that the party seeking inspection bears the burden of showing the necessity of full disclosure for the fair disposal of the action. In other words, once a solicitor for the redacting party avers on affidavit that the redactions are necessary, the redactions should be accepted, according to this trend. Part of the rationale for this approach seems to be that a solicitor, being an officer of the Court and owing consequent duties, will be careful to

ensure that no information which may be obtained from redacted portions will give "*litigious advantage*" to the party seeking inspection.

19. There is no controversy that curiosity about the content of a document is "*of no importance"* (*Taylor v. Anderton* [1995] 1 WLR 447 at 462, per Bingham M.R.).

Overall approach to disclosure

20. Clarke J. (as he then was) in *Telefonica O2 Ireland Limited v. Commission for Communications Regulation* [2011] IEHC 265 (unreported, High Court, 30th June, 2011), summarised the overall approach to discovery and disclosure as follows at para. 3.3:-

> *"1. In order for discovery or disclosure to be appropriate the documents or materials sought must be shown to be relevant.*
>
> *2. If the documents are relevant, then confidentiality (as opposed to privilege) does not, of itself, provide a barrier to their disclosure.*
>
> *3. The court is required to exercise some balance between the likely materiality of the documents concerned to the issues which are anticipated as being likely to arise in the proceedings, and the degree of confidentiality attaching to the relevant materials. In that context, the confidence of third parties may be given added weight for it must be accepted that those parties who become embroiled in litigation will necessarily have to disclose information about their confidential affairs when that information is necessary to the fair and just resolution of the relevant litigation. See the discussion of the relevant authorities by Kelly J. in* Koger Inc v. O'Donnell *[2009] IEHC 385*.
>
> 4. *In attempting to balance those rights the court can seek to fashion an appropriate order designed to meet the facts of the individual case so as to protect both the legitimate interests of the party seeking disclosure to ensure that all relevant materials potentially influential on the result of the case are before the court and, to the extent that it may be proportionate, the legitimate interests of confidence asserted.* Thema, Yap v. Children's University Hospital Temple Street [*2006] IEHC 308 and* Hartside v. Heineken Ireland Ltd *[2010] IEHC 3. The discovery aspects of Yap are not addressed in the written judgment cited but involved a postponement of disclosure of confidential patient records until determined necessary by the trial judge.*
>
> *3.4 … At a general level, it seems likely that confidence will only come into play where there is a disproportion between the level of confidence which would be breached and a very limited potential relevance of the material concerned. Highly confidential information, which would only have a very tangential relevance to proceedings, might legitimately not be disclosed."*

21. Further para. 7.3 of Clarke C.J. in *Tobin v. Minister for Defence* [2019] IESC 57 (unreported, Supreme Court, 15th July, 2019), also influences consideration of the

insistence by IBRC to rely on general averments in order not to disclose parts of the redacted documents. The affidavit evidence does not detail how or why the redacted portions are irrelevant or commercially sensitive:-

> *"In addition, discovery can play an important role in ensuring that the case presented by an opponent is not inconsistent with the documentation which that opponent possesses but which is withheld from the court. Thus, from as far back as Peruvian Guano, discovery has been seen as playing a role in either strengthening the discovery seeking party's case or potentially damaging the opponent's case. I might add that, in my experience, discovery can also play a role in keeping parties honest, for it cannot be ruled out that some parties might succumb to the temptation to present a less than full picture of events to the court, were it not for the fact that they know that any attempt to do so may be significantly impaired if there is a documentary record which shows their account either to be inaccurate or materially incomplete. I consider that latter point to be of particular importance, for it provides a potential counterweight to the oft quoted argument that the vast majority of documents which are discovered do not find their way into the evidence presented to the court."*

Judgments subsequent to oral hearing

22. The following two judgments were delivered after oral submissions on the 12th March, 2019, and the parties took the opportunity given by the Court to deliver written supplemental submissions after the Court had identified in a written communication to the parties the further factors extrapolated from those judgments described below. The Court desires to synthesise issues for this type of application due to the demands on parties and the Court in assimilating the large amount of reading which invariably arises.

Further factors to be considered

23. Haughton J. in *Courtney v. OCM Emru Debtco DAC & David O'Connor* [2019] IEHC 160 (unreported, High Court, 15th March, 2019) ("*Courtney*"), referred to the established principles in redaction cases before positing further factors, including the following, which may be considered in the application by the plaintiffs in these proceedings:-

    (i) Once a reason for redaction is presented, it will be for the court to inspect the document, to determine what redactions may be justified and to consider imposing a limitation on disclosure (para. 56);

    (ii) The court should be vigilant to stop the abuse of redactions [Charles Hollander QC *Documentary Evidence* (13th ed.) at para. 10-16]. Suspicion, resentment, and justification have "*absorbed considerable court time*" (para. 57);

    (iii) *"… complex commercial litigation ought not to be unduly cumbersome, and the parties ought to be forthright in the production of documents which will in due course be disclosed in the course of the litigation process, whether through discovery or cross examination or other investigations."* (para. 69 which includes

this excerpt from Baker J. in *Playboy Enterprises International Incorporated v. Entertainment Media Networks Ltd* [2015] IEHC 102 (unreported, High Court, 19th February, 2015) at para. 38);

(iv) If a party refers to or exhibits a document, that party leaves open the potential for a production order "*unless he can prove special cause to the contrary*" such as commercial sensitivity or confidentiality (para. 71 which refers to *Hunter v. Dublin, Wicklow & Wexford Railway Company* [1891] 28 LR Ir 498 at 495);

(v) The general thrust of Article 34.1 of the Constitution (administering justice in pubic) should be borne in mind by the Court when considering whether and to what extent redactions to the documents should be allowed (para. 77). If there is a plenary hearing in this case, the documents may be opened with consequent probing because they are referred to in paras. 44 and 46 of the amended defence and counterclaim of Launceston delivered on 23rd September, 2016.

Capacity to understand

24. McDonald J., in an *ex tempore* judgment in *Everyday Finance DAC v. Enda Woods & Kieran McNamara* [2019] IEHC 605 (unreported, High Court, 19th July, 2019) ("*Everyday Finance*") at para. 12, explained his view that the relevant parts of the deeds of transfer from Allied Irish Banks plc to the plaintiff appear to have been produced but *"… they cannot be understood without the relevant definitions of the defined words used in the unredacted provisions and it therefore seems to* [McDonald J.] *to be necessary, in the interests of disposing of the matter fairly …".*

Plaintiffs' submissions

25. Written submissions were exchanged and counsel for the plaintiffs identified the following issues for determination by the Court in his final oral submission having regard to the case law:

"1. Is disclosure of the redacted documents necessary for the fair disposal of the case?

2. If so, does the court view it as appropriate to choose to inspect the unredacted portions itself prior to disclosure?

3. Are there any restrictions, e.g. lawyer only access that the court views as appropriate?"

26. The plaintiffs claim that:-

(i) The defendants are of the mistaken view that the only relevance of the documents is to establish Launceston's title;

(ii) The redactions are so extensive that it is impossible to identify even the context so as to obtain assurance as to the supposed irrelevance or confidentiality of the material;

(iii) There are no individual explanations for the redactions.

Submissions of IBRC

27. It was submitted on behalf of IBRC that it is implicit from the principles laid down in *Cooper-Flynn v. RTE* [2000] 3 I.R. 344 (Kelly J. (as he then was)) that the Court must carefully assess whether those parts of the documents which are redacted are truly necessary for the fair disposal of the action. They continued that un-redacting a particular clause should not be ordered simply to demonstrate that it is indeed confidential and irrelevant because that would dilute the right of a party making discovery to redact confidential and irrelevant material. According to the submission, it is for this precise reason that the authorities require the parties seeking disclosure of redacted parts to demonstrate that it is necessary for the fair disposal of the action.

28. The written submissions mentioned that the contents page of the loan sale agreement in unredacted form was provided after the first hearing of this motion on the 19th December, 2018, and that the plaintiffs have singularly failed to identify any specific redacted clause which should be disclosed for the fair disposal of the action.

29. IBRC requests the court to bear in mind that MT and IBRC are constrained in the level of information which they can provide. It would set at naught the right to maintain the confidentiality in such information if that material had to be disclosed for the Court to see that it was indeed confidential. It referenced *Irish Haemophilia Society Limited v. Lindsey* [2001] IEHC 240 where Kelly J. rejected the argument of the applicant that a more detailed description of privileged documents was required. The caution of Kelly J. that *"care must be taken to ensure that privilege is not abused on the one hand and on the other that the requirement for its assertion are not such as to in effect dilute or destroy it"* was cited by counsel for IBRC.

30. IBRC emphasised that MT averred that neither of the documents contain provisions regarding the right of borrowers generally (and/or these plaintiffs specifically) to set off any claims they may have had against IBRC at the date of transfer against any indebtedness transferred to Launceston. As the plaintiffs have not demonstrated a concrete basis for saying that the averment is wrong they are embarking on a *"classic fishing expedition*" quoting from Hedigan J. in *Irish Bank Resolution Corporation Ltd and Kenmare Property Finance Ltd v. Patrick Halpin* (unreported, High Court, 3rd November, 2015).

31. IBRC, in supplemental written submissions:-

(i) Accepts that the starting position is that parties should be forthright in the production of documents and contends that it has been forthright.

(ii) Repeats that the plaintiffs cannot satisfy the Court that they have a *prima facie* case for disclosure and that the burden has not shifted to the defendants. Despite now having the index page, the plaintiffs are unable to identify any redacted clause which should be disclosed for the fair disposal of the proceedings.

(iii) Distinguishes Courtney on the basis that the redactions in this case were made by solicitor MT. Unlike the redactions in *Courtney*, these were not "*client led*".

(iv) Clarifies that O. 31 r. 15 RSC does not apply because IBRC has not objected to disclosure on the basis of the title document exception.

(v) Notes that in *Courtney*, the price paid for the loan had been redacted but was clearly relevant and capable of resolving the issue in dispute. In this case, however, "*the information sought by the Plaintiffs – in respect of the plea that they are entitled to a common law set off – has not been redacted. The information is simply not contained in the documents."*

Submissions of Launceston

32. Launceston relied upon the submissions of IBRC and cited the judgment of Kennedy J. in *Maye v. Adams & Ors* [2015] IEHC 530 (unreported, High Court, 31st July, 2015), including para. 14 thereof in respect of the discretion of the court and the requirement for the court to be satisfied that inspection will benefit the fair disposal of the matter or for saving costs:-

> *"Order 31, Rule 18 is clearly discretionary in its terms and the jurisprudence confirms that the court has a broad discretion, which such discretion being exercised on the facts of any given case. It is also clear, from an analysis of the jurisprudence, and, on reading Order 31, Rule 18(2), that an order for inspection will not be made, unless the court is satisfied that it is necessary, either for disposing fairly of the cause or matter, or for saving costs. This was confirmed recently by Costello J. in Lowry v Mr. Justice Moriarty [2014] IEHC 602. The courts may, and have taken, steps to address the loss of confidentiality by redacting portions of a document or restricting disclosure in an appropriate manner."*

33. Launceston claimed that the plaintiffs had made no *prima facie* case for redaction and had failed to discharge the burden of showing that the disclosure of the un-redacted documents is necessary for the fair disposal of the action.

34. In its supplemental submissions Launceston also distinguished *Courtney* on the facts and emphasised that the plaintiffs advance an argument based on speculation to overcome their burden to satisfy the Court.

Conclusion

35. It is common case that discovery and disclosure should only concern relevant documents. The controversy arises here due to the extent of redaction in copies of relevant documents produced. Those redactions were justified originally by a director of Launceston and more recently in two affidavits sworn by MT, a partner in the firm of solicitors for IBRC when the documents were negotiated and executed over five years ago. The Court learnt for the first time from the second affidavit of MT filed after the initial hearing of this application in December 2018 that he was the person who had made the redactions.

36. In this application the defendants have made rather bald assertions that each and every redacted portion of the documents is not relevant and/or is commercially sensitive. The defendants rely too heavily on the burden placed on the plaintiffs to satisfy the Court that the redacted portions are relevant to their claims. I have outlined the extent of the redactions and the difficulties for interpreting the documents when the reader does not have any explanation about the information behind the blanked portions.

37. Having regard to the submission that the plaintiffs are on a fishing expedition, the Court is satisfied that there is potential for a set off claim, without determining that it goes beyond a *prima facie* claim.

38. The plaintiffs with their lawyers and the Court are concerned with claims that are peculiar to the plaintiffs and it is desirable if not necessary for IBRC to explain to the legal representatives for the plaintiffs (without necessarily disclosing confidential information) the thrust of the clauses which have been redacted to ensure that justice is not only done but is also seen to be done. Counsel and solicitors for the plaintiffs were unable to identify specific redacted clauses when this application was commenced because they did not have the index of clauses. The index, which was furnished belatedly, has limited value for the exercise which the defendants expect to be undertaken by the plaintiffs to satisfy the Court that specific redactions are relevant.

39. Nothing has been said on affidavit to disabuse the suggestion that the redactions are uniform or standard when disclosing loan transfer documentation as may be discovered in various proceedings about the recovery of loans which were acquired at some stage by IBRC. The Court has no reason to doubt the integrity of MT in making his affidavits. However, there is a difficulty in understanding the terms and context of the heavily redacted documents without having further detail about the content of many redacted portions.

Guidance from the Court

40. If the parties cannot agree a *modus operandi* to overcome their difficulties, the Court offers this further guidance for the defendants in preparing a supplemental affidavit to overcome the bald assertions. Para 10(g) of MT's first affidavit avers that the indemnity provisions in the loan sale deed relate to an indemnity regarding Launceston's obligations and that they do not refer to the subject of these proceedings. An understanding of that view would be improved by disclosing the clause or by describing on affidavit the obligations of Launceston in respect of the liabilities and assets of INBS.

41. There is consensus that all references to parties who are not involved in these proceedings should be redacted in the documents for inspection.

42. Finlay C.J. for the Supreme Court in *Bula Ltd (in Receivership) v. Crowley* [1991] 1 I.R. 220 at 222, in the context of a claim for privilege, required "*… an individual listing of the documents with the general classification of privilege claimed in respect of each document indicated in such fashion by enumeration as would convey to a reader of the affidavit the*

general nature of the document concerned in each individual case together with the broad heading of privilege being claimed for it."

43. The Court will not at this stage direct the enumeration or description of each redacted portion like in *Bula* or order inspection by the Court. The Court gives one last opportunity to the defendants by directing them to categorise on affidavit the redactions with explanations for each category. The averments should improve on the bald averments about irrelevance, confidentiality and commercial sensitivity and describe why each substantial redaction is irrelevant and then why the information is confidential or sensitive. The Court also directs the defendants to identify in writing those specific redacted portions which they will refuse the solicitor for the plaintiffs to inspect and the reasons for not accepting an undertaking to maintain confidentiality to be given by that solicitor. Liberty is given to the defendants to draft the undertaking which they will accept in relation to those redacted portions to be disclosed.

44. By way of further assistance to follow the spirit of the directions, the Court mentions that more than five years have elapsed since the creation and execution of the documents. The number of people who now know about the general provisions of loan transfer documentation from IBRC has no doubt grown over those years. This Court is not satisfied as to the necessity for confidentiality of general provisions when the reasons are not outlined and when an unidentified and increasing group are aware of those provisions. That does not mean that the Court will ignore grounds for protecting commercially sensitive or confidential information provided the constitutional imperative to determine cases in public is not infringed. I should add that the Courts have not accepted *"… that the confidentiality outweighs the proper administration of justice."* (*Maye v. Adams*, para. 21, as cited by Haughton J. in *Courtney*, para. 50).

45. I also direct that the solicitor for the plaintiffs be allowed, on conditions to be specified by the defendants, to inspect (but not necessarily photocopy) the documents which should have a reduced number of redactions as may be chosen and identified by IBRC in the supplemental affidavit for categorising and explanation. I will also hear the parties about the terms of an undertaking not to disclose any information relating to the redacted portions of the documents to any other party without seeking an order from this Court on notice to the defendants.

46. This order may appear to deviate from the practice adopted by IBRC and others who have relied upon *GE Capital*. However, the time has come for the Court to order and guide the parties in this and future applications for uncovering substantial redactions of discovered documents. The burden still rests on an applicant to satisfy the Court about relevance but there is also an initial onus on a party who redacts to categorise and explain by way of more than bald assertions.

47. I am satisfied that the legal advisers for the plaintiffs have a legitimate interest in ensuring that there is nothing in the documents which might set them on a line of enquiry or further investigation to support a *prima facie* claim for a set off in respect of the counterclaim by Launceston.

48. The view of McDonald J. at para. 21 of *Everyday Finance* that "*… it is usually counterproductive for a* [party] *to refuse to hand over copies of documents of this kind*" in such a redacted format resonates.

49. I clarify that I decline to inspect the documents at this stage without having the benefit of the categorisation and explanation which the defendants are directed to do now as it is about time that the party who redacts extensively carries out the duty to categorise and explain, without burdening the Court or other parties in the proceedings. The Court emphasises the word "*extensively*" because there will be cases where redacted portions are clearly irrelevant or confidential to another party without an effect on the person who seeks disclosure.

Elaborating questions

50. The Court poses and replies to the following questions to look at matters from another perspective in this application concerned with the widespread redaction:-

(i) Does the fact that neither MT nor his firm are engaged for any party in the litigation have a bearing when considering the application? This was a point made for distinguishing *Courtney* on the facts. On the one hand, MT referred in his affidavits to the loans which are the subject of the proceedings. On the other, he does not describe the instructions and information given to him about the claims of the plaintiffs or his entire understanding of the claims made in the pleadings.

(ii) Should the Court, without viewing the unredacted versions of the documents, rely on the averments of MT which have evolved in affidavits filed since the hearing of this application started? The Court has no reason to doubt the integrity or professionalism of MT but the defendants have not categorised or explained the reasons for each category in the manner which the Court desires and now directs as explained.

(iii) Why cannot the respect for the integrity of MT be accorded to the partner of another reputable firm of solicitors who are acting for the plaintiffs and who is prepared to give undertakings to maintain the confidentiality of information? This is an issue that arose in December 2018 which IBRC has not answered to the satisfaction of this Court other than by flatly refusing any inspection of reduced redacted documents by the solicitor on terms which it could seek to impose. The Court will give the parties leave to apply relating to this topic if matters are not resolved following delivery of this judgment.