

Loan Portfolio Price a Relevant Factor in Irish Unjust Enrichment Claim

Introduction

In our previous [client update](#) we reported on the High Court decision in *Promontoria (Aran) Ltd v Sheehy* ([2019] IEHC 613), in which the court ordered discovery of documents relating to the price paid by a plaintiff for the transfer of a loan portfolio from the original lender. That decision has been affirmed by the Court of Appeal in a decision handed down on 16 April 2020 (*Promontoria (Aran) Ltd v Sheehy* [2020] IECA 104).

The courts have held that a creditor is entitled to rely on redacted documents, if the unredacted parts establish the transfer of the loans. Generally therefore a borrower needs a good reason as to why the court should order documents to be unredacted. It is not enough for a borrower to say that there might be something in the redacted portions of the document which would undermine the transfer.

High Court Decision

The key factor which led to the High Court ordering discovery of loan sale documentation concerning the price paid for the loans was the way parties had pleaded their case. Specifically:

- (a) In addition to relying on the contract, the plaintiff ("Promontoria") sought judgment based on the doctrines of restitution and unjust enrichment.
- (b) The borrower pleaded that Promontoria was not entitled to rely on those doctrines because it had not made a "payment of substance" when it acquired the loans from the original lender.

- (c) In reply, Promontoria denied the claim that it had not made a payment of substance.

The High Court ruled that the price paid for the loans was therefore (unusually) a relevant – or *potentially* relevant – issue in the proceedings.

Court of Appeal Decision

Haughton J, giving the judgment of the Court of Appeal, acknowledged the right of a loan purchaser to protect commercially sensitive information such as the purchase price and that it is only in "special circumstances" that discovery of price will be ordered.

Haughton J concluded that Promontoria had failed to demonstrate that the High Court judge erred in principle or in his approach, as the High Court was entitled to distinguish between the wider discovery relevant to the unjust enrichment claim and the more limited discovery that would apply if the claim were grounded only in contract.

The Court of Appeal held that discovery of documentation containing information on the price paid for the loans was appropriate in this case, because such documentation "may directly or indirectly" enable the borrower to advance his defence. Haughton J cited the decision in [Hannon v Commissioner for Public Works](#) ([2001] IEHC 59), in which it was stated that "*the court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the court to order discovery simply because there is a possibility that documents may be relevant.*" The Court of Appeal pointed out that the final decision as to the relevance or significance of the

price paid for the loans was ultimately a matter for the High Court judge who would be hearing the trial of the proceedings. At discovery stage, all the Court of Appeal was deciding was that the question of price was potentially or probably relevant. The Court of Appeal was therefore not deciding that the question of price would provide the borrower with a defence to the claim for judgment.

The decision of the Court of Appeal in *Sheehy* can be compared to the approach taken by the High Court recently in [Wheelock v Promontoria \(Arrow\) Ltd and Tennant](#) [2020] IEHC 114. In *Wheelock*, the High Court refused to order discovery of the price paid by Promontoria to NAMA for the transfer to it of the plaintiff's loan and security on the basis that the question of price was not relevant.

Key Takeaways

It is noteworthy that the Court of Appeal in *Sheehy* recognised the right of a loan purchaser to protect commercially sensitive information. Both the High Court and the Court of Appeal emphasised that the decision to order discovery of documentation containing information relating to the purchase price was linked to the specific

way that the parties had pleaded their case. It is a reminder that the manner in which a claim is formulated can have unintended consequences, and that care needs to be taken to weigh up the significance of those potential consequences at the outset.

Further Information

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