THE HIGH COURT

[2021] IEHC 57

[2019/2040 P]

BETWEEN

JOHN MC NULTY

AND

PAT LENEGHAN

PLAINTIFFS

AND

DIAKALI LTD.

AND

PAUL MORAN

AND

PMPT LTD.

AND

HUGH O'CONNOR

AND

BEN O'CONNOR

DEFENDANTS

RULING of Mr. Justice Brian O'Moore delivered on the 28th day of January, 2021.

1. In this action, the Plaintiffs claim that their bid to purchase properties in Dorset Street, Dublin 1, was subverted by the unlawful and underhand activities of the Defendants. The second and third Defendants were, the Plaintiffs claim, engaged to assist with the bid, but at some unknown time defected to the side of the first Defendant, a company also involved in bidding for the properties. The fourth and fifth Defendants are alleged to be involved in a conspiracy to cause the second Defendant to defect, and it is further alleged that these Defendants were acting in concert with the undisclosed beneficial owner of the first Defendant; indeed, it is also alleged that the Fourth Defendant has a 'material undisclosed interest' in the first Defendant, and that the fifth Defendant is a *de facto* or shadow director of the first Defendant.

2. These claims are denied by the Defendants.

3. The action was admitted to the Commercial List on the application of the first and fourth Defendants. Discovery was either agreed or ordered in the usual way.

4. The Order for Discovery was made by Barniville J. on the 11th of November 2019. Subsequently, the Statement of Claim was amended and amended Defences then delivered on behalf of the two groups of Defendants; the gist of the amendment was to add the fifth Defendant to the proceedings.

5. Witness statements were delivered on behalf of all parties between May 2020 and October 2020.

6. In April, May and June 2020 five motions were issued by the Plaintiffs; in July 2020 a motion was issued by the first and fourth Defendants against the Plaintiffs.

7. All motions were listed for hearing on the 15th of October 2020. Only three motions now remain to be decided; these are all motions issued by the Plaintiffs against the Defendants. I will deal with these in the order they were argued before me.

Motion 1

8. In this motion, the surviving relief sought by the Plaintiffs is for an Order that the first and fourth Defendants discover:-

> "All documents in the power possession or procurement of Hugh O'Connor, Ben O'Connor, Aoife O'Connor and Brendan O'Connor, their servants and agents, touching or concerning the Dorset Street Properties between 1 August 2018 and 1 July 2019."

9. Counsel for the Plaintiffs submitted that this discovery should be ordered for three reasons:-

(i) The Affidavit of Discovery of the first and fourth Defendant did not identify the deponent (the fourth Defendant) as either a director or beneficial owner of the first Defendant; it was then argued that this gave rise to concern as to the extent to which documents connected with the first Defendant had been sought or discovered. Counsel accepted that the fourth Defendant had, in his replying affidavit to this motion, sworn that he had adopted a broad approach to discovery and that the discovery encompassed documents available to Aoife and Brendan O'Connor, as well as himself; as Ben O'Connor is now a Defendant to the action, it was later accepted by his counsel that he would now have to make discovery of the categories already ordered against the Defendants. Counsel for the Plaintiffs either proposed or accepted (I am unsure which) that the averments of the fourth Defendant could be treated as "an adage of his Affidavit of Discovery" or that a further affidavit of discovery would have to be sworn; I presume that this fresh affidavit would simply incorporate the relevant portions of the replying affidavit of the fourth Defendant, but add nothing further.

(ii) The Order of Barniville J. had directed discovery of communications between the Defendants, their servants or agents, relating to the Dorset Properties between the 1st of June 2018 and the 18th of December 2018 (the date that the first Defendant entered into a contract to buy the Dorset Properties). This had thrown up a sparse amount of documents; counsel added that the first Defendant was introduced late in the day to the transaction. The date proposed for the new discovery was the date of the conveyance to the first Defendant when, counsel argued, "the Plaintiffs' claim finally crystallised".

(iii) There was nothing unduly onerous in extending the period. I have to say that, while this may be the case, in itself this provides no sustainable reason for granting the discovery sought.

10. It is important to note that this motion originally sought a second relief, namely an order striking out the Defence of the first and fourth Defendants for failing to make full and proper discovery. This application was not proceeded with, even in the most cursory form, at the hearing of the motion. I can therefore proceed on the basis that these Defendants have complied with their existing discovery obligations.

11. The application is, in reality, one under Order 31 rule 12(11) of the Rules of the Superior Courts. It seeks to have discovery ordered which is fresh in the following ways:-

    (i) The form of the proposed order, which is that the first and fourth Defendants discover documents not only in their own power possession or procurement but also in the power possession or procurement of third parties who are not joined to these proceedings. Counsel for the Plaintiffs could not identify any basis or precedent for such a form of order. In the absence of any authority (either in the Rules or in the caselaw) I will not make an order which I believe places a potentially problematic burden on these Defendants. For example, Brendan O'Connor could conceivably have a document "touching or concerning the Dorset Properties" which these Defendants do not have. It could be as simple as a piece of paper advertising the properties for sale upon which he has noted a phone number. If, for whatever reason, this document is not provided to the fourth Defendant and is therefore not discovered to the Plaintiffs then that Defendant is, arguably, in breach of an Order and potentially in contempt of court. This would be an absurd result. In addition, it is worth remembering that the fourth Defendant has given evidence (which has not been challenged by cross examination) that in making discovery he has already included all documents in the power, possession or procurement of Brendan and Aoife O'Connor. Imposing a fresh discovery obligation in these terms would, in itself, achieve nothing.

    (ii) The scope of the proposed discovery, in that it captures "all documents […] touching or concerning the Dorset Properties […]" over a particular time. As counsel for these Defendants submitted, this discovery is very much in the form of the discovery sought in the motion which resulted in the Order of Barniville J. of the 11th of November 2019. This category was subsumed into a separate category by Barniville J., namely:-

        > "All communication records between, on the one part, the Second or Third Named Defendants and, on the other part, the First Named Defendant, the Fourth Named Defendant or any entity connected to the First Named Defendant (to include their servants or agents) […] limited to communications concerning the Dorset Properties."

    The discovery now sought appears to seek to reinstate the wording rejected by Barniville J. The class of documents sought is simply too broad. Even if this was the first motion for discovery brought by the Plaintiffs (and, by extension, even if there was not the precedent of Barniville J.'s refusal to direct such a category) I would not order that "all documents…touching or concerning the Dorset Properties" be

discovered. The wording is far too wide, and no attempt was made by counsel for the Plaintiffs to justify such a broad Order. Indeed, counsel accepted that it was "a point well made" that Barniville J. had earlier refused the broader category. He understandably did not try to explain why such a broad category, previously found to be unacceptable to the Court in an Order not appealed by the Plaintiffs, should now be imposed on these Defendants. The furthest counsel went was to point out the sparsity of the documents discovered. This may well be the subject of cross-examination at trial, but this submission does not satisfy me that the category as now sought by the Plaintiffs is necessary or proportionate; indeed, a certain amount of the documents within the category are likely not even to be relevant to any issue in the proceedings.

The Plaintiffs have not really tried, in the submissions of their counsel, to address the further requirement of rule 12(11) that there is the required 'good reason' for seeking this discovery at this time; Murray J. in *Hireservices (E) Ltd. & Anor. V. An Post* [2020] IECA 120. In *Micks-Wallace (A Minor) v. Dunne* [2020] IECA 282 Murray J. describes as "wholly exceptional" the circumstances in which a party will be permitted to seek again a category of discovery which has already been refused. I do not believe that the Plaintiffs have made out such circumstances. The argument which they make, namely that the paucity of documents so far discovered justify the discovery now sought, could at the very most support a very focused application for discovery of documents which could be expected to correct the shortcomings in the documentation already received by the Plaintiffs. Far from being such an application, the current motion seeks a range of documents which is far from focused and, as I will shortly describe, which relates to a period after the alleged wrongdoing had occurred (on the Plaintiffs' own case).

(iii) The period covered by the discovery sought runs to a later date (namely the date of the conveyance to the first Defendant of the Dorset Properties). As I am not in any event prepared to direct the first and fourth Defendants to make discovery in the terms sought for any period, it is not necessary to dwell on the temporal limit suggested by the Plaintiffs. However, it is notable that the affidavit sworn on behalf of the Plaintiffs grounding Motion 3 contains evidence that (in the Plaintiffs' view) "[...] Diakali Limited was only nominated as purchasing entity after the wrongful acts had occurred [...]"; paragraph 48 of the Affidavit of John W. Carroll, the Plaintiffs' solicitor. If that is the case made by the Plaintiffs, then they already have discovery in respect of documents generated for the period over which the wrongdoing was taking place. It is, of course, always possible that a document could come into existence at a much later date which would assist the Plaintiffs (for example, a note referring back to the advantage of any defection of the second or third Defendant to the camp of the first Defendant). However, the parties agree that there has to be some temporal limit on the discovery and it is clear to me that the line is properly drawn at the 18th of December 2018, by which the wrongful acts are alleged to have occurred.

12. I therefore will not make the an Order requiring the relevant Defendants to make discovery as sought in Motion 1.

Motion 2

13. In this motion, the Plaintiffs seek an Order dispensing with the need for witness statements in respect of certain witnesses which they wish to call at the trial of the action.

14. This motion can be dealt with at the level of principle. Mr. Carroll, on behalf of the Plaintiffs, has sworn an affidavit making a plausible case that each of these intended witnesses may be able to provide evidence relevant to the case and favourable to the Plaintiffs. The intended witnesses have either refused to cooperate with the solicitors for the Plaintiffs, or have failed to respond to correspondence in that regard. Clearly, obtaining witness statements for these individuals will be impossible. In those circumstances, should an order be made under Order 63A rule 22(1) allowing these witnesses to be called notwithstanding the absence of a witness statement from any of them?

15. The answer to this question must be "yes". I will explain briefly why this is so.

16. The purpose of witness statements, as with so much of Order 63A, is to facilitate the efficient and fair progress of proceedings in the Commercial List. When witness statements are provided, parties are aware of the nature and detail of the evidence which a witness will provide. This takes at least some of the element of surprise out of the most important part of an action, namely the trial. It allows early and precise objection to be taken to aspects of the evidence which are prone to such objection; lawyers can think through the merits (or wisdom) of objecting to portions of the evidence to be tendered on behalf of the other side, and fine tune such interventions accordingly. More importantly, it allows the cross examination of witnesses to be conducted in a surgical manner or, indeed, in a more wide ranging way if that is what is required to advance the case being made and the ultimate ascertainment of the facts. The provision of witness statements should also, in every case, cause the party in receipt of them to reflect long and hard on what their contents mean for the chances of success (or failure) at trial; this in turn should provoke realistic discussions about compromise of some or all of the claims in the action.

17. When sufficiently detailed, witness statements can provide the spine of the direct evidence of the person concerned. In my view, it would be expected that a witness statement should be comprehensive and clear enough to allow that person to adopt the statement as his evidence, and then elaborate upon the statement rather than rephrase its contents, let alone slavishly repeat them.

18. In passing, I should point out that the value of witness statements is reduced by treating them as a vehicle to make submissions, to comment on the discovery, or to disparage the evidence of others. The witness statement should provide "the essential elements of [the] evidence [...]" that an individual will provide. It should not, as can happen, provide the

intended witness' views on discovered documents which they never saw until long after the events about which they are giving factual testimony. While expert witnesses can be given more leeway, as their evidence is qualitatively different to that provided by witnesses of fact, even such persons should not descend to using witness statements to make a case; see *McKillen v. Tynan* [2020] IEHC 198.

19. Notwithstanding the benefits and potential drawbacks of witness statements, it must be kept in mind that the rules providing for them cannot trump or override the basic entitlement of a party to call a witness to give evidence at a trial. While that right is hemmed in by inevitable restrictions (including basic requirements of the relevance of the evidence and the required knowledge on the part of the witness), Order 63A rule 22(1) is not intended to prevent a party calling a witness who has refused to provide a witness statement. The procuring of a witness statement is not something over which a party has full control, and the unwillingness of a relevant (and possibly crucial) person to provide such a statement cannot rob the party wishing to rely on such evidence of the ability to do so.

20. There may well be a concern that an unscrupulous litigant could pretend that a witness was unwilling to provide a statement, and thus avoid giving the opposition notice of the evidence that such a witness was in fact always intended to give. There are at least two ways of dealing with such a worry. Firstly, it is always possible for a witness who has not provided a statement to be cross examined about their unwillingness to do so. Secondly, where an Order is sought dispensing with the need to provide a statement, the Court can direct that a summary of that witness' intended evidence be provided in lieu of a witness statement. Without in any way suggesting that the Plaintiffs in these proceedings fall under the rubric of unscrupulous litigants, such a summary should be provided by them in respect of each of the relevant witnesses which they intend to call. I do so in order to ensure that notice of the evidence of each witness is expected to give is provided to the Defendants.

21. The Defendants made one submission of substance in response to this motion. Counsel for the second and third Defendants argued that the Plaintiffs should commit irrevocably to calling these witnesses. I cannot see the logic of this position. Given that the Plaintiffs cannot be sure what these witnesses will say, it seems unfair on them that they would undertake to call them in all circumstances. It may also be that, as the trial progresses, the perceived likely evidence of these witnesses may lose all relevance; if that were the case, it would simply be a waste of time to have them testify.

22. I will allow the Plaintiffs to call the identified persons as witnesses without the provision of witness statements by them. A condition of this Order is that the Plaintiffs will provide to the Defendants a detailed *precis* of the matters in respect of which these witnesses will be asked to give evidence. I will not require the Plaintiffs to undertake to call these witnesses.

Motion 3

23. In this motion, the Plaintiffs have again dropped certain of the reliefs claimed and have limited the order sought by them to one fresh category of discovery, sought against the first and fourth Defendants. It requires discovery of:-

> "All documents noting, evidencing or referring to the beneficial ownership of Quevega Limited, the beneficial ownership of Diakali Limited and the beneficial ownership of the Dorset Properties."

24. At paragraphs 42 to 51 of his grounding Affidavit, Mr. Carroll avers that there are two reasons why this discovery is required.

25. The first is to allow the Plaintiffs call as a witness the beneficial owner of these assets so that evidence can be obtained about the "true benefits and payments he agreed to pay [the second Defendant]". However, as counsel for these Defendants submitted, the Order made by Barniville J. requires discovery of communications concerning the Dorset Properties involving (*inter alia*) the beneficial owners of the first Defendant. That discovery, in itself, could shed light on the identity of the beneficial owner of the first Defendant and (by extension) of the Dorset Properties which were acquired by that Defendant.

26. Moreover, the question of the identity of the beneficial ownership of all of these assets is more directly addressed at paragraph eight of the affidavit of the fourth Defendant sworn on the 8th of July 2020 which reads:-

> "First, I confirm that the registered owner of Kaifan Ltd. Quevaga Ltd. and Diakali Ltd. is Aoife O'Connor who holds the beneficial interests in trust for me since the date of incorporation of these entities. Aoife O'Connor, Ben O'Connor and I are siblings. Ben and Aoife acted on my behalf at all times in relation to the Dorset Properties. Brendan O'Connor and Margaret O'Connor are our parents and have neither a legal nor beneficial interest in these companies."

27. In light of this, the Plaintiffs do not need discovery in order to call the fourth Defendant to give evidence about his dealings with the second Defendant.

28. The second reason put forward by Mr. Carroll is that the discovery is needed in order to join the beneficial owner of these assets as a Defendant; as Mr. Hugh O'Connor is already the fourth Defendant to this claim, and has identified himself as the beneficial owner, this discovery is not required for this purpose.

29. At the hearing, a further reason was advanced by counsel for the Plaintiffs as to why this discovery should be ordered. It was submitted that there were very few documents discovered showing contact between the second Defendant and the first, fourth and fifth Defendants. Counsel extrapolated from this that there was another person (presumably the beneficial owner of the first Defendant) engaging with the second Defendant in connection with the Dorset Property and procuring his alleged betrayal of the Plaintiffs.

30. When asked where this was pleaded, counsel relied on paragraph 23 of the Amended Statement of Claim:-

> "Further, on a date unknown and in circumstances that are not at present known to the Plaintiffs, the Second Named Defendant (and Third Named Defendant) commenced acting for the First Named Defendant in relation to its renewed efforts to secure the purchase of the Dorset Properties and for the Fourth Named Defendant."

31. This plea, which also appeared in the original Statement of Claim, does not in my view carry the meaning suggested by counsel. It is quite a stretch of the language used to say that there is a comprehensible allegation that the second and third Defendants were suborned by the beneficial owner of the first Defendant, possibly in conjunction with others. In any event, even if this is the meaning of paragraph 23, the discovery ordered by Barniville J. catches all contact between the Diakali/O'Connor Defendants and the Moran/PMPT Defendants and their respective servants or agents. My reading of the relevant paragraph of the Order of Barniville J. (paragraph two of the discovery which was ordered) is that the beneficial owner or owners of the first Defendant fall under the description of "servants or agents" in the context of this part of the Order. If the beneficial owner of the first Defendant was contacting the second and/or third Defendants in connection with the Dorset Properties, he must have been doing so as a servant or agent of the first Defendant as the end result of such contact was that the first Defendant acquired this property. I gather that the discovery already made follows that approach; if it does not, then supplemental discovery must be made by these Defendants.

32. Of course, even if paragraph 23 means what the Plaintiffs say it means and even if that paragraph justifies the discovery now sought, it is incumbent on the Plaintiffs to explain why this fresh class of discovery is being sought now. No good reason is advanced by the Plaintiffs as to why this documentation was not sought initially, and instead is being sought now. However, I am refusing this application not because of the failure to justify the fact it is only made now but rather because the reasons advanced on behalf of the Plaintiffs do not convince me that this discovery is necessary.

33. I will therefore make Orders refusing the reliefs sought in Motions 1 and 3, and granting the relief sought in Motion 2 subject to the condition about the provision of a *precis* of evidence in respect of each intended witness.