

THE HIGH COURT

[2021] IEHC 697
2017/6193P

BETWEEN

**ANN NOLAN, ELIZABETH NOLAN, JOAN NOLAN, RICHARD NOLAN, PATRICIA NOLAN,
SALLY NOLAN AND QUEST CAPITAL TRUSTEES LIMITED**

PLAINTIFF

AND

**DILDAR LIMITED, CIARAN DESMOND FORMERLY TRADING UNDER THE STYLE AND
TITLE OF MAGUIRE DESMOND SOLICITORS, COLM S MAGUIRE FORMALLY TRADING
UNDER THE STYLE AND TITLE OF MAGUIRE DESMOND SOLICITORS, DERVAL M
O'HALLORAN FORMALLY TRADING UNDER THE STYLE AND TITLE OF MAGUIRE
DESMOND SOLICITORS, JOHN MILLET, PINNACLE PENSIONER TRUSTEES LIMITED,
DILDAR LIMITED, JOHN MILLET INDEPENDENT FINANCIAL ADVISORS LIMITED**

AND BY ORDER

DILLON KENNY AND DARREN KENNY

DEFENDANT

AND

**STEPHEN DECLAN MURPHY, EDEL MURPHY, KEVIN JOSEPH MCMAHON, JOHN LYNCH,
EFG BANK AG, BNP PARIBAS WEALTH MANAGEMENT, UNITED OVERSEAS BANK
LIMITED AND ALLIED FINACE TRUST AG**

THIRD PARTIES

JUDGMENT OF Mr. Justice Twomey delivered on the 8th day of November, 2021

SUMMARY

1. This is a case in which the plaintiffs (the "Nolans") allege that, *inter alia*, their solicitor, the second defendant ("Mr. Desmond"), was responsible for the loss of several million euro from their pension funds, when they were transferred abroad during the financial crisis in Ireland.
2. This judgment deals with a preliminary application by Mr. Desmond, for an order against the Nolans requiring the production of unredacted versions of certain bank statements belonging to an associated company of the Nolans called Serene Consultancy Limited ("Serene"). It is claimed by Mr. Desmond that these unredacted statements are in the Nolans' *'possession or power'* for the purposes of Order 31 Rules 14 and 15 of the Rules of the Superior Courts.
3. The key issue for determination is whether the Nolans, who have *redacted* versions of the relevant bank statements in their possession, have *unredacted* versions of those bank statements within their *'power'*.
4. This issue is determined by considering, *inter alia*, whether the connection between the Nolans and the Nolan Family associated company (Serene) is sufficient for this Court to conclude that the Nolans should be able to obtain those documents.
5. For the reasons set out below, this Court concludes that, on the balance of probabilities, there is a sufficient connection between the Nolans and Serene for this Court to conclude that unredacted versions of the bank statements are within their *'power'* and so for the Order to Produce to be made.

BACKGROUND

6. The background to this application is that the Nolans allege that Mr. Desmond, who was their solicitor, caused significant losses to their pension fund, when those funds were transferred offshore and then allegedly dissipated.
7. The Nolans claim that they made these offshore transfers during the financial crisis in Ireland as they had concerns about the stability of Irish banks, on the advice of, *inter alia*, Mr. Desmond.
8. Mr. Desmond, in his defence to the claim that he is liable for those alleged losses, claims that this was not in fact the purpose of the transfer offshore of the funds. Rather, he claims that the Nolans had an unlawful purpose in moving their pension funds offshore, namely to shelter their funds from creditors and then to purchase, at a discount, their own debts owed to Irish banks at that time.
9. Mr. Desmond claims that, because of this unlawful purpose, the Nolans should not be permitted to pursue these proceedings against him for the alleged loss of their pension funds. This defence is based on the principle of *ex turpi causa* (i.e. an action does not arise from a base cause).
10. The fourth plaintiff ("Mr. Richard Nolan"), at para. 44 of his Witness Statement dated 4th August, 2021 in these proceedings, states that certain sums belonging to the Nolans were transferred to Serene, which he describes in that statement as a '*Nolan Family associated company..in the Isle of Man*'.
11. In the exhibits to that Witness Statement, Mr. Richard Nolan sets out redacted copies of the bank statements of Serene, which are the subject of this application to produce by Mr. Desmond.
12. Mr. Desmond claims that he needs access to the *unredacted* bank statements to support his claim that the Nolans' funds were transferred offshore, not because of concerns about the Irish banking sector, but in order to defeat creditors and then purchase their own debt at a discount.
13. The Nolans have made it clear, in their solicitors' letter of 21st October, 2021 to Mr. Desmond's solicitors, that they only have unredacted Serene bank statements in their possession. They are therefore resisting this application on the basis that they do not have in their 'possession or power' the unredacted bank statements belonging to Serene. In the affidavit resisting this motion, it was averred on behalf of the Nolans that:

"As previously confirmed by letter dated 21 October 2021 prior to issue of this motion, [the Nolans] do not have unredacted copies of these Serene Statements and they have been provided in the only form in which the [Nolans] hold them."
14. The solicitors for Mr. Desmond wrote to Nolans' solicitors in reply to that letter of 21st October, 2021 and asked:

"To enable us to fully consider your response could you please deal with the following:-

1. Who redacted the bank statements?
2. Who sent the bank statements to your client?
3. When were they sent to your client?"

No reply was received by Mr. Desmond to these queries prior to the hearing of this motion.

15. Evidence was provided by Mr. Desmond to this Court that Serene was struck off the companies register in the Isle of Man on the 12th June, 2019, which evidence was not controverted by the Nolans.
16. However, it is relevant to note that it was after Serene's dissolution and striking-off, that the Nolans wrote (on 12th June, 2020) to, who were then, the purported directors of (the then dissolved and struck-off) Serene. In that letter they sought documents to enable the Nolans to comply with a Court Order dated 12th March, 2019, that they provide discovery of documents to the ninth, tenth and eleventh defendants in these proceedings (the "Kennys"). This is how the redacted Serene bank statements, that are now being sought by Mr. Desmond in an unredacted form, came into the possession of the Nolans.
17. This letter from the Nolans' solicitors and addressed to 'The Directors' of Serene states, *inter alia*, that:

"For the purpose of this letter and the discovery order made by Mr Justice Twomey the "Plaintiffs' Other Funds" means:

A sum of €620,000 transferred from CVS SA to Serene Consultancy Limited on 14 January 2013; and

A sum of €2,480,000 transferred from CVS SA to Serene Consultancy Limited on 14 February 2013

Mr Justice Twomey ordered that the plaintiff make discovery in, *inter alia*, the following terms:

Documents created on before 21 February 2019 relation to actual or purported dealings, in an after 2013, with the Plaintiffs' Other Funds, including:

- a) documents relating to any payment, transfer, holding, application, misappropriation of, or dealing with, the Plaintiffs' Other Funds;
- b) documents relating to the basis and/or terms upon which the Plaintiffs' Other Funds were to be transferred, held or applied;
- c) documents relating to any investment or other purpose (direct or indirect) of any actual or intended dealing with the Plaintiffs' Other Funds; and
- d) account statements relating to the Plaintiffs' Other Funds."

18. The Serene bank statements for the period 18th January, 2013 to 30th June, 2015 were duly redacted, it seems, on the basis of this letter and provided to the Nolans. Accordingly, only the references to the sums of €620,000 and €2,480,000 are visible in the bank statements now in the Nolans' possession, and these are exhibited in Mr. Richard Nolan's Witness Statement in that format.
19. It is these bank statements for the period 18th January, 2013 to 30th June, 2015, *albeit* unredacted, which Mr. Desmond requires to be produced by the Nolans to Mr. Desmond.

ANALYSIS

20. It is common case and is clear from the judgment of O'Flaherty J. in *Bula Ltd. (In Receivership and Others) v. Tara Mines Ltd. and Others* [1994] 1 ILRM 111 at p. 113, that this means whether the Nolans have an enforceable legal right to obtain the unredacted Serene bank statements from whoever holds them without the need to obtain the consent of anyone else.
21. In considering whether the Nolans are able to procure possession of the unredacted bank statements of Serene, it is crucial to consider the evidence of the connection between the Nolans and Serene which was opened to this Court.
22. Before considering the Witness Statement dated 4th August, 2021 of Mr. Richard Nolan, it is necessary to note that 'OPT' is a trust comprising the pension funds of the Nolans, 'CVS SA' and 'Allied Finance' are Swiss companies, 'EFG' is a Swiss bank and 'MECD' is a Dubai company.
23. At para. 43 *et seq* of his Witness Statement Mr. Richard Nolan states as follows:

"Relying on Mr. Desmond and Mr. Millet's representations to us my family and I agreed to transfer funds from the OPT to CVS SA, and/or MECD.

Transfers of OPT Funds

In December 2012 we decided to test the smooth functioning of Mr. Desmond's and Mr. Millet's advice through a "*test-transaction*". Mr Desmond and Mr Millet were aware of this. In this test-transaction **OPT funds in the amount of €620,000** were to be transferred from OPT to MECD, then from MECD to CVS SA. These **funds ended up being transferred from CVS SA to a Nolan Family associated company called Serene Consultancy Limited** (Serene) in the Isle of Man (IOM) as detailed below." (Emphasis added)

24. It appears from this Witness Statement that, in addition to this test-transaction, a second sum of €620,000 belonging to OPT was transferred at this time to a bank account called MECD in Dubai. At para. 49 of his witness statement, Mr. Richard Nolan states in relation to this second €620,000:

"It was confirmed to Ann [Nolan] and me that €620,000 was held in the bank account of MECD as per the transfer instructions. These funds were to be transferred by any MECD to the account of CVS SA with EFG. All person's present

were aware of this. To document this transaction and to verify the main company involved, i.e., CVS SA, I was handed a certificate of incorporation of CVS SA, proving its existence. At this time, I (and my siblings) had concerns over the control over the CVS SA bank account. **As no controls were in place, I sought to have these funds transferred from CVS SA to Serene who would hold the monies in trust for OPT.** One of the representatives of Allied Finance then drew up a bank order in the name of CVS SA to EFG, **instructing EFG to transfer OPT pension funds in the amount of €620,000 to the account of Serene** once it had been received into CVS SA. Ann Nolan co-signed this transfer instruction and wrote the words "*Approved by Ann Nolan 09/ 01/2013.*" (Emphasis added)

25. At para. 51 *et seq* of his Witness Statement, he adds:

"At the time we had agreed that **a further €2.2M would be transferred** into CVS SA from the Nolan Family pension funds. Allied Finance also drawn up these transfer instructions and signed debit instructions for these even though as of 9 January 2013 the €2.2M was still in OPT bank account.

These transfer instructions were again co-signed by Ann Nolan who wrote the words "*Approved by Ann Nolan 09/01/2013.* Mr Desmond, William Garcia and Michael Siegenthaler from Allied Finance also co-signed the instruction. **It consisted of 3 transfers of €800,000, €791,000 and €690,000 payable to Serene Consultancy.** These instructions confirmed our approval was required for any transfers from CVS SA.

On 12 January 2013, €619,000 was debited from the MECD bank account. On 14 January 2013, €619,000 was credited into the bank account of CVS SA. On 18 January 2013 €619,000 was credited into the bank account of Serene. **Serene held these funds on trust for OPT until 30 June 2015 when they were returned to OPT with interest.**" [sic] (Emphasis added)

26. It is important to note that the Witness Statement is a summary of the evidence which Mr. Richard Nolan intends to give at the trial of the action. It is not sworn evidence at this stage in the proceedings and will not become sworn evidence until affirmed by Mr. Richard Nolan at the hearing. However, counsel for the Nolans indicated that there was no suggestion of Mr. Richard Nolan seeking to resile from the terms of his Witness Statement.
27. While these statements therefore do not amount to sworn evidence, it seems clear to this Court that for the purposes of an interlocutory hearing, and so not a final judgment in this matter, this Court can rely on this intended evidence in these circumstances to assist this Court in determining whether the Nolans are correct in their assertion that the unredacted bank statements are not within their power.
28. In light of the foregoing, it seems to this court that the following conclusions can be drawn:

- I. Serene is a company associated with the Nolans.
- II. There is a very significant connection between the Nolans and Serene, because it was such as to offer the Nolans comfort that their money was safe in Serene's bank account, which was not the case regarding the unconnected company, CVS SA.
- III. The extent of that connection between the Nolans is such that the Nolans appear to have transferred very significant sums of money to Serene of circa €2.2 million.
- IV. As well as being a company associated with the Nolans, Serene held money on trust for the Nolans, i.e. the sum of €2.2 million
- V. The relationship between the Nolans and Serene is such that the Nolans were able to procure what is a crucial document for any company, namely its bank statements. These bank statements were then redacted in line with the terms of the Court Order obtained by the Kennys, which terms were set out in the letter sent by the Nolans to Serene seeking those bank statements.
- VI. The connection between the Nolans and Serene and the person(s) who controls Serene's documentation was not affected by the dissolution and striking-off of Serene. This is because even though Serene was dissolved and struck off the companies register in the Isle of Man on the 12th June, 2019, this did not impact upon the power of the Nolans to procure the Serene bank statements after that date, since the request for the bank statements was made on the 12th June, 2020.
- VII. It is clear that at that time, the Serene bank statements (albeit ones that were redacted in line with the request from the Nolans for those statements) were within the Nolans' power for the purposes of Order 31 Rules 14 and 15 of the Rules of the Superior Courts, as they were duly obtained by them.
- VIII. No evidence has been provided to this Court which would indicate that the position has changed and that the Serene bank statements are no longer within the Nolans' power today.
- IX. These bank statements were, it seems, redacted by the provider of those statements to the Nolans, and those redactions were in line with the very specific information requested by Nolans (i.e. the *unredacted* information related only to the transfers of the sums of €620,000 and €2,480,000 referred to in the Court Order). It is not clear whether those redactions were made by the purported directors to whom the request was made or by some other party.
- X. Mr. Desmond asked the Nolans who redacted the statements and who provided the redacted bank statements to the Nolans. In response, the Nolans however averred that these are not matters which are within a production motion.
- XI. Whether the Nolans are in fact aware of who redacted the statements or who provided the bank statements to them, the Nolans have made no attempt to

procure unredacted bank statements from whoever provided them with the redacted bank statements. This was confirmed by the Nolans' in their submissions to this Court that, since their letter of 12th June, 2020 to the purported directors of Serene seeking the bank statements, no attempt was made to seek unredacted statements.

29. Based on the foregoing, it seems clear to this Court that the Nolans were on the 12th June, 2020 able to procure bank statements belonging to Serene (which were redacted in line with their request for those statements) and thus it seems within their 'power' for the purposes of Order 31, Rules 14 and 15 of the Rules of the Superior Court.
30. It seems to this Court, on the balance of probabilities, that there is reason to believe that today the Nolans should be able to obtain bank statements belonging to Serene from the same source, but ones which are not redacted.
31. This is because it seems to this Court that on the balance of probabilities the Nolans have a legal entitlement to require possession of the bank statements of the accounts through which €2.4 million of their funds flowed and which were held on trust by the owner of those bank statements. This Court reaches this conclusion on the basis that it seems unlikely that the Nolans would have confidence (as noted in Mr. Richard Nolan's Witness Statement) in Serene holding so much money, in preference to CVS SA, unless the Nolans had considerable legal rights vis-à-vis Serene in relation to the recovery of those monies and indeed considerable legal rights regarding associated matters (such as obtaining statements of the bank accounts in which the Nolan monies were held).
32. Also in support of the grant of the order is the fact that the documents being sought are a narrow and identifiable category of documents and so they should be relatively easy to procure. It seems clear that for obvious practical reasons, the fact that only a small number of documents are involved supports an order for discovery being made, and clearly similar principles apply in the case of a production order. This is clear from the statement of Clarke J., as he then was, in the Supreme Court case of *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) Ltd.* [2013] 1 I.R. 274 at p. 283 and p. 290 that:

"It does need to be emphasised that, at least so far as the existing jurisprudence is concerned, the only two cases in which the court has gone beyond requiring discovery of documents in respect of which a legal entitlement existed in the party required to make discovery were cases where a single or small number of specified documents, known to exist, were directed to be disclosed in circumstances where the court was satisfied that there was no reason to believe that any difficulty would be incurred in securing the documents concerned.

[...]

On that basis, it seems to me that the discovery ordered in this case goes beyond the scope of that which the rule permits. Whatever may be the case in the sort of

situation where there is a single or small number of readily identifiable documents in respect of which there is good reason to believe that production can be procured”.

Court alive to the most efficient manner in which to conduct litigation

33. Of course, it is possible that Mr. Desmond could pursue Serene by way of an application for non-party discovery. However, in *Thema*, Clarke J. also stated at p. 291 that:

“While, strictly speaking, a party would be entitled to require its opponent to bring an application for third party discovery in the event that its opponent wished to obtain disclosure of relevant documents held by a related (although non-party) company, it seems to me that a party who imposed on its opponent such a cumbersome procedure, without there being some good reason, could well find that the court would be unsympathetic to applying the usual costs regime which applies in respect of true third party discovery involving orders against entities which have no connection with the parties.”

34. In that extract, Clarke J. was referring solely to a costs penalty for a party that seeks to impose a cumbersome procedure on his opponent. However, it seems to this Court that the sentiment expressed by him also supports the contention that this Court should be alive to the most efficient manner in which to conduct litigation, when deciding whether to grant interlocutory orders such as this. In this regard, it seems to this Court that requiring Mr. Desmond to pursue non-party discovery against an Isle of Man dissolved company (and perhaps for him to have to first seek to have it restored to the register of companies and perhaps seek further orders from this Court in this regard) would not be the most efficient manner in which to conduct this litigation and the most efficient use of court resources, when the Nolans have already procured these bank statements (*albeit* redacted) from their source in the Isle of Man. Facilitating the most efficient manner in which to conduct litigation, although not determinative in this case, is nonetheless another factor in support of the order sought.

35. For its part, in its written legal submissions, the Nolans place particular reliance on the fact that Serene no longer exists as an entity, in resisting the order:

“More pertinently though, [Mr. Desmond] has adduced evidence that the non-party entity which had the legal right to the statements has been *dissolved* with effect from 12 June 2019.

The notion of an enforceable legal right against a legal entity which no longer exists is simply not sustainable. There is no foundation in the evidence that the [Nolans] have a legal right to acquire unredacted copies of the Statements.”

36. This Court is not persuaded by this reliance on the current status of Serene to resist the application to produce. This is because firstly, the dissolution and striking-off of Serene did not prevent the Nolans from obtaining the *redacted* bank statements for the purposes

of complying with the court-ordered discovery, so this Court cannot see why it assumes such significance now.

37. Secondly, the claim that there cannot be, now or in the future, an enforceable right against a company which no longer exists, was made by the Nolans, without providing any evidence regarding the existence or non-existence of a procedure in the Isle of Man for the restoration of struck-off companies to the companies register (or some other way to enforce rights against a struck-off company). If such a procedure exists, this should mean that rights can be enforced against struck-off companies, by the simple expedient of having them restored to the companies register. This Court cannot therefore simply accept the proposition that the Nolans would not be able to enforce a legal right against a struck-off company in the Isle of Man, whether by restoring the company to the register or otherwise.
38. For these two reasons, this Court is not persuaded by the argument that the current status of Serene means that the Nolans do not have the unredacted bank statements in their power.

CONCLUSION

39. For all the foregoing reasons, this Court will grant the order sought requiring the Nolans to produce the unredacted bank statements.
40. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. In case it is necessary for this Court to deal with final orders, this case will be provisionally put this matter in for mention one week from the date of delivery of judgment, at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).