

THE HIGH COURT

[2023] IEHC 740

[2022 No. 279 CA]

BETWEEN

JOHN FLANAGAN AND LAZARUS INVESTMENTS LIMITED

PLAINTIFFS/APPELLANTS

AND

PATRICK CONSIDINE

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 20th of December, 2023.

INTRODUCTION

1. This matter comes before the court by way of an appeal dated 19 December 2022 from a judgment given on 14 December 2022 at Ennis Circuit Court in County Clare, and is concerned with an application for a non-party discovery.
2. For the reasons set out in this judgment, the court will grant the appeal and make an order directing the non-party discovery of the category of document sought, subject to certain undertakings being made by the plaintiffs' solicitors. The decision is made on the basis that the application meets the established criteria for a grant of non-party discovery. Insofar as the matter concerns documents that are subject to a solicitor's lien,

I have endeavoured to consider the application in the light of and informed by principles set out in the case law dealing with analogous situations.

3. The underlying proceedings were commenced by way of an Equity Civil Bill dated 7 July 2020. By way of summary, the plaintiffs seek orders directing the defendant to execute a transfer of part of the property comprised in Folio 46545F of the Register of Freeholders in County Clare, being property situated at Liscannor in County Clare, together with a variety of ancillary orders. The plaintiffs plead that in May 2008 the first named plaintiff and the defendant entered into an agreement whereby the first named plaintiff would purchase in trust the property in consideration of payment to the defendant the amount of €100,000. It is pleaded that the purchase monies were paid to the defendant in about May 2008, and that a company (to which the second named plaintiff is the successor) entered into occupation and commenced construction on a wastewater treatment facility, having obtained a grant of planning permission in respect of the property.
4. The nub of the dispute is that the defendant contends that only part of the property was the subject of the agreement for May 2008, and the defendant has no obligation to transfer the full property to the second named plaintiff or a nominee of the first named plaintiff. In the Defence delivered on 8 February 2021, the defendant admits that the agreement was entered into in May 2008, but denies that the property agreed to be sold was accurately delineated on a map annexed to the Equity Civil Bill. It is clear that a central issue to be determined in the Circuit Court will be the precise nature of the agreement entered into in May 2008, and, specifically, the precise details of the property that the parties agreed to transfer by way of that agreement.

5. In that regard, in 2008 the first named plaintiff instructed a firm of solicitors, Messrs M. O'Shea & Co., to act in respect of the transaction which is now the subject of these proceedings. It is common case that Messrs M. O'Shea & Co. have been subsumed into the practice of Patrick F. Molony & Company Solicitors and that the relevant conveyancing file remains within the power and procurement of Patrick F. Molony & Company.

6. In a notice of motion dated 13 May 2022, the plaintiffs sought an order pursuant to Order 32, rule 9 of the Rules of the Circuit Court ("RCC") directing that the non-party, Patrick F. Molony & Company Solicitors make discovery of a single category of document, being: -

"The entire file of the practice formerly known as M. O'Shea and Co Solicitors in relation to the agreement entered into in or about May 2008 (attached hereto) made between Mr. John Flanagan (the First Plaintiff), as purchaser of all that on those part of the property comprised in Folio 46545F of the Register of Freeholders County Clare situate at Liscannor, in the County of Clare and subsequent sale from Mr. Patrick Considine (the Defendant) to include all correspondence, emails, memos, attendances, notes, file notes, title documents, cash accounts etcetera"

7. The original application came on before the County Registrar, who declined to make the order sought. That decision was reviewed by His Honour Judge Comerford in the Circuit Court and the court refused the order for discovery and made an order for costs in favour of the defendant as against the plaintiffs.

8. The appeal before this court is resisted by the non-party essentially on the basis that the files in question are being held subject to a solicitor's lien in respect of a number of outstanding legal bills that date from the period leading up to 2008/2009.

9. At the hearing of the appeal, the court was assisted by the submissions made by counsel for the plaintiffs and counsel for the non-party, each of whom approached the matter in a careful and helpful manner. In particular, the court appreciated the work that had been put into the preparation of joint issues papers and a short, combined book of authorities. Despite the effort that had been made, it was clear that counsel had not been able to identify any authorities directly on point. Counsel did identify a body of helpful authorities from this jurisdiction, Northern Ireland, and England and Wales that address the analogous question of access to solicitor's files in respect of which liens are asserted and where a party has changed legal representation in the course of litigation. There does not appear to be an authority addressing the central question in this appeal of how to resolve a request for non-party discovery of a solicitor's file in respect of a transaction that later gave rise to litigation in which the solicitor is neither a party nor acted for one of the parties in the litigation itself but where that file is subject to an asserted lien.

THE EVIDENCE

10. The court has considered the affidavits sworn on 12 May 2022 and 19 July 2022 by Mr. Condon, a solicitor instructed by the plaintiffs. On behalf of the non-party, Mr. Molony,

who is the principal in the firm of solicitors that in effect is the successor to M. O'Shea and Co Solicitors, swore an affidavit on 9 June 2022.

11. By way of summary, in his affidavit Mr. Condon sets out the efforts that were made from May 2019 to April 2022 to obtain the files in question. In that regard, it is clear that efforts were made to obtain discovery from the non-party on a voluntary basis, but this was resisted. As averred to by Mr. Condon, and this does not appear to be disputed, the contention on the part of the plaintiffs is framed as follows:-

“30. I further say that discovery of the MOS file is necessary (and in fact, crucial) for disposing fairly of the within proceedings. Furthermore, clearly an order for discovery would not be unduly burdensome or oppressive against PFM in circumstances where *[sic]* the documentation requested is comprised in one single conveyancing file and the discovery review in this regard will clearly be a relatively straightforward matter and will not require an extensive trawl for documentation.

31. For the reasons set out in above in paragraph 30 complying with an order for discovery if one is made will not be an overly costly process but, in any event, the Plaintiffs are agreeable to indemnifying PFM in respect of any such costs they may incur in complying with the request/order for discovery and retrieving the may relevant MOS file and discovering same.”

12. It is significant that the opposition to the making of non-party discovery in this case was not grounded on any contention that discovery was unnecessary or that the documents sought were not relevant to the proceedings. There is no suggestion that non-party discovery would be so oppressive or prejudicial that it could not be remedied

by an appropriate order for costs. Rather, the opposition is grounded in the contention that the practice of M. O’Shea Solicitors acted for the first named plaintiff in many transactions relating to property developments throughout the decade leading up to the year 2009, and that there are very substantial and long overdue professional fees due and owing by that plaintiff for work carried out for and on his behalf and on his instructions. In that regard, and as set out in Mr. Molony’s affidavit it is clear that there are disputes between the first named plaintiff and the non-party as to whether fees are due and owing to the non-party, whether any fees claimed to be due and owing are statute barred, and/or whether or not there was a failure on the part of the non-party to comply with the provisions of section 68(8) of the Solicitors (Amendment) Act, 1994.

13. On behalf of the non-party, Mr. Molony’s affidavit sets out the considerable correspondence that was exchanged over the course of 2009 and 2010 with regard to the claims for outstanding legal fees. The court notes that although Mr. Condon – on instructions – stated that the first named plaintiff did not accept that any fees were due to the non-party, the correspondence from the relevant period makes reasonably clear that this was not entirely the case. The correspondence from the first named plaintiff instead suggests that when he instructed new solicitors in relation to his affairs, he sought to have the non-party transfer over the relevant files. The non-party was reluctant to take that step without having the question of outstanding bills addressed, and asserted a lien over the first named plaintiff’s files in a letter dated 18 November 2009. The first named plaintiff seemed – according to correspondence dated 27 November 2009 – to take the position that, “...*we are not in a position to agree any such fees without reviewing the contents of this file ...we are willing to meet and discuss bills and outlays at a time and place that is convenient to all.*”

14. At the hearing of the appeal, it emerged that the non-party had issued two sets of proceedings in the Circuit Court in 2012, seeking to recover the fees claimed to be outstanding. Appearances were entered on behalf of the first named plaintiff (but not by his current solicitors) and a defence was delivered in one of the cases. The proceedings then went into abeyance and have not been progressed.

15. Clearly, there is considerable dispute in relation to the question of whether there are amounts due and owing by the first named plaintiff to the non-party. The court in this application cannot and should not seek to resolve that dispute. I can only proceed on the basis that the non-party asserted a solicitor's lien over the first named plaintiff's files in 2009, and that the non-party contends that the lien remains valid. If that underlying dispute is to be resolved it will be a matter for separate consideration.

16. All other things being equal, the court is satisfied that, having regard to the dispute on the pleadings between the plaintiffs and the defendant, this is a situation in which non-party discovery clearly is warranted, and in fact there is a strong argument that without access to the original conveyancing file the plaintiffs' ability to prosecute the case will be severely prejudiced, and, in turn, the ability of the Circuit Court to determine the issues in dispute in the proceedings will be compromised and unsatisfactory. As noted above, although some work will be required by the non-party to retrieve the relevant conveyancing file, particularly given the fact that it involves a file that dates from 2008, the court is not satisfied that the request is oppressive or prejudicial per se. Finally, in terms of the formal requirements for the making of non-party discovery, the court is satisfied that the plaintiffs sought the materials on a voluntary basis in the first instance

and have given an appropriate undertaking to discharge the costs of the non-party associated with complying with any discovery order.

17. Insofar as it could be argued that the plaintiff could access the documents in question simply by paying the bills that the non-party issued, this seems simplistic and unfair. The bills exceed €50,000, are disputed, date from the decade leading to 2009, and the non-party appears to have allowed the proceedings seeking to recover the fees to lapse.

THE SOLICITOR'S LIEN ISSUE

18. The primary difficulty in this appeal is addressing the question of whether the existence of the solicitor's lien is a sufficient basis for the court to refuse non-party discovery. On balance, the court considers that this is a case where the competing interests will have to be balanced with a view to ascertaining a just result.

19. In that regard, the starting point for the analysis is that as a general proposition a solicitor's lien can be asserted in respect of all the files that are held in relation to a particular client even if the outstanding bills only relate to some of those files. This was confirmed conclusively by the Supreme Court in *Re Galdan Properties Ltd (in Liq.)* [1988] IR 213. As noted there by McCarthy J.:-

“A solicitor holds a general or retaining lien; in that respect it differs from the ordinary lien derived from possession of the article to which value has been added and to which there attaches a lien for payment of the charges in respect of that added value. A solicitor's lien attaches to all documents and other personal property in the possession as such solicitor and relates to all

outstanding charges, as solicitor, not merely those in respect of the particular documents over which the lien is claimed. The lien entitles the solicitor to retain the documents, or other personal property, till payment of the full amount of his bill, subject to taxation if required and if the bill is still liable to taxation.”

20. The court has been directed to a number of judgments of the High Court and authorities from Northern Ireland and England and Wales. None of the cases arose from a request for non-party discovery, and with one exception, the cases seek to address situations where in the course of ongoing litigation a plaintiff instructed new solicitors and where the former solicitors refused to transfer the legal file on the basis that there were fees due to them and a lien asserted over the file. There is a difference here in so much as the files held by the non-party were not prepared in the context of an instruction concerning this litigation but rather in respect of the transaction that gave rise to the litigation. Nevertheless, I consider that there is extremely helpful guidance from those cases.

21. I have had particular regard to a series of cases determined by Laffoy J. in the High Court, starting with *Mulheir & Arnold v. Gannon* [2009] 3 IR 433, and including *Ahern & Ors v. The Minister for Agriculture and Food & Ors* [2008] IEHC 286, and *Treacy v. Roche & Anor* [2009] IEHC 103. I note that the approach adopted by Laffoy J. appears to have been endorsed by the Supreme Court in a judgment of McKechnie J., in *Cadden v. Vesey & Anor* [2016] IESC 75. In many respects and for the purposes of this application, the case from Northern Ireland, *Donaghy v. JJ Haughey Solicitors Ltd* [2019] NICH 1, and the case from England and Wales, *Ellis v. John Hodge Solicitors*

[2022] EWHC 2284 (Comm), draw on many of the same authorities that were considered by Laffoy J.

22. In the *Donaghy* case, McBride J. identifies a series of principles drawn from the UK jurisprudence. Those principles can be summarised as follows:

- (a) Subject to any agreement to the contrary, a solicitor is entitled to exercise a general lien in respect of their costs in any property belonging to their client which properly comes into their possession in their capacity as a solicitor.
- (b) Solicitors as officers of the court are subject to its supervisory jurisdiction and the court is entitled to interfere with the enforcement of the common law lien on equitable principles.
- (c) In situations where there is a change of solicitors representing a party in the course of litigation, the approach of the court will depend to a large extent on whether the solicitor terminated the instruction or whether they were discharged by the client. Where the solicitor has terminated the retainer, the court normally will make an order that the papers are transferred subject to the new solicitor subject to that solicitor providing an undertaking to preserve the lien of the original solicitor.
- (d) As the court is exercising a judicial discretion to grant a remedy that is equitable in nature orders are not to be granted automatically, and, depending on the nature of the case, the court might impose terms where justice is so required.

23. The overriding principle is that the court should make the order that best serves the interests of justice. In that regard, the court may consider factors such as the nature of

the case, the stage that it has reached, the conduct of the solicitor and client, and the balance of hardship which might result from the order that the court is asked to make.

24. The court is satisfied that the principles set out above do not differ in any material respect from the principles identified by Laffoy J. in the cases identified above.

25. The court is being asked to exercise the jurisdiction to order a non-party to make discovery, and is not being asked in terms to exercise its jurisdiction over solicitors. However, where the opposition to the making of discovery is grounded on the assertion of a solicitor's lien, I consider that it is appropriate to draw on the jurisprudence relating to those liens and particularly the manner in which the courts have sought to balance the respective rights and interests of the parties.

26. I am satisfied of the following matters:

- (a) The underlying proceedings effectively have been on hold pending the resolution of this issue. From the perspective of the plaintiffs and defendant, there is a need to ensure that litigation, particularly in relation to a transaction dating from 2008 is progressed with expedition.
- (b) The conveyancing file held by the non-party is likely to be of critical importance to the proceedings between the plaintiffs and the defendant.
- (c) Without access to that file, it is likely that the plaintiffs will be deprived of the ability to prosecute their case, perhaps fatally.
- (d) The court must also have regard to the interest of the solicitors who should not be left without payment for what may be determined, ultimately, to be due to them.

- (e) This court is unable to resolve, and should not endeavour to resolve, any disputed issue as between the plaintiffs and the non-party regarding allegations of unpaid bills. If the plaintiff has a liability to the non-party, this is a matter that will have to be resolved in the appropriate way in the appropriate forum. Certainly, there is no possibility of this court on this application being in a position to resolve the dispute.
- (f) However, the court takes into account that the contested bills have been outstanding since approximately 2009, and that proceedings seeking to recover the amounts have been allowed to fall into abeyance by the non-party.
- (g) The court is satisfied that the balance of justice in this case strongly favours the making of the orders sought by the plaintiff. If the order is not made the plaintiff likely will not be able to prove its case. If the order is made the non-party will encounter further difficulty in recovering whatever fees they may be owed; but, it is significant that litigation seeking to recover those fees has not been progressed for close to a decade.
- (h) In my view, the interests of the non-party can be protected by requiring certain undertakings as a condition of an order directing non-party discovery.

27. In those premises, I propose allowing the appeal and making an order that the non-party be directed to make discovery of the conveyancing file described in the notice of motion. The equity of the situation and the non-party's interest represented by their lien does not outweigh the necessity for the plaintiff to obtain the documents necessary to prosecute these proceedings. Adopting the approach taken by Laffoy J. in *Mulheir* and *Ahern*, I propose to make an order which will facilitate the plaintiffs in prosecuting their claims, but which seeks to preserve, to the extent practicable, the asserted lien.

28. Hence, the order for non-party discovery will be conditional on the solicitors acting for the plaintiffs in these proceedings giving an undertaking in writing to hold those files subject to the non-party's lien and to return them to the non-party on the conclusion of these proceedings. Compliance by the non-party with its discovery obligations will be strictly without prejudice to the non-party's lien on the files. It will not in any way affect the liability of the client for costs or the entitlement of the non-party to pursue recovery of their costs which would have to be the subject of separate proceedings.

29. Hence, the plaintiffs' current solicitors will be obliged to furnish an undertaking in writing to the non-party solicitors in the following terms:

- (a) to receive from the non-party solicitors the files that are the subject of the discovery order without prejudice to the non-party's lien over the same;
- (b) to preserve that lien over the said files, documents and papers;
- (c) to notify the non-party when these proceedings are finalised and/or in the event of the solicitor's retainer being withdrawn and at that time to return the said files, documents and papers to the non-party if so requested; and
- (d) to prosecute these proceedings in an active manner.

30. To be clear, if those undertakings are not forthcoming then the obligation on the non-party to make discovery in accordance with the terms of the notice of motion will not be triggered. As is the usual practice in non-party discovery the plaintiffs will have to discharge the costs of the non-party associated with making discovery.

31. I will hear the parties in relation to the question of costs. As this judgment is being delivered electronically, I will indicate that my provisional view is that the plaintiff having succeeded in full in the appeal before this court should be entitled to their costs of the motion and appeal in this court and the court below.

32. The parties should communicate with the Registrar by close of business on Monday 22 January 2024 to indicate whether an alternative order is sought. If there is disagreement the court will list the matter for final argument at a date to be scheduled later. If there is no disagreement then final orders can be drawn up at that point.