

## THE HIGH COURT

## COMMERCIAL

[2017 No. 6193 P.]

## BETWEEN

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

PLAINTIFFS

AND

**DILDAR LIMITED [IOM], CIARAN DESMOND, COLM S MCGUIRE, DERVAL M O'HALLORAN FORMERLY TRADING UNDER THE STYLE AND TITLE OF MCGUIRE DESMOND SOLICITORS, A FIRM, (THE SECOND NAMED DEFENDANT NOW TRADING UNDER THE STYLE AND TITLE OF CIARAN DESMOND SOLICITORS), JOHN MILLETT, PINNACLE PENSIONER TRUSTEES LIMITED, DILDAR LIMITED [ROI], JOHN MILLETT INDEPENDENT FINANCIAL ADVISORS LIMITED**

AND BY ORDER

DILLON KENNY AND DARREN KENNY

DEFENDANTS

AND

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

THIRD PARTIES

**JUDGMENT of Mr. Justice Twomey delivered on the 5th day of March, 2019**

**SUMMARY**

1. This is a series of discovery applications in a case involving a claim by the plaintiffs (the "Nolans") that their former solicitor, the second named defendant ("Mr. Desmond"), their former financial adviser, the fifth named defendant ("Mr. Millett"), and the eighth named defendant, John Millett Independent Financial Advisors Limited, defrauded them out of approximately €7 million in pension funds which they held on behalf of thirteen members of the Nolan family.

2. In particular, it is alleged that the Nolans transferred their pension funds to an account in Switzerland and that when the Nolans requested their money back, Mr. Desmond could not provide it. It is alleged that the Nolans' money was used as security for a \$100 million loan, which was designed to make a secret profit for Mr. Desmond and/or Mr. Millett, but as this investment was not capital protected, the Nolans' funds used as security are now gone.

3. While the Nolans claim that most of the €7 million has been misappropriated in this way, they also claim that approximately €2.8 million of that amount was used to purchase in September 2013, unbeknownst to them, the grounds of Nemo Rangers in Cork (the "Nemo Lands") through the first named defendant, Dildar Limited which is registered in the Isle of Man ("Dildar IOM"). As a result, in the substantive case between the parties, the Nolans seek, *inter alia*, a declaration that they are the beneficial owners of the Nemo Lands, which are registered in the name of Dildar IOM.

4. However, there is another family which claims to be the beneficial owner of the Nemo Lands. This is because two cousins in that other family, Mr. Dillon Kenny and Mr. Darren Kenny, the ninth named and tenth named defendants (the "Kennys"), were joined to these proceedings as defendants on their own application, which application was resisted by the Nolans. The Kennys claim that they also were clients of Mr. Desmond and Mr. Millett and that they are the beneficial owners of the entire shareholding in Dildar IOM and that they are therefore also the beneficial owners of the Nemo Lands. A central issue in the substantive case will be whether the €2.8 million which was used by Dildar IOM to purchase the Nemo Lands was the Nolans' money or the Kennys' money. Against this general background the discovery applications must be considered.

**FACTS RELEVANT TO DISCOVERY APPLICATIONS**

5. The registered shareholders in Dildar IOM are Brookmanor Limited and Woodcraft Limited, although as previously noted, the Kennys allege that they are the beneficial owners of those shares.

6. There is a second company also called Dildar Limited, the seventh named defendant, but it is registered in Ireland, rather than the Isle of Man ("Dildar Ireland"). It was submitted on behalf of the Nolans, and not contradicted by counsel on behalf of the Kennys (who represents both Dildar Ireland and the Kennys), that Dildar Ireland is the corporate vehicle of the Kennys, although the precise ownership structure and management arrangements is sought to be clarified as part of this discovery process.

7. Dildar Ireland is relevant to these proceedings, because Dildar Ireland applied for planning permission in respect of the Nemo Lands, even though it never owned the Nemo Lands. The Nolans, in their Statement of Claim, allege that by doing so, Dildar Ireland unlawfully and wrongfully held itself out as the owner of the Nemo Lands.

8. It is also relevant to note that Mr. Desmond was a partner in a law firm called McGuire Desmond, prior to his departure from that firm. His partners in that firm were the third named defendant ("Mr. McGuire") and the fourth named defendant ("Ms. O'Halloran"), together the "Partners", when the alleged fraud occurred. For this reason, although no claims of fraud are made against the Partners, both are being sued on the basis of their liability as partners for the alleged actions of their former partner, Mr. Desmond.

9. Mr. Desmond and Mr. Millett have denied any wrongdoing as alleged against them by the Nolans. Furthermore, Mr. Desmond has joined various third parties to the proceedings, from whom he claims he is entitled to an indemnity, if indeed there is found to be any liability to the Nolans for the loss of their funds. Mr. Desmond makes various allegations against each of these third parties in relation to, *inter alia*, breach of fiduciary duties, fraud, unjust enrichment and conspiracy regarding the Nolans' funds.

10. Discovery has been agreed between the Nolans and Mr. Desmond and Mr. Millett. These proceedings, therefore, concern primarily discovery issues between the Nolans and the Kennys and to a lesser degree between the Nolans and the Partners.

#### **DISCOVERY BY MR DESMOND'S FORMER PARTNERS v THE NOLANS**

11. The motions for discovery between the Partners and the Nolans have been agreed subject to two issues which have to be determined by the Court. It should however be noted that while the Partners have agreed to the discovery motions against them, that discovery is being done on foot of a court order, so that it is clear that client information is to be handed over by the Partners, who are solicitors, only on foot of that court order.

12. The first outstanding issue relates to the temporal limit on the discovery, or more accurately the cut-off date for the discovery to be provided by the Nolans to the Partners, since it became clear during the hearing that both parties did not have an issue with the start date for the discovery being 1 January, 2012.

13. In considering what the cut-off date should be, it is relevant to note that in this discovery, the Partners are seeking various categories of documents from the Nolans in order to defend these proceedings. In looking for these documents, the Partners are expecting, *inter alia*, to establish that the alleged acts and omissions of Mr. Desmond, in dealing with the pension funds of the Nolans, were sufficiently remote from his position as a partner in his former law firm, such that his former partners should not be liable for those alleged acts and omissions under partnership law.

#### **Cut-off date for discovery**

14. The Nolans argue that the cut-off date for the various categories of discovery should be the 15th July, 2017, as this approximates to the time when the plenary summons issued (it having actually issued on 7th July, 2017), while the Partners argue that the discovery should be up to the date of this hearing, that being 21st February, 2019.

15. It is true that the normal cut-off date for discovery agreed between the parties is the date when proceedings are issued, for the good reason that after that date all documentation created involving the party who is the subject of discovery would normally be created in the knowledge of the pending litigation and for this reason much of it would in any case be privileged. Thus, to take a typical personal injuries case regarding an accident claim by an employee, once the employee issues proceedings, any notes, correspondence etc created by the defendant employer regarding the accident after the date the proceedings are issued, would normally not be available to the plaintiff employee, since these would have come into existence with a view to litigation. In these circumstances, the cut-off date for discovery is typically agreed between the parties as the date the proceedings issue and there is normally little controversy regarding same.

16. However, in this case there are two reasons why this Court believes that this is an exceptional case, where the cut-off date should not be the date the proceedings issued.

17. First, although the proceedings issued in July 2017, it was not until 31st October, 2018 that the Court of Appeal ordered the joining of the Kennys as defendants to the proceedings. This was a very unusual move because the application to join a defendant was made, not by the plaintiff, but by the proposed defendant, the Kennys. In addition, it was opposed by the plaintiffs, the Nolans. Thus, the Kennys were seeking to be joined to proceedings so that they could be sued by the Nolans, *albeit* that they wished to do so to contest, *inter alia*, the Nolans' application for a declaration that the Nemo Lands belonged to them. Thus, this is not a mere procedural joining of defendants. Rather, it is obvious that the Kennys, who were only joined to the proceedings four months ago, have a very significant role to play in these proceedings, since in their Defence and Counterclaim delivered on 21st November, 2018, they allege that they, rather than the Nolans, are the true owners of the Nemo Lands and that Mr. Desmond and Mr. Millet were also their solicitor and financial advisers, respectively. It is for this reason that this Court considers that this may be a case where the usual cut-off date for discovery (namely, the date the proceedings issue) may not be appropriate.

18. Combined with this, is the fact that these proceedings involve an alleged complex fraud and conspiracy amongst a number of disparate parties in different jurisdictions and involving large sums of money. In this regard, it is relevant that the Partners are alleged to be liable for, not just the alleged use of the Nolan funds to purchase the Nemo Lands, but more generally for the loss of approximately €7 million of the Nolans' funds in Switzerland. Unlike, say, an accident at work, where details of the alleged wrong are easily established, in a case involving alleged fraud and conspiracy, considerable effort over some number of years may go into disguising a party's true actions and motivations, and for this reason the details of the alleged wrong are not as easily established as an alleged wrong in the workplace. In addition, counsel for the Partners has submitted that the exact whereabouts and use of the funds is still a live issue, since it is not clear whether the Nolan funds were, or were not, used to purchase the Nemo Lands. For this reason, any documents in the possession of the Nolans, which might help to establish that the alleged fraud was remote from Mr. Desmond's position as a partner in a law firm (and therefore that the Partners are not liable for it) should be made available to the Partners, even though they may have come into existence after the issue of the proceedings in this case.

19. In those circumstances, this Court will draw the line in the sand, as the cut-off date for the discovery between the Partners and the Nolans, as not the usual date of the issue of proceedings, but rather the date of the hearing of this application, being the 21st February, 2019. However, this is now the definitive line in the sand and, notwithstanding Counsel for the Partners' suggestion that he might have to seek discovery in the future of documents created after the date of the hearing, this Court does not believe that it should be necessary, save in exceptional circumstances, for there to be any discovery of documents created after this date, since, as a general rule, discovery looks to the present and the past and not to the future, and it is not generally appropriate for parties to litigation to fear that they may face new discovery motions every few months to see what new documents have been sent to them or by them since the last discovery motion.

#### **Categories 14 and 15**

20. In addition to not reaching agreement on the temporal limit, the Partners and the Nolans have failed to reach agreement on two categories of discovery. The Nolans claim that categories 14 and 15 are not relevant and so should not be provided. The background to this request for discovery is that at para. 26 et seq of their Statement of Claim, the Nolans claim that Mr. Desmond fraudulently procured the pledging of Nolan funds by an entity called Clear Vision as security for a US dollar loan, known as the EFG loan (the "EFG Loan"). The Nolans in this Statement of Claim also allege that Mr. Millett fraudulently procured the consent of the Nolans to the transfer of funds to Clear Vision, *via* an entity called MECD, for this purpose. Accordingly, the Partners claim that to defend the allegation that they are liable for the alleged actions of their partner in this regard, they require discovery of the following categories of documents from the Nolans.

"Category 14:

All documentation evidencing the plea that the Fifth Defendant [Mr. Millett] fraudulently procured the transfer by MECD of Two Million

Euro to the Clear Vision account or further procured the Plaintiffs' consent to transfer for the purpose of achieving the necessary sum by way of collateral for the EFG loan.

Category 15:

All documentation evidencing the sale by the Second Defendant [Mr. Desmond] by Clear Vision of some or all of the funds into a US Dollar account."

21. Since no allegation of fraud has been made against the Partners, their defence is that this alleged fraud is something for which they are not liable, as partners in a solicitors' firm with Mr. Desmond. To help their defence, they wish to show that the mechanics of the alleged fraud were sufficiently remote from their practice to justify such a finding as a matter of partnership law.

22. It is this Court's view that the discovery, which seeks documents evidencing the said mechanics of the alleged fraud held by the Nolans, is relevant. This is because, depending on the exact mechanics of the alleged fraud as set out in those documents, it could indeed assist the Partners in proving that the alleged fraud is sufficiently remote from their practice as solicitors.

23. Accordingly, Categories 14 and 15 are permitted subject to the time period 1st January, 2012 to 21st February, 2019.

#### **DISCOVERY BETWEEN THE KENNYS/DILDAR AND THE NOLANS**

24. This primary area of dispute between the parties to this hearing is the discovery between the Kennys/Dildar Ireland and the Nolans. For practical purposes during the hearing, the parties dealt with the motions involving the Kennys/Dildar Ireland as one where possible, since in all instances the categories of discovery being sought by the Kennys/Dildar Ireland were in identical terms and it was accepted that there would be sharing of information discovered between the Kennys and their corporate vehicle, Dildar Ireland.

25. The Nolans, in seeking relatively extensive discovery against the Kennys under 15 different categories, rely, *inter alia*, on an affidavit sworn on 15th December, 2017, on the Nolans' behalf, by Mr. Bernard McEvoy, solicitor ("Mr. McEvoy's Affidavit").

26. In that affidavit, there is referenced two sets of minutes of meetings held in the Isle of Man, at which a Mr. Paul Kenny was present along with Mr. Millett. Mr. Paul Kenny is the father of Mr. Dillon Kenny and uncle of Mr. Darren Kenny. The minutes of the first of these meetings referred to in Mr. McEvoy's Affidavit, and held on 18th September, 2015, provide that Mr. Millett and Mr. Paul Kenny claimed to be in a position to prove that the funds used by Dildar Limited to purchase the Nemo Lands came from the Kenny family and not from Oaklands Property Trust, a unit trust structure of which the Nolans are trustees. Mr. McEvoy's Affidavit also exhibits minutes of a meeting held on 27th September, 2016 (at which Mr. Paul Kenny is stated to be present) in which Mr. Millett alleges that he should never have stated that the Nolans were the beneficiaries of the Nemo Lands and that he was wrong to have done so.

27. In their request for relatively extensive discovery, the Nolans also rely on the fact that one is dealing in this case with an alleged fraud and conspiracy and so claim that nothing can be taken at face value and accordingly, they say it is necessary for them to seek this type of discovery to get to the bottom of what actually happened to their money.

28. The alleged presence of fraud may assist the Nolans in their search for extensive discovery, but as is clear from the Court of Appeal decision in *BAM v. National Treasury Management Agency & Anor.* [2015] IECA 246, the question of whether a category of discovery is relevant is still solely to be determined by the state of the pleadings. At para. 37, the Court of Appeal states:

"It is not the case that the issues, as defined in the pleadings in an action, are merely some of the matters to be taken into account by the Court; they are the matters to be taken into account."

In this regard, it is relevant to note that, as the pleadings currently stand, the Kennys are an innocent party in a claim of fraud and conspiracy against Mr. Desmond and Mr. Millett (*albeit* that the Kennys' corporate vehicle, Dildar Ireland, is accused of wrongfully holding itself out as the owner of the Nemo Lands). There are absolutely no allegations against the Kennys of fraud, conspiracy, breach of trust, breach of duty etc, although such allegations are made against Mr. Desmond and Mr. Millett.

#### **The State of the Pleadings**

29. There are only two references of any significance to the Kennys or more accurately their corporate vehicle, Dildar Ireland, in the Statement of Claim, *i.e.*:

- Para. 41: That Dildar Ireland falsely represented itself to be the owner of the Nemo Lands by lodging a planning application for those lands without the authority of the Nolans, and
- Para. 47(5): The relief sought is an order restraining Dildar Ireland from holding itself out as owner of the Nemo Lands.

30. In addition, in replying to a notice for particulars seeking details of any claims for breach of trust or breach of fiduciary duty against Dildar Ireland, the Nolans reply that '*no breach of fiduciary duty is alleged against Dildar Ireland.*'

31. When considering the discovery being sought between the Nolans and the Kennys/Dildar Ireland, the other relevant pleading is in Dildar Ireland's Defence where it pleads that it inadvertently applied for planning permission for the Nemo Lands, instead of Dildar Limited (Isle of Man), the actual owner of those lands.

32. While the Nolans are of course entitled to challenge or go behind this defence, it is against these pleadings in particular, that each category of discovery between the Nolans and the Kennys/Dildar Ireland must be considered, since as is clear from the *BAM* case, these pleadings *are* the matters to be taken into account in deciding if the discovery sought is relevant.

33. In addition, it is to be noted that the Statement of Claim, which was delivered on 12th February, 2018, some two months after Mr. McEvoy's Affidavit, makes the following claims on behalf of the Nolans:

- Dildar IOM is, and was, at all relevant times, the registered owner of the Nemo Lands, and
- As a primary claim, that Mr. Desmond and Mr. Millett fraudulently paid out of the Clear Vision account the sum of €2.8 million to a Dublin firm of solicitors to purchase the Nemo Lands.

34. Thus, despite suggestions from counsel for the Nolans that Mr. McEvoy's Affidavit indicates that Mr. Paul Kenny might have known, and that therefore perhaps the Kennys knew, about the fact that Dildar IOM/Nemo Lands were beneficially owned by the Nolans, rather than by the Kennys, Mr. Paul Kenny is not a party to these proceedings. Furthermore, there is no allegation in the Statement of Claim, which was filed after Mr. McEvoy's Affidavit, that the Kennys are implicated in any of the suggestions of fraud in that affidavit. This is the state of the pleadings against which the relevance of the documents sought, must be decided.

35. It is also relevant to note that the Nolans are not without extensive discovery in their quest to get to the bottom of this alleged fraud, since they are getting discovery from the parties against whom they allege fraud, namely Mr. Desmond and Mr. Millett.

36. In all of these circumstances, this Court would deal with each of the categories of discovery as follows:

#### **Nolans v Kennys Discovery**

##### Category 1:

###### "Incorporation of Dildar IoM

All documents relating to the incorporation of Dildar IoM together with all documents submitted by these Defendants or on their behalf prior to 31 December 2013 to Mann Made for the purposes of incorporating Dildar IoM including documents vouching the source of funds and/or other documentation required by Mann Made at incorporation, including for the purposes of satisfying regulatory requirements."

This category is accepted by the Kennys, but not with the undefined time period suggested by the Nolans (insofar as the category seeks all documents submitted prior to 31 December 2013). The Kennys say that the relevant time-frame should be the period as laid out in the Nolans' Statement of Claim. In this regard, the Nolans claim at para. 30 of their Statement of Claim that Mr. Desmond submitted a bid for the Nemo Lands on or about 6 May, 2013, which was accepted on 16 May, 2013. Para. 34 claims that the Nolans' money was paid out of the Clear Vision account in or about September 2013 to purchase the Nemo Lands. For this reason, this Court accepts that the appropriate time period for this category of discovery, relating to the incorporation and use of Dildar IOM in the purchase of the Nemo Lands, is in general terms from 1st May, 2013 to 30th September, 2013. Although there is no fraud alleged against the Kennys, there is nonetheless the risk that the Kennys and the Nolans might have been misled by participants in the alleged fraud. For this reason therefore, and because of the element of alleged fraud in this case, this Court will allow some leeway on either side, so that the time period for this discovery is from 1st April, 2013 to 31st December, 2013.

##### Category 2

###### "Millett Vouching Documentation

All documents submitted by these Defendants or on their behalf prior to 31 December 2013 to or through Mr Millett, his servants or agents or John Millett Independent Financial Advisors Limited, its servants or Mr Desmond, his servants or agents for the purposes of incorporating Dildar IoM including documents vouching the source of funds and/or other documentation required for the purposes of effecting incorporation of or establishing their interest in Dildar IoM."

The Kennys say that this is encompassed within Category 1, but that they are willing to make express reference in Category 1 to documents provided to Mr. Millett in relation to the incorporation of Dildar IOM.

On this basis, this Court will remove Category 2 and instead amend Category 1, to encompass Category 2, and the revised Category 1 will read as follows:

###### "Incorporation of Dildar IoM

All documents relating to the incorporation of Dildar IoM together with all documents submitted by these Defendants or on their behalf from 1 April 2013 to 31 December 2013 to Mann Made, to or through Mr Millett, his servants or agents or John Millett Independent Financial Advisors Limited, its servants or Mr Desmond, his servants or agents, for the purposes of incorporating Dildar IoM including documents vouching the source of funds and/or other documentation required by those parties at incorporation, including for the purposes of satisfying regulatory requirements."

##### Category 3

###### "Beneficial Ownership Claim

All documents [from 1st April, 2013 until 21st February, 2019] evidencing the plea that Darren Kenny and Dillon Kenny are the beneficial owners of the share capital of Dildar IoM including the date and means of acquisition of such a beneficial ownership and all documents evidencing the source of any funds invested in Dildar IoM."

This was agreed between the parties. The only issue in dispute is the time period and in this instance the Court imposes a time period, for reasons already stated, which begins on 1st April, 2013 and ends on the date of the hearing of these motions, the 21st February, 2019. The extended time period is because the beneficial ownership of Dildar IOM is crucial to the dispute and even though there are no allegations of fraud against the Kennys, it is possible that the Kennys may have unwittingly been caught up in a fraud and hence the extended period of discovery, which is nonetheless regarded by this Court as proportionate since the subject matter of the discovery request itself is quite specific.

##### Category 4

###### "Category 4: Provenance of Nemo Property Funds

All documents evidencing the source and/or provenance of funds used to acquire the Nemo Property and the specific persons providing said funds and the accounts from which funds were transmitted."

The Kennys say that this category should be more specific and have a cut-off date. However, it is this Court's view that the essence of the question contained in this category is where did the money come from, with which the Nemo Lands were purchased? This could not be more specific in this Court's view.

Accordingly, this category is permitted without any cut-off date.

#### Category 5

"Communications to Mann Made re: Kenny ownership

All communications submitted to Mann Made regarding these Defendants' ownership of and/or other Kenny Family ownership of Dildar IoM."

The Kennys say that this is encompassed in Category 3, which would seem to be the case. However, this Category 5 applies not just to the Kennys, but also refers to 'and/or other Kenny Family ownership'. For this reason, this Court will remove this category but amend Category 3 to include 'and/or other Kenny Family' to read:

"Beneficial Ownership Claim

All documents from 1st April, 2013 until 21st February 2019 evidencing the plea that Darren Kenny and Dillon Kenny and/or other Kenny Family members are the beneficial owners of the share capital of Dildar IoM including the date and means of acquisition of such a beneficial ownership and all documents evidencing the source of any funds invested in Dildar IoM."

#### Category 6

"Communications with Millett re: Kenny ownership

All communications with Mr Millett his servants or agents regarding:

- a. these Defendants' ownership of and/or other Kenny Family ownership of Dildar IoM and/or the Nemo Property.
- b. the Plaintiffs' ownership claims over Dildar IoM and/or the Nemo Property."

The Kennys say that the first part of this category is encompassed in Categories 1 and 3, (now as amended to include the Kenny family). This is accepted by the Court insofar as there is a reference to Dildar IoM, but not in relation to the Nemo Lands, which are not referenced in Category 1 or 3.

As regards the second part of this category, this Court notes below, in the context of the discovery by the Nolans against Dildar Ireland, that it is relevant that Dildar Ireland disclose any documentation it has regarding the ownership claims of the Nolans over the Nemo Lands, since there is a claim of wrongful/unlawful misrepresentation of ownership of the Nemo Lands against Dildar Ireland in the pleadings. Since it seems to be accepted by counsel for the Kennys that Dildar Ireland is the corporate vehicle of the Kennys, it therefore is relevant for the Kennys to disclose any communications regarding the ownership claims of the Nolans.

Hence this category should read as follows:

"Communications with Millett re: Kenny ownership

All communications with Mr Millett his servants or agents regarding:

- a. these Defendants' ownership of and/or other Kenny Family ownership of the Nemo Property.
- b. the Plaintiffs' ownership claims over Dildar IoM and/or the Nemo Property."

#### Category 7

"September 2015 and subsequent meetings with Mann Made

All records of and documents relating to the meetings with Mann Made in September 2015 and September 2016 and/or any other meetings by the Defendants' agents with Mann Made wherein Paul Kenny and Millett (presumably on these Defendants' behalf) disputed the Plaintiffs' claim to ownership and any subsequent communications with Mann Made regarding said ownership claims including the purported proof of funds submitted in August 2016 and the purported submission of 2013 dated documentation (acknowledged in September 2016 not to have been sent in 2013)."

It is important to bear in mind that the Nolans are getting discovery of documents in the possession of the Kennys in relation to the incorporation of Dildar IoM and the ownership of the Nemo Lands and indeed the Kennys' knowledge of the Nolan family's ownership claim to the Nemo Lands and to Dildar IoM.

With this in mind, this category of discovery appears to this Court to be a roving enquiry by the Nolans to explore the relationship between the Kennys and Mr. Paul Kenny in respect of meetings held in the Isle of Man, in which no allegations are made against the Kennys. It would of course be different if Mr. Paul Kenny was a party to this litigation (in which case discovery might be sought against him) or indeed if there were allegations of wrongdoing in the pleadings against the Kennys regarding these meetings. However, this is not the case and so this Court determines that this category of discovery is not relevant based on the pleadings.

Accordingly, this category is not permitted.

#### Category 8

"Control and/or Direction of Dildar IoM

All documentation relating to and/or evidencing control of and/or directions regarding the affairs of Dildar IoM whether communicated directly or indirectly from May 2013 to date."

This is agreed, subject to the appropriate time limit and this Court would apply, for the reasons already stated, a time period from 1

May 2013, as sought by the Nolans, to the date of this hearing, 21st February, 2019 so it reads:

"Control and/or Direction of Dildar IoM

All documentation relating to and/or evidencing control of and/or directions regarding the affairs of Dildar IoM whether communicated directly or indirectly from 1 May 2013 to 21 February, 2019."

#### Category 9

"Planning application

All documentation evidencing the circumstances in which Dildar Ireland came to apply for planning permission in respect of the Nemo Property in the capacity of its owner."

The background to this category of discovery is that paragraph 41 of the Statement of Claim states that Dildar Ireland lodged a planning application which falsely represented itself to be the owner of the Nemo Lands and '*in so doing*' it wrongfully and unlawfully held itself out as the owner of the Nemo Lands and purported to deal with the Nemo Lands as owner.

The Kennys have argued that, because of this wording, the claim against them is a net question, namely does applying for planning permission for a property that you do not own, amount to holding yourself out as the owner of that property?

However, in this Court's view, this is an unduly restrictive interpretation of the wording of the Statement of Claim, which alleges that the Kennys, through their corporate vehicle, wrongfully and unlawfully held themselves out as the owner of the Nemo Lands. It is in this Court's view relevant to that claim to have sight of documents evidencing the circumstances in which Dildar Ireland came to apply for planning permission. It is an unduly restrictive interpretation of the pleadings to say that it is accepted that the planning application was made in error, so the only question is a legal one, namely does applying for planning permission amount to a holding out as owner and so you are not entitled to see the documents in which this allegedly unlawful misrepresentation was made.

For this reason, this category is permitted.

#### Category 10

"Attempted Removal of Mann Made

All communications with Mann Made regarding any intention on the part of the Defendants' to remove or replace Mann Made as Dildar IoM's corporate administrator."

There is no allegation against the Kennys that they sought or had any intention of removing Mann Made as the corporate administrator for Dildar IoM. The Nolans have not pleaded this case and it would seem to this Court that they are, in this category of discovery, fishing for documents to see if they can plead this case. However, that is not the purpose of discovery.

For this reason, this category is rejected.

#### Category 11

"Nominee Shareholders

All documents relating actual or intended role as ultimate nominee shareholder in Dildar IoM and the role of Brookmanor Ltd and/or Woodcroft Ltd and/or Kevin Neiland and/or the Caroma Foundation and/or Rachel Rose Assets SA and/or the Clada Foundation and/or CVS Holdings Inc and the beneficial owners of these entities and/or their appointment or attempted appointment to such a role of nominee shareholders and/or any trust arrangements regarding the holding of shares for Kevin Neiland and/or Caroma Foundation and/or Rachel Rose Assets and/or the Clada Foundation and/or CVS Holdings Inc."

It seems to this Court that this category is aimed at the same documents as are covered by Category 3, which deals with the beneficial ownership of Dildar IoM. Beyond that, it appears to have no basis in the pleadings and to amount to a fishing expedition.

Accordingly, this category is rejected

#### Category 12

"Awareness of Plaintiffs' Claims

All documents relating to the awareness of the Defendants of the claims of the Plaintiffs to an interest in Dildar IoM and/or the Nemo Property [and/or evidencing any actions take in consequence of this awareness]."

This category is relevant because the Nolans allege that the corporate vehicle of the Kennys, Dildar Ireland, unlawfully and wrongfully misrepresented their ownership of the Nemo Lands. This is because it is relevant to a claim of wrongful misrepresentation regarding the Nemo Lands if the Kennys knew that the Nolans had a claim to the Nemo Lands. In addition, in their defence to these proceedings, the Kennys allege that they are strangers to the alleged wrongdoing of Mr. Millett and Mr. Desmond regarding the alleged ownership of the Nemo Lands by the Nolans. Accordingly, the existence of any documents regarding the Kennys' awareness of the Nolans' claims to an interest in Dildar IoM or the Nemo Lands, is relevant to this pleaded defence.

For this reason, this category is permitted.

#### Category 13

"Text Communications

To the extent not otherwise discovered, all documents evidencing and/or relating to text messages, WhatsApp message and other mobile communications and/or records of same between the Ninth and Tenth Defendants, Paul Kenny, John

Kenny and Kevin Neiland and any of the Defendants or the Third Parties in relation to the Plaintiffs' or the Plaintiffs' funds from January 2013 to July 2017 and/or the Kenny Defendants' stake/investment in Dildar IoM and/or the acquisition of the Nemo Property."

This category is not permitted, since the reference in other categories of discovery to 'documents' includes all media on which information is stored and so includes not just letters, but also emails and texts. Accordingly, there is no need for a separate category of discovery dealing with texts, particularly since the subject matter of this discovery, the acquisition of Dildar IoM and the Nemo Lands and knowledge regarding the plaintiffs' claims, are covered in other categories.

In addition, this category deals with alleged contact between persons who are not parties to the proceedings in relation to the Nolans or the Nolans' funds, and thus amounts to a fishing expedition.

Accordingly, this category is refused.

#### Category 14

"The Nemo Acquisition File

The Kenny Defendants' file (including such conveyancing or other file maintained on their behalf by their solicitor) concerning the purchase of the Nemo Property together with all solicitors' communication and correspondence regarding its purchase."

The Kennys argue that this is a repeat of Category 3. However, Category 3 deals with ownership of the shares in Dildar IoM, while this category deals with the ownership of the Nemo Lands.

Accordingly, this category is permitted.

#### Category 15

"MECD/CVSSA

All communications between the Kenny Defendants, their servants or agents and/or Paul Kenny, John Kenny and/or Kevin Neiland and each or any of the Second and/or Fifth Defendants and/or (the Third Parties regarding the MECD and CVSSA up to July 2017. For the avoidance of doubt this should include documents pertaining to transferring sums to or through MECD and CVSSA, the MECD and CVSSA structures, the purposes of transferring funds to those entities and any explanations provided to them by the Second and/or Fifth Defendants."

In this Court's view, this is a general trawl of documents which goes beyond the allegations made against the Kennys in the pleadings. The Kennys are obliged in the other categories of this discovery (primarily Category 4) to provide details of the source of *their* €2.8 million, which they say was used (rather than *the Nolans'* €2.8 million) to fund the purchase of the Nemo Lands. The earlier Category 4 is relevant and proportionate in light of the pleadings, while the contents of this Category 15 are, in this Court's view, in the nature of a fishing expedition.

Accordingly, this category of documents is not permitted.

### **Nolans v Dildar Ireland Discovery**

#### Category 1

"Acquisition of Nemo Property

All documents relating to the bidding process and acquisition of the Nemo Property to include the solicitors' client file concerning the transaction and all instructions to the Second and Fifth, Sixth or Eight Defendants concerning the purchase of the Nemo Property."

Since the Statement of Claim states that Dildar IoM is the owner of the Nemo Lands, Dildar Ireland claims that this category of discovery has no application to it.

However, there is a claim that Dildar Ireland wrongfully misrepresented that it was the owner of the Nemo Lands, and while Dildar Ireland claims that this was a mistake, the Nolans are not obliged to accept that it was a mistake and can seek documents that might support their claim that Dildar Ireland wrongfully misrepresented the position and the motivation behind this alleged wrongful misrepresentation. Thus, rather than it being a simple mistake by Dildar Ireland, for example because the two companies are called 'Dildar Limited', there may be more to it than that, which may become clearer from the documents, if any, in Dildar Ireland's possession relating to the acquisition of the Nemo Lands.

For this reason, this Court will allow this category.

#### Category 2

"Application of Plaintiffs' Pension Funds

All documents relating to the awareness of the Seventh Defendant or its officers concerning the alleged interest of the Plaintiffs' in the Nemo Property and/or the alleged usage of the Plaintiffs' funds in acquiring same and/or the Plaintiffs' claim to funds held in MECD or the Clear Vision account or the subsequent or present whereabouts of the Plaintiffs' funds."

The pleadings allege that Dildar Ireland wrongfully and unlawfully misrepresented that it was the owner of the Nemo Lands, although Dildar IoM is the legal owner and the Nolans are the alleged beneficial owners of the Nemo Lands. In these circumstances, the knowledge, if any, of Dildar Ireland, that the Nolans' funds were used to purchase the Nemo Lands, is relevant in determining if Dildar Ireland is guilty of wrongful misrepresentation (or innocent misrepresentation, as claimed by Dildar Ireland).

In addition, it is to be noted that, if, as alleged by Dildar Ireland, its only involvement and knowledge in relation to this matter was an

entirely innocent mistaken submission of a planning application, then the extent of the discovery process is likely to be very limited.

For these reasons, this category is permitted.

### Category 3

"Communications with the First, Second, Fifth, Sixth and Eighth Defendants

All communications by or between the Seventh Defendant or its officers and the First, Second and/or Fifth and/or Sixth Defendants and/or Eighth concerning:

- i. the Plaintiffs' Pension Funds and/or
- ii. Mann Made Corporate Services and/or
- iii. Dildar IOM and/or
- iv. the Nemo Property

to include all mobile phone and email records from the relevant period."

Again, for the same reasons as for Category 2, the existence of any communications regarding the use of the Nolan funds to allegedly become beneficial owners of the Nemo Lands, is relevant in determining if Dildar Ireland is guilty of wrongful misrepresentation (or innocent misrepresentation, as claimed by Dildar Ireland).

Accordingly, this category is permitted

### Category 4

"Finance of Nemo Property

All communications involving the Seventh Defendant or its officers and all documents relating to:

- i. the financing of the purchase of the Nemo Property whether directly or indirectly;
  - ii. the investment of monies Clear Vision Solutions Holding Inc and/or Clear Vision Solutions SA;
- together with all documents relating to the awareness of the Seventh Defendant or its officers concerning same."

Again, for the same reasons as for Category 2 (namely that Dildar Ireland claims that its representation that it was the owner of the Nemo Lands was entirely innocent, while the Nolans claim it was an unlawful and wrongful misrepresentation), the existence of any documents showing Dildar Ireland's knowledge of Nolan funds having been used to finance the purchase of the Nemo Lands, will clarify whether the misrepresentation was innocent or not.

Accordingly, this category is permitted.

### Category 5

"Holding out as owner

All documents relating to the Seventh Defendant's holding itself out as owner of the Nemo Property and/or relating to any intention to acquire ownership of same and/or in relation to in the planning permission lodged in September 2016 in which the Seventh Defendant represented itself to be the owner of the Nemo Property."

Dildar Ireland alleges that it is not necessary to provide the planning documents themselves, since the key claim against it, is simply that it applied for planning permission for the Nemo Lands and that the net legal issue therefore is whether this application per se amounts to a holding out as the owner of the Nemo Lands or not.

However, for the same reasons as for Category 2, namely that documents relating to the planning permission could indicate whether the misrepresentation was innocent or wrongful/unlawful, this Court regards this category as relevant.

Accordingly, this category is permitted.

### Category 6

"Dildar Irl Formation and Planning Documents

- i. All documents regarding the formation of Dildar Ireland, its purpose and its owners/directors;
- ii. All documents relating to the planning file concerning the Nemo Property and/or relating to the payment of monies towards the planning fees and the source of funds."

As regards the Nolans seeking from Dildar Ireland the planning file, this is a public document and a party to litigation should not put another party to the expense of getting a public document, when the party seeking the document is equally able to get that document. Accordingly, this element of the category is not permitted.

The remainder of the category could reveal documents relevant to the allegation that the misrepresentation of ownership was innocent or wrongful and so is permitted. The permitted category will therefore read as follows:



- i. All documents regarding the formation of Dildar Ireland, its purpose and its owners/directors;
- ii. All documents relating to the payment of monies towards the planning fees and the source of funds."

***Kennys v Nolans Discovery & Dildar Ireland v Nolans Discovery***

37. The discovery by the Kennys against the Nolans is in exactly the same terms as the discovery by Dildar Ireland against the Nolans. Accordingly, the parties agreed to deal with the categories together and so an order in favour of the Kennys is to be treated as an order in favour of Dildar Ireland.

38. The background to these applications for discovery relates to the competing claims of the Nolans and the Kennys to the €2.8 million which was paid out of the account of an entity called Clear Vision to finance the purchase by Dildar IOM of the Nemo Lands. It is alleged that the money came from a mixed account in Clear Vision's name, into which sums were paid from a number of different parties. In the Nolans' Statement of Claim they state that three separate sums on three separate dates in 2013, totalling €6,960,000, were transferred from the Nolans' bank account with Investec and then went *via* an entity called MECD to Clear Vision's account. In support of this claim, they refer to three very similar sums on very proximate dates, to the dates of the transfer out of the Investec account, being credited to the Clear Vision account, totalling €6,927,800 (which the Nolans allege is one and the same as the €6.96 million which left their Investec account).

39. The Statement of Claim goes on to allege that breaches of trust led to this money being used as collateral for the \$100 million EFG loan and that some of the €6.9 million, i.e. €2.8 million, was used to purchase the Nemo Lands. However, whether the €2.8 million was the Nolans' €2.8 million or the Kennys' €2.8 million or some other party's money, is not a simple matter as it is alleged that the Clear Vision account is a mixed account.

40. Indeed, it is obvious that this matter is far from clear, since in the Defence filed by Mr. Millett to the claim by the Nolans that €6.9 million was transferred to the Clear Vision account, he in fact states at para. 17 of his Defence that a total of €10 million was in fact transferred on behalf of the Nolans to MECD and some of it on to Clear Vision, which amounts to an additional €3.1 million of Nolan funds (not referenced in the Statement of Claim).

41. A determination will have to be made at the hearing regarding whether the €2.8 million, which is alleged to have come out of the mixed Clear Vision account, to fund the purchase of the Nemo Lands, belongs wholly or partially to the Kennys, the Nolans or some other party. This will involve complex issues of law regarding the timing of payments in and out of a joint account and the identity of payers and payees.

42. Against this background the following six categories of discovery are sought by the Kennys/Dildar against the Nolans.

43. The following definitions are relevant to some of the categories of discovery:

- '*Plaintiffs' Main Funds*' refers to the money totalling €6,960,000 mentioned at paragraph 17 of the Statement of Claim, alleged by the Plaintiffs [the Nolans] to be their money, and any part of the same, and the benefit of any deposit (in whatever currency) alleged to represent all or any part of the same.
- '*Plaintiffs' Other Funds*' refers to the further money totalling €3,100,000, mentioned at lines 1 (€620,000) and 3 (€2,480,000) of the table at paragraph 17 of the defence of the Millett Defendants in these Proceedings and alleged by those defendants to be the Plaintiffs' money, and any part of same, and the benefit of any deposit (in whatever currency) alleged to represent all or any part of the same.
- '*Non-Plaintiff Funds*' refers to any funds, not being the Plaintiffs' Main Funds or the Plaintiffs' Other Funds, held at any time in or after 2012 in any account with any of the Plaintiffs' Main Funds and/or the Plaintiffs' Other Funds, and any part of the same, and the benefit of any deposit (in whatever currency) representing all or any part of the same.

**Category 1**

"Documents relating to actual or purported dealings, in or after 2013, with the Plaintiff's Main Funds. For clarity, and to assist your clients in making discovery, we note that this category should include:

- (a) documents relating to any payment, transfer, holding, application, misappropriation of, or other dealing with, the Plaintiffs' Main Funds;
- (b) documents relating to the basis and/or terms upon which the Plaintiffs' Main Funds were to be transferred, held or applied;
- (c) documents relating to any investment or other purpose (direct or indirect) of any other actual or intended dealing with the Plaintiffs' Main Funds;
- (d) account statements relating to the Plaintiffs' Main Funds;
- (e) documents relating to the representations alleged at paragraphs 14 and 15 of the Statement of Claim (or any of them);
- (f) documents relating to the agreements alleged at paragraph 16 of the Statement of Claim (or any of them);
- (g) documents relating to the purpose or objective, direct or indirect, of the transfer of the Plaintiffs Main Funds alleged at paragraph 17 of the Statement of Claim;
- (h) documents relating to the representations alleged at paragraph 23 of the Statement of Claim (or any of them);
- (i) documents relating to the pledging of the Plaintiffs Main Funds alleged at paragraphs 26 and 27 of the Statement of Claim;

(j) documents relating to the sale by Clear Vision of some of the Plaintiffs' Main Funds into a US Dollar Account, alleged at paragraph 28 of the Statement of Claim;

(k) documents relating to any property (real or personal, tangible or intangible) alleged to have been acquired using the Plaintiffs' Main Funds (including the Nemo Property, as alleged at paragraphs 24, 34 and 43(vii) of the Statement of Claim);

(l) documents relating to the representations alleged at paragraph 38 of the Statement of Claim;

(m) documents relating to the conversion of the Plaintiffs' Main Funds alleged at paragraph 40 of the Statement of Claim; and

(n) documents relating to any arrangement by which the Plaintiffs (or any of them) could have knowledge or oversight of the Plaintiffs' Main Funds and/or their application (including, without limitation, the arrangement pleaded at paragraph 15 (final sentence), of the defence of the second-named Defendant)."

This Court does not believe discovery should be made any more onerous than necessary. The Nolans are willing to provide discovery regarding the Nolans' Main Funds and of necessity this is likely to include some or all of the sub-categories listed by the Kennys/Dildar. However, it is not necessary for the discovery to be given under each category and so the discovery should read simply as follows:

"Documents relating to actual or purported dealings, in or after 2013, with the Plaintiff's Main Funds."

If subsequently, the Kennys/Dildar are not satisfied with that discovery, it is open to them to seek further and better discovery.

#### Category 2

"Documents relating to advices and representations allegedly given or made by Mr Desmond and/or Mr Millett in relation to the safekeeping of the Plaintiffs' Main Funds."

This category has been agreed.

#### Category 3

"Documents relating to actual or purported dealings, in and after 2013, with the Plaintiff's Other Funds. For clarity, and to assist your clients in making discovery, we note that this category should include:

(a) documents relating to any payment, transfer, holding, application, misappropriation of, or other 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 other actual or intended dealing with the Plaintiffs' Other Funds; and

(d) account statements relating to the Plaintiffs' Other Funds."

The Nolans say that this category is not relevant because in these proceedings, the Nolans are simply making claims against the Kennys/Dildar Ireland regarding the use of the €2.8 million which is part of the €6.9 million (*i.e.* the Plaintiffs' Main Funds). Accordingly, the Nolans say that any dealings they had with the other €3.1 million, to which Mr. Millett refers in his defence, are not relevant.

However, the reason dealings with these other funds are relevant is because the implication of the Nolans' Statement of Claim is that the €2.8 million paid out of the Clear Vision account belonged to them. Yet this Clear Vision account is alleged to be a mixed account and therefore the tracing of the balance of the Nolans' funds (*i.e.* the Plaintiffs' Other Funds, referenced in Mr. Millett's defence and amounting to circa €3.1 million), which may have been paid to MECD and/or Clear Vision, is relevant. This is because the timing of payments, in and out of a mixed account and by whom and to whom the payments are made, is relevant to a determination of to whom a particular payment out belongs, in this case the payment of €2.8 million to purchase the Nemo Lands.

For this reason, while the payments of the Plaintiffs' Other Funds might not appear at first glance to be relevant, it is possible that they could be relevant to a determination of to whom the €2.8 million (paid out of the Clear Vision account) belongs.

Accordingly, this category is relevant and is permitted.

#### Category 4

"Documents:

(a) upon which the Plaintiffs may rely to demonstrate their alleged interest in the Nemo Property and/or in Dildar IoM; and/or

(b) indicating that the Nemo Property was bought with funds other than the Plaintiffs' funds and/or that the Plaintiffs do not have an interest in the Nemo Property; and/or

(c) indicating that the Plaintiffs do not have any proprietary interest in Dildar IoM."

This category is agreed.

#### Category 5

"Documents relating to dealings in or after 2013 with any Non-Plaintiff Funds. For clarity, and to assist your client in making discovery, we note that this category should include:

- (a) documents relating to any payment, transfer, receipt, holding and/or application of Non-Plaintiff Funds;
- (b) account statements relating to Non-Plaintiff Funds; and
- (c) documents relating to property acquired using Non-Plaintiff Funds.”

This category is on the one hand of necessity somewhat broad, since it relates to any funds not belonging to the Nolans, in or after 2012, but on the other hand it is limited to those funds being held in an account with the Plaintiffs’ Main Funds or the Plaintiffs’ Other Funds (since that is how the expression Non-Plaintiff Funds is defined.) It is also the case that if there are not any such funds held in an account with the Nolans’ funds, then the discovery will not be onerous. Furthermore, since this category could highlight a mixing of funds and therefore impact upon the ultimate decision which has to be made by the Court regarding whether the €2.8 million belongs to the Nolans or the Kennys or some other party, it is relevant.

For this reason, this category is permitted.

Category 6

“Documents relating to the establishment, ownership or purpose of Dildar IoM.”

This category is agreed.

#### **CONCLUSION**

44. In light of the complexity and overlap of the various categories of discovery and the relevant parties, this Court will hear from counsel before finalising the orders.