APPROVED **[2023] IEHC 678**

THE HIGH COURT

Record No.: 2022/3078 P

Between:

DANIEL BOON (ALSO KNOWN AS "DANY BOON")

Plaintiff

-AND-

SOUTH SEA MERCHANTS MARINERS LTD PARTNERSHIP,

THIERRY FIALEK-BIRLES (ALSO KNOWN AS "TERRY BIRLES" AND "THIERRY WATERFORD-MANDEVILLE"),

UNITED FAR EAST AND ORIENTAL HOLDINGS (SAMOA) LIMITED,

HIBERNIAN PETROLEUM LIMITED PARTNERSHIP,

UNITED IRISH ESTATES LIMITED,

HIBERNIAN YACHTS COMPANY LIMITED,

AMERICAN SAIL & MOTOR NAVIGATION INC.,

AMALGAMATED PLANTATIONS COMPANY LIMITED,

ASIA MONACO INVESTMENTS LIMITED,

ASIA MONACO SARL,

SAIL AND MOTOR NAVIGATION COMPANY LIMITED

Defendants

JUDGMENT of Mr Justice Rory Mulcahy delivered on 5 December 2023

NO REDACTION REQUIRED

Introduction.

1. In these proceedings, the Plaintiff alleges that he has been defrauded by the Defendants, and in particular the first and second Defendants, of almost €7 million. This judgment, however, concerns an application by the Plaintiff, pursuant to the inherent jurisdiction of the court, seeking leave for the Plaintiff, or rather for his Monégasque lawyers, to furnish affidavits and exhibits filed on behalf of the ninth and tenth Defendants in these proceedings to the prosecuting authorities in Monaco who are investigating the fraud the subject matter of these proceedings.

The Proceedings

2. In 2020, the Plaintiff commissioned the construction of a yacht for his personal use. The yacht was completed in July 2021. The Plaintiff claims that in January 2021, he was introduced to the second Defendant, Mr Birles, by a mutual acquaintance. He alleges that Mr Birles held himself out as an experienced maritime law attorney and the provider of services to the first Defendant, South Sea Merchants Mariners ("**SSMM**"), an Irish limited partnership. Following his introduction to Mr Birles, the Plaintiff engaged SSMM to register the yacht and manage its operation. This led, it is alleged, to a fraud, as counsel put it, in three parts, which she described as the yacht maintenance fraud, the insurance fraud, and the investment fraud.

3. The yacht maintenance fraud involved, it is alleged, Mr Birles diverting funds which had been transferred to him by the Plaintiff for the day-to-day operation of the yacht. It is said that the larger part of €2.235 million paid by the Plaintiff into an account operated by SSMM ("**the Account**") towards the maintenance of the yacht was diverted to Mr Birles' own use.

4. The insurance fraud involved the Plaintiff paying €14,000 into the Account for insurance on the yacht to a company recommended by Mr Birles. It is alleged that the insurance company doesn't exist and that no insurance was ever put in place.

5. The allegation in relation to the investment fraud is that, on the recommendation of Mr Birles, the Plaintiff transferred €4.5 million to the Account to be invested in an alleged investment opportunity by which money could be deposited in the Central Bank

of Ireland with a guaranteed interest rate, free of tax. This scheme is also alleged to be a fabrication.

6. The Plaintiff sought the return of all funds transferred to the Account, but SSMM failed to return any part of them.

7. It is alleged that the third to eleventh Defendants are knowing recipients of some or all of the funds paid into the Account and fraudulently obtained from the Plaintiff. The case as pleaded against the ninth Defendant is that it is to be inferred that it is a knowing recipient of sums defrauded from the Plaintiff and a co-conspirator in the scheme to defraud him by receiving and/or assisting in the dissipation of funds from the Account by reason of the following pleaded allegations. First, the ninth Defendant is capitalised to the sum of €6.8 million, which closely approximates the amount paid by the Plaintiff into the Account. Second, the sole shareholder of the ninth Defendant is Ms Xin Zhao, the partner of Mr Birles, and she has an address given on relevant CRO forms as the address of the sixth Defendant, of which Mr Birles is the sole shareholder and which corresponded with the Plaintiff on behalf of Mr Birles. Third, Mr Birles is the secretary of the ninth Defendant.

8. The tenth Defendant is a Monégasque company. In respect of this Defendant, it is alleged that Ms Zhao is the principal shareholder and that it has the same address as a residential address given by Mr Birles and Ms Zhao. It is alleged that a related company purchased a French property in 2022 to be held directly or indirectly on behalf of Mr Birles and Ms Zhao, and the Plaintiff pleads that it can be inferred that that property was purchased with proceeds of the alleged fraud.

9. The Plaintiff issued proceedings against the first six Defendants in July 2022, and *mareva*-type relief was granted against those Defendants at that time. The ninth and tenth Defendants were joined as Defendants to the proceeding by order dated 11 October 2022, and *mareva*-type relief was granted against those Defendants on an interim basis on that date restraining those Defendants from reducing their assets below the sum of €6 million until further order ("**the Interim Order**"). The ninth and tenth Defendants were also required to swear affidavits disclosing details of all bank accounts worldwide in which they had any interest ("**the Disclosure Order**").

10. A Statement of Claim was delivered on 18 October 2022, and a full Defence was delivered on behalf of the ninth and tenth Defendants on 16 December 2022.

11. In response to the Interim Order, Ms Zhao swore and filed a number of affidavits on behalf of the ninth and tenth Defendants. She swore an affidavit on 25 October 2022, which sought a variation of the Interim Order. In this first affidavit, Ms Zhao referred to the fact that she had been interviewed by Monégasque police in relation to their investigation of the second Defendant and related companies and that she was being questioned in relation to money laundering. She described herself as a victim in this matter. She swore affidavits on 25 October and 7 November 2022 in the purported discharge of the ninth and tenth Defendant's obligations pursuant to the Disclosure Order. She swore a further detailed affidavit, including 18 exhibits, on 22 December 2022 in opposition to the continuation of the Interim Order on an interlocutory basis.

12. On 16 February 2023, the ninth and tenth Defendants consented to the application for interlocutory relief pending the trial of the action by which the ninth and tenth Defendants were restrained from reducing their assets below the sum of €4,870,412.85. As a consequence, none of the affidavits filed by Ms Zhao were opened in court.

13. By motion dated 26 June 2023, the Plaintiff sought leave to furnish the affidavits and exhibits sworn by Ms Zhao (other than the affidavit of 7 November 2022) to Noghes de Monceau Attorneys, his Monégasque lawyers, for the purpose of furnishing them to the Instructing Judge in charge of the criminal investigation in Monaco into the fraud the subject matter of these proceedings.

14. The application was grounded on the affidavit of the Plaintiff's Irish solicitor, Ciara Fitzgerald of Dentons. Ms Fitzgerald's affidavit highlights certain relevant matters, including that the Plaintiff has obtained freezing orders in Monaco against Ms Zhao's shares in a Monégasque company and the property of that company in aid of any claim by the Plaintiff against Ms Zhao or the company pursuant to the criminal investigation or the Irish proceedings. Counsel for the Plaintiff helpfully explained that it is a feature of Monégasque law that a party can seek civil damages in the context of criminal proceedings there and that, as has occurred here, a party claiming to have suffered damage can seek injunctive relief in the context of such criminal proceedings.

15. The application to furnish the affidavits and exhibits (together "**the Documents**") was prompted by a letter dated 16 June 2023 to Dentons from Noghes de Monceau in the following terms:

> *"Dear Colleague,*
>
> *I would be grateful if you can ask the Irish Judge to unseal the documents and evidences provided in the claim made by our client against the following Defendants: Asia Monaco Investments Ltd. And Asia Monaco SARL.*
>
> *This information might be useful to determine the reality of the facts in the context of this case for the purposes of a criminal case open in Monaco. The Monaco Criminal case….. was initiated by Monégasque authorities in Monaco. Some information contained in the documents in evidence is likely to be relevant to the investigations currently ongoing and to the administration of justice in the criminal proceedings.*
>
> *We can confirm that we will communicate the documents and evidences to the Investigating Judge only. However, these documents may be made public, among other possibilities, by the Prosecutor and /or the Criminal Court if the criminal case goes to trial."*

16. The ninth and tenth Defendants object to the Documents, which were not opened in court, being furnished in these circumstances.

Relevant Principles

17. It is accepted by both parties that where affidavits have been opened in court, then the leave of the court is not required in order for them to be furnished to any other party. As explained by Hogan J in **AIB v Tracey [2013] IEHC 242; [2013] 3 IR 398** (at p. 404 – 405):

> "*These allegations were ventilated in civil proceedings in open court and, as I have already found, the affidavits were effectively openly read into the record of the*

court. Given that these proceedings were in open court pursuant to the requirements of Article 34.1 of the Constitution, it follows that any cloak of confidentiality or protection from non-disclosure vanished at that point. In this respect, therefore, the present case is a very different one from Breslin v. McKenna *[2008] IESC 43; [2009] 1 IR 298.*

[22] *The open administration of justice is, of course, a vital safeguard in any free and democratic society. It ensures that the judicial branch is subjected to scrutiny and examination and helps to promote confidence in the fair and even handed administration of justice. Any system of secret court hearings could pave the way for judicial arrogance, overbearing judicial conduct and abuse.*

[23] *In these circumstances the public are entitled to have access to documents which were accordingly opened without restriction in open court. This is simply part and parcel of the open administration of justice which the Constitution, subject to exceptions, enjoins. Entirely different considerations would naturally arise in respect of material which was not opened in open court or which was protected by the* in camera *rules or by reporting restrictions imposed, for example, pursuant to s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008."*

* emphasis added

18. **Breslin v McKenna**, to which Hogan J referred in the passages cited above, concerned an application regarding the production of books of evidence prepared for proceedings before the Special Criminal Court in civil proceedings in Northern Ireland relating to the Omagh bombings. The High Court of Justice of Northern Ireland had made an order requiring the production of the books of evidence from the criminal proceedings, subject to there being no lawful impediment to such production in this jurisdiction. The Plaintiff sought a declaration that there was no such impediment. The Supreme Court concluded that the books of evidence should be provided.

19. In the High Court, the application had proceeded on the basis that, by analogy with the civil law regarding discovery, there was an implied undertaking that documents produced in a criminal trial would not be used by an accused for purposes other than the

criminal trial without leave of the Court. The court exercised its discretion to waive the assumed undertaking and granted such leave.

20. The Supreme Court (Geoghegan J) cautioned against importing civil law principles regarding discovery into the rules governing criminal proceedings but concluded that the application of those principles would lead to the same ultimate conclusion:

> *"**[36]** If I am right in the view that I take, the difference will be for the most part academic because, like the High Court Judge, I believe that if the books of evidence are going to be used for some wholly different purpose from their original intended use, the approval of the court should be sought. This will normally be the court of trial but, in the case of the Special Criminal Court, an appropriate court would seem to me to be the High Court. Rather than base this requirement on an alleged implied undertaking, I would prefer to base it on the courts' overall responsibility to ensure the due administration of justice. In considering whether a court should accede to the application or not, the principles to be applied would be no different than the principles which would apply if there was an implied undertaking as originally suggested. Therefore, in that sense, I would uphold the granting of leave by Gilligan J. and I would agree with him that considerable assistance is to be gained from the judgment of Clarke J. in* Cork Plastics (Manufacturing) v. Ineos Compounds U.K. Ltd. *[2008] IEHC 93, [2008] 1 I.L.R.M. 174, in so far as two different jurisdictions were concerned.*
>
> ***[37]** It is neither possible nor indeed desirable to attempt a precise definition of what set of circumstances would be regarded as use of the books of evidence for some other purpose. It would not be the case that the book of evidence was confidential in the sense that an accused could not discuss it with his spouse or members of his family or other advisors. Permission would be required however to use it for wholly different proceedings or indeed for any uncontemplated public or semi-public purpose. These restrictions are necessary in the interest of justice having regard to the ultimate finality of the verdicts of guilt or otherwise in the due process. I, therefore, believe that the High Court Judge was correct in his exercise of discretion and in the manner in which he exercised it, even though I do not agree with the presumption of law on which it was based. This agreement is wholly*

immaterial in my view because no different principles would have applied in exercising the discretion on the basis that I have suggested."

21. Geoghegan J ultimately concluded that, in the circumstances of that case, the transcripts should be made available:

*"**[42]** In my view, there is no prohibition on the handing over of transcripts for production for inspection purposes with the permission of the High Court, if it is necessary for the purpose of doing justice and provided there is no relevant legal prejudice to the other party as a consequence of so doing. Where the proceeding in which the production is required is in another jurisdiction, the courts of this jurisdiction should accept any finding by that court that the documents are necessary unless there is any reason to believe that, for some reason or other, the handing over of the documents could lead to a fundamental injustice.*

...

***[44]** In my view, this court should accept that a fair trial will be conducted by the High Court of Northern Ireland and I see no reason why this court now should not, as a matter of discretion, permit both the relevant books of evidence and the relevant transcripts to be produced in accordance with the orders made by the High Court and Court of Appeal in Northern Ireland*."

22. In delivering a dissenting judgment, Hardiman J accepted the principles enunciated by Geoghegan J but disagreed with the result, concluding that the court should have exercised its discretion to refuse relief because there was "*insufficient information before the court to enable it to decide whether to grant or withhold permission*". He concluded:

***"[9]** In the absence of evidence of [the use intended for the documents], I do not find it possible to be satisfied that there is, in the words of Geoghegan J., "no relevant legal prejudice" to the other party. I consider that this court, which has an intimate knowledge of material of the sort in issue here, should have been informed what was proposed to be done with it.*

…

[13] *I consider that this novel and unusual application should have been urged on the basis of a much more complete showing of information, which I consider as a matter of great probability was in fact available to the plaintiffs. I would have taken this view whether the action in aid of which production is sought was to be heard in this jurisdiction or in any other."*

23. The Defendant, in its written submissions, argued that the Plaintiff should have proceeded by way of an application pursuant to the Foreign Tribunals Evidence Act 1856, and that an application to give effect to letters rogatory from the Monégasque court should be made. Although it was accepted at the hearing that that form of application was only appropriate when seeking to depose a witness, the principles applicable to such applications may have some relevance. In **Cornec v Morrice [2012] IEHC 376; [2012] 1 IR 804** identified the conditions which must be met before such an application could be granted (at p. 813):

*"**[19]** The power to grant international assistance* via *the letters rogatory is, of course, a discretionary one. Naturally, in the interests of the international judicial comity, this court will endeavour to give assistance where at all possible to requests of courts from foreign states and, as Denham J. put it in* Novell Inc. v. M.C.B. Enterprises *[2001] 1 I.R. 608 at p. 623, it should "be slow to refuse such an order". Nevertheless, before any such order could properly be granted, it would be necessary to establish that (i) the evidence proposed to be taken is relevant to the foreign proceedings; (ii) the application is not oppressive; (iii) the grant of the request would not override any established privilege or protection available to the prospective witness; and (iv) the evidence so taken on commission is itself admissible under the law of the requesting state. The applicant for such judicial assistance must satisfy all four of these conditions."*

24. Finally, the Plaintiff referred to jurisprudence from England and Wales, where Rules of Court govern applications of this type. In **The Official Receiver v Skeene and Anor [2020] EWHC 1252 (Ch)**, the Official Receiver asked the court for permission to provide the Serious Fraud Office ("**SFO**") with an affirmation made by the Defendants in disqualification proceedings and certain exhibits provided by him. Much

of the judgment concerns an analysis of the scope of the relevant Rules of Court, but the English High Court also identified a number of factors which were relevant to the exercise of its discretion in that case. These may be summarised as follows:

- There was clearly a public interest in ensuring that the criminal proceedings against the Defendants were conducted properly and that all relevant evidence was before the court;
- The documents sought were highly likely to be relevant to the criminal proceedings;
- The documents were requested by the SFO as part of its continuing duty to investigate the subject matter of the criminal proceedings against the Defendants;
- The documents were produced by the Defendants voluntarily. The Defendants, therefore, took the risk that they might be sought for a purpose other than the Disqualification Proceedings;
- The provision of the documents did not mean that any of the documents would be used as evidence in the criminal proceedings. In fact, it appeared that the evidence could not be used in the criminal proceedings save in limited, defined circumstances.

25. Having regard to all of those factors, the court concluded that the grant of permission would not cause any injustice to the Defendants and that the balance lay in favour of granting permission.

Arguments of the Parties

26. The Plaintiff accepts that the leave of the court is required in order to furnish the Documents to the Monégasque authorities but argues that leave should be granted in this case. The Plaintiff contends that no prejudice will be caused to the Defendants by making available affidavits and exhibits which she has volunteered in the context of these proceedings, though his Counsel fairly acknowledged that a distinction might be drawn between the affidavits Ms Zhao *elected* to swear in opposition to the injunction application and the affidavits she was *required* to swear to comply with the Disclosure

Order. It is suggested that any argument that the documents might be prejudicial to Ms Zhao would be "surprising to say the least" and that she will, in any event, be entitled to participate in any investigative or criminal procedure in Monaco and thereby protect her interests. Counsel argues that the Documents will clearly be relevant to any criminal investigation in Monaco and that they are sought for the purpose of assisting in that investigation. Insofar as they have not been sought by the authorities investigating the fraud in Monaco, she claims that it would be a logical impossibility to make it a requirement that the investigating authorities request the Documents when, by definition, her client cannot tell the authorities what is in them. She argues that many of the factors which were considered relevant in the **Skeene** proceedings are of relevance here.

27. The ninth and tenth Defendants contend that the order sought by the Plaintiff goes beyond any of the authorities upon which he relies. Although no specific prejudice to Ms Zhao or the ninth and tenth Defendants is identified, their Counsel highlights the fact that the Plaintiff is pursuing civil remedies in conjunction with the criminal investigation in Monaco. Counsel argues, in effect, that the court cannot safely assume that there was no potential for injustice or prejudice.

28. In response to this last proposition, Counsel for the Plaintiff highlighted that in **Breslin**, the Supreme Court had ordered the release of the documents, notwithstanding that it was for the purpose of the Plaintiff pursuing a purely civil claim. Moreover, she argues, by reference to the decision of Barniville J (as he then was) in **Trafalgar Developments Ltd and Ors v Mazepin and Ors [2022] IEHC 167**, the court should not proceed on the basis of an assumption of an unfair trial. Counsel contends, in any event, that Ms Zhao's Monégasque lawyers will be able to defend her interests in the event that "*something happens which shouldn't happen*."

Discussion

29. Some assistance can be obtained from each of the authorities referred to above and discussed in the parties' written and oral submissions. None, however, address a situation of the type at issue here, and therefore none are determinative.

30. Although the Plaintiff understandably focuses on the likely relevance of the documents to any criminal investigation in Monaco, relevance is not the key determinant of whether leave should be given for the use of documents disclosed in proceedings but not used in court outside those proceedings. Rather, it appears *per* **Breslin**, that the overriding considerations are whether consent to furnishing the documents is consistent with the "due administration of justice" or would unduly prejudice the party affected by the order sought. This is so whether or not one proceeds on the assumption that there is an implied undertaking that documents produced in proceedings would not be used for any purpose other than those proceedings.

31. Where the documents are requested on foot of a court order made in this jurisdiction, no difficulty is likely to arise in determining whether the provision of the documents sought serves the due administration of justice. Where requested by a court in another jurisdiction, however, somewhat different considerations arise. In my view, the conditions identified by Hogan J in **Cornec v Morrice** as requiring to be satisfied to grant a request for assistance by way of letters rogatory reflect the principles applicable to a request to use documents submitted in evidence before an Irish court in legal proceedings in a different jurisdiction. As noted by Hogan J, in the interests of judicial comity, an Irish court should, where possible, seek to assist courts in other jurisdictions, and, as made clear by the majority in **Breslin**, where requested by a foreign court, the courts here should assume that the documents are necessary absent evidence that their provision will lead to a fundamental injustice.

32. But it is also clear from **Cornec** and the dissenting judgment of Hardiman J in **Breslin** (applying the principles identified by the majority) that the burden of establishing that it is appropriate for an Irish court to provide assistance in an application such as this rests with the party seeking to use the documents. In particular, the onus rests with the applicant for leave to satisfy the court that there is no risk of prejudice to any party by the provision of the documents, or that the provision of the documents won't be oppressive or undermine any entitlement to claim privilege. In **Breslin**, the majority was satisfied in this regard, *inter alia*, by the fact that the documents at issue, the books of evidence, had been ordered to be produced by the Northern Irish court. For Hardiman J, even that was not sufficient in the absence of any explanation of the use to which it was intended to put the documents once they were produced in the Northern

Irish proceedings. As he put it, "*the plaintiffs' case was so minimally and vaguely presented as to make rebuttal, or the demonstration of prejudice, very difficult.*"

33. **Breslin** does not suggest that the burden on a moving party is a particularly onerous one, but it is nonetheless a burden which must be discharged. It seems to me that the Plaintiff's application in this case suffers from the same infirmities as Hardiman J identified with the application in **Breslin**. And crucially, there is no order from a Monégasque court or even a request from Monégasque authorities, which might enable the court to assume that any risk of prejudice will be addressed by the application of appropriate procedures in that jurisdiction. The Plaintiff's Monégasque lawyers own request acknowledges the uncertainty regarding the use which might be made of the Documents once furnished to the Investigating Judge.

34. It seems to me that a court should, in all cases, show some caution when faced with an application that would involve providing prosecuting authorities with evidence provided by a person for the purpose of assisting with a criminal investigation into that person. That caution must apply with greater force where the evidence is given in court proceedings in this jurisdiction but is to be provided for the purpose of a criminal investigation in an entirely different jurisdiction. Although the Plaintiff may be correct that this court should not proceed on the assumption of an unfair trial or unfair procedures in another jurisdiction, where the request is being made by the Plaintiff's Monégasque lawyers, without any official imprimatur, this court cannot, on the evidence before it, satisfy itself that the provision of this evidence might not unfairly prejudice the ninth and tenth Defendants or Ms Zhao in defence of any criminal proceedings in Monaco, or the related civil claims being pursued by the Plaintiff.

35. I accept the Plaintiff's proposition that a court order from a foreign jurisdiction is not a prerequisite to obtaining an order of the type sought here, but I think the suggestion that it is a logical impossibility that the Monaco courts or authorities could request the Documents is exaggerated. There is no barrier to the Monégasque authorities being told of the *existence* of the Documents and the context in which they were put in evidence. If a request was forthcoming from those courts or authorities, which set out the intended use of the Documents, then an Irish court would no doubt look at that request in a different light than the request made here.

36. I also agree that the Plaintiff's application shares some of the features with the application in **Skeene**. For instance, some of the Documents were produced voluntarily – the affidavit and exhibits opposing the injunction application– and, therefore, it could be said that the ninth and tenth Defendants took the risk that they may be deployed elsewhere. But, in truth, it is the differences which are decisive. Although the Documents may be relevant to the underlying criminal investigation, their relevance is less apparent than in **Skeene,** where the request was made by the SFO, the party conducting the investigation. That, of course, is the second significant difference. In **Skeene**, the request came from the SFO, the party with the responsibility to conduct investigations. Here, it is merely suggested that the intent is to provide the Documents to the investigating authority because it is believed that they are likely to be relevant to the ongoing investigation. Finally, and most significantly, there is no basis upon which the court could be satisfied that there is any limitation on the manner in which the Documents are used once provided to the Monégasque authorities, whereas in **Skeene,** the likely use to which the documents sought might be put seems to have been well understood.

37. In the circumstances, the Plaintiff has failed to discharge the onus of establishing that the provision of the Documents is in accordance with the due administration of justice or that the ninth and tenth Defendants, or Ms Zhao, would not be unfairly prejudiced if the Documents were made available. I, therefore, refuse the application sought for leave to use the affidavits or exhibits sworn in these proceedings. In circumstances where the Plaintiff has failed to discharge the burden in relation to any of the Documents, it is not necessary for me to consider what different considerations might arise in respect of the affidavit which was sworn in opposition to the injunction application, and therefore voluntarily, and the affidavits sworn in order to comply with the Disclosure Order, and therefore under the compulsion of a court order.

38. My provisional view is that the ninth and tenth Defendants, having succeeded in resisting this application, are entitled to an order for their costs. However, it seems to me that it would be appropriate to place a stay on the execution of any such order pending the determination of these proceedings. I will list these proceedings for mention before me at 10.30 am on 12 December 2023 for the purpose of making final orders.