

THE HIGH COURT

COMMERCIAL

[2015 No. 7941 P.]

BETWEEN

XL FUELS GROUP LIMITED (IN RECEIVERSHIP) AND

KIERAN WALLACE

PLAINTIFFS

AND

MICHAEL CURRAN AND MAUREEN CURRAN AND

EDMUND CAHILL PRACTISING UNDER THE STYLE AND TITLE OF EDMUND CAHILL & CO.

DEFENDANTS

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 11th day of November, 2015

1. This is an application for an order pursuant to O. 40, r. 1 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the court ordering the attendance of the first named defendant for cross examination by the plaintiffs on evidence given by the first named defendant, in affidavits sworn on 16th October, 2015, and 28th October, 2015. A motion for interlocutory injunction brought by the plaintiffs against the defendants has been fixed for hearing on 18th November, and the plaintiffs seek the cross examination of the first named defendant in connection with that hearing. In the interlocutory motion to be heard on 18th November, the second named plaintiff, as receiver of the first named plaintiff, seeks, *inter alia*, orders requiring the defendants to make a sworn statement of affairs and to deliver books and records of the company and the return of stock and fuel and other fixed assets including machinery, equipment and vehicles which he claims have been wrongfully removed from the first named plaintiff's premises or control. The receiver alleges that at the time he commenced the receivership, the first named defendant procured the setting up of a "*phoenix company*" which took over the assets and business of the company under the guise of a new legal entity.

2. The first defendant for his part claims that he has delivered up to the receiver all the relevant books and records of the company and has not misappropriated any assets of the company. Moreover, his solicitors wrote to the plaintiffs' solicitors offering to submit to the orders sought in the notice of motion for interlocutory injunction which is due to be heard on 18th November. In those circumstances, the first defendant claims that there is no necessity for an order for cross examination.

3. In applications for interlocutory injunction commenced by notice of motion and grounded on affidavit evidence, a notice to cross examine may only be served with the leave of the court. While the judge has a discretion, the general rule is that leave can only be granted if there is a conflict of facts upon the affidavits that it is necessary to resolve in order to determine the proceedings. (See *Bula Limited v. Crowley (No. 4)* [2003] 2 I.R. 430 and *Governor and Company of Bank of Ireland and Kavanagh v. O'Donnell* [2015] IEHC 149)

4. In circumstances where the first defendant is prepared to consent to interlocutory orders in the terms sought in the notice of motion, the question arises as to whether it is necessary to resolve the conflicts of facts on the affidavits in order to come to a decision on the motion. The plaintiffs argue that in view of the serious nature of the allegations made by the receiver against the first named defendant and in view of the first named defendant's failure to cooperate in the receivership process and alleged obstruction that it will be necessary for the court to make a particularly focused order specifying precisely what steps must be taken by the first named defendant to comply with his obligations under the Companies Acts.

5. The first defendant argues that if the court makes interlocutory injunctive orders in the terms sought by the plaintiffs and to which the first defendant will submit, that he will then be subject to serious consequences if he fails to comply with such orders.

6. Allegations of a most serious kind have been made by the receiver against the first defendant. These allegations go way beyond a complaint that he has failed to deliver up the books and records of the first named plaintiff but go so far as to allege misappropriation of company property, obstruction of the receiver and his agents in carrying out their duties, including attempts to intimidate them, orchestrating acts of vandalism and destruction to company property and there is also an allegation that in related summary proceedings brought by a bank against the first defendant that he falsely imprisoned a summons server.

7. What I have to decide is whether or not this case, having regard to all these issues, falls outside the normal rule. If the first defendant is willing to submit to orders sought by the plaintiffs in the motion for interlocutory relief are there any circumstances in which it can be necessary for him to be cross examined on his affidavit filed in response to such a motion?

8. I think the answer must be yes insofar as the court has a discretion. The motion for interlocutory relief which is shortly to be heard by the court is a step being taken by the receiver to preserve and collect assets of the first named plaintiff so that he can deal with them in the receivership. In the face of serious allegations made about misappropriation of company assets and their use in a "*phoenix company*" which was set up simultaneously with the commencement of the receivership, it is important that the court should resolve the conflicts of fact between the receiver and the first defendant as soon as possible and preferably at the time of the hearing of the interlocutory motion.

9. I accept the argument made on behalf of the receiver that it may be necessary to incorporate into the terms of any interlocutory order specified and targeted measures aimed at preserving the company's assets or preventing their further dissipation.

10. I accept that it would be unfair to the first defendant to permit him to be cross examined and for a conclusion to be reached on the issues in conflict between him and the receiver in the absence of the receiver also being cross examined. I have been informed that the receiver will make himself available for cross examination, if required to do so. On the information presently available to the court, I think there is a real and substantial danger that company property could be lost to the benefit of the receivership if these issues are not decided as quickly as possible. While the first defendant has indicated that he is prepared to submit to interlocutory relief as sought by the plaintiffs, he has not admitted any allegations made by the receiver and it seems to me that there are a number of serious issues which need to be addressed without delay. The orderly and proper conduct of the receivership will be assisted if cross examination of the first defendant takes place. It will also assist the court in determining what specific orders should be made on the motion for interlocutory relief (whether on consent or otherwise).

11. In the particular circumstances of this case, therefore, I will exercise my discretion to permit cross examination of the first named defendant and I direct that he attends for cross examination on 18th November, 2015. I also direct that the second named plaintiff (the receiver) attend for cross examination on that date.