

BETWEEN

THE GOVERNOR AND COMPANY OF BANK OF IRELAND

PLAINTIFF

AND

GERRY WARD

RESPONDENT

JUDGMENT of Mr. Justice MacGrath delivered on the 9th day of April, 2019.

1. On the 8th of February, 2019, this Court delivered a judgment in which it determined that the affidavits of Mr. Buckley and Mr. Enright should be admitted in evidence, subject to any entitlement of Mr. Ward, the defendant to cross-examine those deponents.

2. The court also determined that, in the circumstances, leave of the court is required to cross-examine these deponents on the contents of their affidavits. The application before the court was therefore treated as an application for the extension of time within which to serve notice to cross-examine. It is clear from this court's previous ruling on the 8th February, 2019 that it did not depart from the directions given by McDermott J. on 12th March, 2018 that Mr. Ward be required to place on affidavit the reasons why he seeks to have these deponents examined. At that stage, this court did not have benefit of sight of the order of McDermott J. When this matter came before the court on the 26th March, 2019, counsel for the plaintiff produced that order made on the 12th March, 2018. It is clear therefrom that it was directed that Mr. Ward should file a further affidavit setting out the basis upon which he seeks the opportunity to cross-examine Mr. Buckley and Ms. Enright. In the judgment of this Court delivered on the 8th February, 2019, the court saw no good reason to depart from those directions. However, time was extended within which to make the appropriate application.

3. Mr. Ward has filed two further affidavits. The plaintiff has not sought to adduce affidavit evidence in reply but relies upon the legal submissions of Mr. Wade B.L.

4. In his affidavit on the 6th March, 2019, Mr. Ward reiterates that O.40 of the Rules of the Superior Courts is categorical in relation to the rules governing affidavits. As I understand it, it is his submission that this Court has no discretion in relation to such an application and it must direct that the deponents be produced for cross-examination. Mr. Ward refers to O.40, r.1, O.40, r.31, O.40, r.32 and O.37, r. 2 in this regard. In essence, Mr. Ward's affidavit of the 6th March, 2019 repeats the legal arguments made by him to the court on a previous occasion as to what he considers to be his absolute entitlement to an order directing the deponents to be presented for cross-examination. In the event of their failure to attend, he submits that the affidavits sworn by Mr. Buckley and Ms. Enright should be excluded.

5. In this regard, at para. 2(c) of his affidavit Mr. Ward avers that the interests of justice dictate that pursuant to a strict application of the law under O.40, r. 32, the court's hands are tied and that the deponents should be compelled to attend for cross-examination. That rule provides:-

"The party to whom such notice as is mentioned in r.31, is given, shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined".

However, O.40, r.32 must be read in the context of the rule in its entirety and as I have previously indicated, on any analysis and in any event, the time has expired for the service of a notice of cross-examination as of right. Leave of the court is required. Nothing in the affidavit of Mr. Ward sworn on the 6th March, 2019 or his more recent affidavit sworn on the 21st March, 2019, alters the position. The latter affidavit essentially is a repetition of the previous affidavit but in addition he alleges that failure on the part of the bank to submit a replying affidavit is an act of contempt of court.

6. I wish to make it clear that the court afforded the plaintiff liberty to file a replying affidavit. The fact that it has chosen not to do so is a matter for the plaintiff. It is not an act of contempt of court. However, as with any failure to, or decision not to reply, if facts are left uncontested, then the court must deal with the facts as presented on the basis of the evidence thus far adduced.

Test for cross-examination of a witness on affidavit

7. Mr. Wade B.L. has referred the court to the decision of McGovern J. in *Irish Bank Resolution Corporation Limited (in special liquidation) and ors v. Sean Quinn and ors* [2015] IEHC 134, where he stated at para. 10 of his judgment:-

"The test for cross-examination of a witness on an affidavit is set out in the Director of Corporate Enforcement v. Seymour [2006] IEHC 369. In that case O'Donovan J. stated at page 5:

"In my view, it is axiomatic that, when, in the course of applications to the court which are required to be heard and determined on affidavit, as is the situation in this case, it becomes apparent from the affidavit sworn in those proceedings that there are material conflicts of fact between the deponents of those affidavits, the court must, if requested to do so, consider whether or not to direct a plenary hearing of the proceedings or that one or more of the deponents should be cross-examined on his or her affidavit. This is so because it is impossible for a judge to resolve a material conflict of fact disclosed in affidavit. However, while it seems to me, that where it is debatable as to whether or not the cross-examination of a deponent on his or her affidavit is either necessary or desirable, the court should tend towards permitting the cross-examination, at the end of the day it is within the discretion of the court as to whether such a cross-examination should be directed and that discretion should only be exercised in favour of such cross-examination if the court considers that it is necessary for the purpose of disposing of the issues which the court has to determine. That appears to me to be the import of a statement of Keane C.J. in the course of an unreported judgment of the Supreme Court delivered on the 15th December, 2003, in a case of Holland v. the Information Commissioner and represents the current jurisprudence in that behalf in this country."

That case concerned an *ex parte* application and McGovern J. held that there were no grounds for giving the applicants leave to cross-examine.

8. Mr. Wade B.L. also referred the court to an *ex-tempore* ruling of Irvine J. in the Court of Appeal on 1st February, 2019. The decision concerned an application by the defendant for an extension of time within which to appeal the decision of this Court as to its jurisdiction to hear the plaintiff's application. Mr. Ward sought leave to cross-examine Ms. McGovern, of Messrs McDowell Purcell solicitors for the plaintiff on the contents of an affidavit which she had sworn in proceedings before the Court of Appeal on the 16th January, 2019. Mr. Ward alleged that Messrs McDowell Purcell solicitors presented the draft order to the registrar containing deliberate clerical mistakes in an unlawful attempt to interfere with the process of justice and thereby deny him access to the Court of Appeal. This was replied to by Ms. McGovern who averred that neither she nor other employees of McDowell Purcell had any input into the drawing of the court order.

9. On her consideration of the rules of court relevant to such application, O.40, r.31, Irvine J. observed that it had no application because it was clear that it applies to proceedings which are to be determined in their entirety on affidavit. In such circumstances, if a party wishes to contest what is sworn by the other party he or she may demand that the deponent be produced at the hearing. Referring, however, to O.40, r.1 upon which reliance was also placed, Irvine J. stated that the question to be addressed concerns the circumstances in which the rule may be invoked. In *Bula v. Crowley (No. 4)* [2003] 2 I.R. 430 Denham J. emphasised that the judge hearing an application had a discretion in relation to whether leave of the court should be granted to cross-examine a deponent on the contents of an affidavit. Irvine J stated:-

"However it is made perfectly clear in that decision and many others to which I can also refer, that leave will only be granted and it is only permissible if there is a conflict of fact on the affidavits that it is necessary to resolve in order to determine the application"

Irvine J. also referred to the decision of O'Donovan J. in *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369, to the effect that the court's discretion should be exercised if the court considers it necessary for the purpose of disposing of the issues required to be determined, such as where it becomes apparent from the affidavits that there are material conflicts of fact between the deponents.

10. Irvine J. was not satisfied that there were conflicting facts regarding the issues which the court had to determine and refused the application. At para. 18 she stated:-

"There are no conflicting affidavits concerning the drawing of this order. Mr. Ward has decided without providing any basis for his belief to swear that Ms. McGovern has committed perjury and interfered with the court order. His stated belief was supported by absolutely nothing and therefore it would be completely inappropriate to accede to his application that he be permitted to cross-examine Ms. McGovern on her affidavit. That proposed cross-examination is simply not necessary to determine the application for the extension of time for the reasons already stated and explained to Mr. Ward in the course of the hearing to date."

11. The court also refused Mr. Ward's application to strike out Ms. McGovern's affidavit as being fraudulent on the grounds that her place of abode was stated to be the offices of McDowell Purcell. The court accepted that the affidavit was in compliance with O.40 and reiterated that there had been many cases decided by the Court of Appeal concerning the requirements of deponents to identify their abode or place of business. While O.40 r.9 stipulates that the affidavit must state the true place of abode of a deponent, this can be the business address of that deponent.

Decision

12. It is clear that in the exercise of its discretion in an application to permit cross examination on the contents of an affidavit, the court must be satisfied that there is a conflict of fact or evidence and that the resolution of that conflict is necessary to dispose of the issues which the court has to determine. Apart from repeating the wording of the rules of court and his interpretation thereof, no particular fact or piece of evidence sworn to by the deponents Mr. Buckley and Ms. Enright is contested.

13. In an exchange before the court, Mr. Ward confirmed that substantive issues remained which relate to the true place of abode of the deponents and what were described as other conflicts or differences which he would address in cross-examination but which have not been raised or intimated in the affidavits before the court.

14. In the circumstances I must conclude that the requirements for the exercise by this court of its discretion pursuant to the provisions of O.40 have not been satisfied by Mr. Ward on this application. It has not been displayed by Mr. Ward, on whom the onus of proof lies, that cross-examination of the deponents relates to, or concerns, any conflict of fact which is necessary for disposing of the issues which the court has to determine. No such material conflicts of fact are apparent from the affidavits which have been submitted.

15. I must therefore refuse the application.