

THE HIGH COURT

[1987 No. 1120 SP]

BETWEEN

JOHN ROONEY

PLAINTIFF

AND

THE MINISTER FOR AGRICULTURE AND FOOD, THE MINISTER FOR FINANCE, AN TAOISEACH, IRELAND, THE ATTORNEY GENERAL, DONAL MCDAID, PATRICK DELANEY, THE IRISH FARMERS ASSOCIATION, ERAD (THE MANAGEMENT BOARD FOR DISEASE IRRADIATION), ALAN GILLIS, PATRICK DELANEY, DENIS COFFEY, TERENCE O'CONNOR, DENNIS G. HICKEY, JAMES NOONAN AND JOHN MALONE — AS BOARD MEMBERS OF ERAD (THE MANAGEMENT BOARD FOR DISEASE IRRADIATION), THE MINISTER FOR THE PUBLIC SERVICE AND THE OMBUDSMAN

DEFENDENTS

THE HIGH COURT

[2015 No. 6293 P]

BETWEEN

JOHN ROONEY

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Eagar delivered on the 16th day of December, 2016

1. In the course of these proceedings a preliminary issue was raised by the plaintiff in which he requested the Court to rule on his application to cross examine Mr. Donough McGuinness in relation to the proceedings [1987 No. 1120 S.P.] and Rachel Ward [2015 No. 6293 P.].

2. Mr. McGuinness swore an affidavit Chief State Solicitor's office and was on record for the first to fifth and seventeenth named defendants. He refers to the judgment of the Supreme Court dated 28th January, 2016 in respect of the two appeals by the plaintiff and refers to the order of the Supreme Court dated 5th April, 2016 and states that the defendants now pursue the present application which is an application for an order dismissing the proceedings. He identifies the history of the case before the Supreme Court and quotes from the decision of the Supreme Court and at para. 10 he said:—

"It will be seen from the transcript [of the Supreme Court] that in finalising the terms of its order the Supreme Court made it clear there was no bar to these defendants bringing an application to have the present proceedings dismissed on the basis that the core legal issue in the proceedings had already been determined by the Supreme Court in deciding the special case back in 1991."

3. On 7th October, 2016 Mr. Rooney applied to this Court for:—

1. an order granting him leave to serve upon Donough McGuinness of the Office of the Chief State Solicitor, a notice to cross examine him on the contents of his affidavit filed on 28th June, 2016 in the action herein;
2. such further or other order as meets the requirements of justice; and,
3. costs.

4. This notice of motion was grounded on the affidavit of John Rooney filed on 7th October, 2016 and he states he seeks liberty from the Court to serve a notice to cross examine Donough McGuinness and at para. 3 he says,

"Upon any fair reading of the said affidavit of Donough McGuinness filed 28th June, 2016 it appears that Donough McGuinness (on behalf of the first to fifth and seventeenth named defendants [herein "the State Defendants"]) is making the claim that all substantial matters in the proceedings have been dealt with in a manner respectful of Bunreacht na hÉireann as of 5th April, 2016 such that this Court is obliged to accede to state defendants' motion seeking an order dismissing the proceedings herein."

5. At para. 4 he says that the statement of claim captures the core domestic (domestic meaning grounded in the law of the State) issue in controversy between the parties and he refers to the *ad hoc* non-statutory scheme of bovine tuberculosis reactor grants is repugnant to the provisions of Article 15.2.1 of Bunreacht na hÉireann and further that the *ad hoc* scheme is abjectly disrespectful of the Disease of Animals Act, 1966.

6. At para. 5 he said,

"it is proper, fair and just by Bunreacht na hÉireann that this Court affords me the opportunity to cross examine Donough McGuinness on the assertions contained within his affidavit that the core domestic issue in these proceedings has been determined in a manner respectful of Bunreacht na hÉireann as on 5th April, 2016." (the Court's emphasis)

7. At para. 6 he says that he believes it fair, proper and just by the Convention for the Protection of Human Rights and Fundamental Freedoms that this Court affords him the opportunity to cross examine Donough McGuinness on the assertions contained within his said affidavit that the core domestic issue in these herein proceedings has been determined in a manner respectful of Bunreacht na hÉireann on 5th April, 2016.

8. In relation to the proceedings *John Rooney v. Ireland and Attorney General* [2015 No. 6293 P.], Rachel Ward swore an affidavit on 11th November, 2015. In that affidavit she sets out the history of the numbers of proceedings in relation to the issues which have been issued by the plaintiff and states that it is the defendants' position they should not be forced to defend proceedings in respect of a claim which has been finally and conclusively determined by the Court in previous proceedings and quotes from a number of those proceedings. She identifies herself as a solicitor of the Chief State Solicitor's Office and said that she acts on behalf of the defendants.

9. Also in relation to the proceedings *John Rooney v. Ireland and Attorney General* [2015 No. 6293 P.], Rachel Ward swore a further affidavit on 17th February, 2016. She says that this affidavit is limited to addressing the claim made by the plaintiff in para. 4 of his replying affidavit wherein he claims,

"that I have falsely and wrongly insinuated that the Superior Courts in previous proceedings rejected the plaintiff's claim that the T.B. Scheme offended and/or was repugnant to Article 15.2.1 of the Constitution."

She continues at para. 4,

"As recently as 28th January, 2016 in separate proceedings brought by the plaintiff in which the plaintiff also sought to impugn the legality and constitutionality of the T.B. Scheme, the Supreme Court, in dismissing the separate appeals brought by the plaintiff in the separate proceedings in question specifically address the issue of whether the plaintiff had previously sought to impugn the T.B. Scheme on the basis of relying on Article 15.2.1 of the Constitution."

10. She refers to the Supreme Court judgment of 28th January, 2016. She then states that from a perusal of the judgment, the issue of the plaintiff raising Article 15.2 had effectively been determined by the High Court and the Supreme Court in previous proceedings issued by the plaintiff and was not now open for the plaintiff to seek to relitigate the issue for the reasons stated in the judgment of O'Donnell J.

11. On 7th October, 2016 the plaintiff, Mr. Rooney, by way of motion sought:—

1. an order granting leave to serve Rachel Ward of the Office of the Chief State Solicitor, a notice to cross examine her on the contents of her affidavits filed on 11th November, 2015 and 17th February, 2016;
2. such further or other order as meets the requirements of justice; and,
3. costs.

12. Mr. Rooney backs his application by way of an affidavit filed 7th October, 2016. He says, at para. 3:—

"Upon any fair reading of the said affidavits of Rachel Ward filed in the action herein, it appears Rachel Ward on behalf of the defendants is making the claim that all substantial matters in these proceedings herein, proceedings and other proceedings (the 1987, 1995 and 2012 proceedings issued by the plaintiff) have been dealt with as of 17th February, 2016 in a manner properly respectful of Bunreacht na hÉireann such that this Honourable Court is obliged to accede to the State's defendants' motion seeking an order dismissing the proceedings herein."

At para. 5 he says:—

"I believe it is proper, fair and just by Bunreacht na hÉireann that this Honourable Court affords me the opportunity to cross examine Rachel Ward of the assertions contained within her said affidavits that the core issues in '1987, 1995 and 2012 proceedings were issued by the plaintiff' have been determined in a manner properly respectful of Bunreacht na hÉireann as of 17th February, 2016."

13. Mr. Sinfeigh on behalf of the defendants states that the sole purpose of cross examination is to cross examine on facts which are in dispute. He says that these are not matters of fact in dispute but are rather legal arguments and interpretations of judgments of the Superior Courts. He submitted that it was not appropriate for this Court to grant orders to cross examine the two deponents.

14. Mr. Rooney states that the Irish Constitution, Article 47 of the Charter of Fundamental Rights and Article 6 of the Charter of Fundamental Freedoms entitles him to cross examine the deponents.

15. In *Delaney & McGrath on "Civil procedure in the Superior Courts"* (3rd Ed.) the learned authors say,

"Where a procedure by way of summary summons or special summons is adopted or in the case of proceedings commenced by plenary summons a trial on affidavit is directed, a party who wishes to cross examine a deponent, can serve a notice to cross examine on the party who has filed that affidavit requiring the production for cross examination at the trial, and unless the deponent has produced for cross examination his affidavit cannot be used as evidence except by leave of the Court."

The authors quote O. 37, r. 2 (dealing with motions for liberty to enter final judgment in proceedings commenced by summary summons), O. 28, r. 3 (dealing with proceedings commenced by special summons) and O. 40, r. 31 (dealing with the trial of proceedings on affidavit). The leave of the court to serve such notice is not required. However, on interlocutory applications and proceedings commenced by petition or originating notice of motion (including judicial review proceedings) a notice to cross examine may only be served with the leave of the Court. This was emphasised by Denham J. in *Limited v. Crowley (No. 4)* [2003] 2 I.R. 430. Denham J. giving the judgment of the Court stated that:—

"Instead, the court, exercising its judicial discretion on the application, may also exercise a judicial discretion as to whether there may be cross-examination. In the exercise of that judicial discretion, it was quite appropriate for the court to have regard to the fact that there had been, by consent, a hearing before the President of the High Court on the 20th March, 2002, for directions as to the application and there had been no application there for cross-examination"

She continued:—

"I am satisfied that the issue of cross-examination in an application under s. 316 is a matter for the judicial discretion of

the court in an application or motion. It is not a right as is expressed for trials on affidavit. Consequently, the court was correct to consider that it had a discretion and then to exercise judicial discretion."

16. In the case of the *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369 O'Donovan J. in relation to an application under O. 75B, r 7 of the Rules of the Superior Courts that set out some of the issues relating to cross examination of a witness who gives evidence by way of affidavit:

*"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 affidavits 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 affidavits. 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 or not such a cross examination should be directed and that discretion should only be exercised in favour of such a 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 day of December, 2003, in a case of *Holland v. The Information Commissioner* and represents the current jurisprudence in that behalf in this country.*

[...]

... discretion should only be exercised in favour of such a cross examination if the court considers that it is necessary for the purpose of disposing of the issues which the court has to determine."

He further stated:—

"The function of cross examination is to cast doubt upon the veracity, accuracy or reliability of evidence given by a witness"

17. The specific grounds which Mr. Rooney seeks to cross examine the two witnesses appears to me to be very clearly issues relating to the interpretation of the Constitution and do not give rise to material conflicts of fact but rather of law.

18. It is also clear that a trial judge has a discretion in relation to such an application. In general, leave will only be granted if there is a conflict of fact on the affidavits that is necessary to resolve in order to determine the proceedings. The Court may also have regard, in deciding to grant leave, to any delay in bringing an application to obtain leave.

19. I am satisfied from the circumstances in this case where the application to cross examine relates to matters which are not disputed matters of fact but rather are issues of law and issues of interpretation of judgments of the Superior Courts that the application to cross examine Mr. McGuinness and Ms. Ward should be refused by this Court exercising its discretion. The Court takes notice of the circumstances of the proceedings which commenced in 1987 and which have had two outings to date in the Supreme Court and a number of outings in the High Court on the same basis.