

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

GERRY WARD

DEFENDANT

JUDGMENT of Mr. Justice MacGrath delivered on the 8th day of February, 2019.

1. This is the plaintiff's application for summary judgment against the defendant in respect of the sum of €776,024.34 alleged to be outstanding on foot of two loan agreement dated 13th December, 2006 and 15th December, 2006. The summary summons was issued on 21st March, 2017.

2. On 23rd May, 2017, Mr. Ward entered what is described as a conditional appearance to the summons. It is stated therein that the defendant did not submit or accede to the court's jurisdiction to proceed as there were no grounds for the claim and no lawful cause of action. It is stated that on 8th March, 2017 he made a lawful payment to the plaintiff which was accepted and therefore the alleged debt has been fully discharged by virtue of the provisions of the Bills of Exchange Act, 1882. Second, it is stated that the defendant wrote to the solicitor for the plaintiff on 14th March, 2017 informing her that the matter had been privately settled with Mr. Andrew Keating of the Bank of Ireland. Third, it is stated that the plaintiff was unlawfully and criminally withholding from the defendant his right to inspect the alleged original mortgage documents contrary to the Land and Conveyancing Law Reform Act, 2009. Finally, he stated that the plaintiff and the court had failed, refused or neglected to address what is described as "*notice of writ of error (coram nobis)*" served on the plaintiff and on the court on 29th June, 2017.

3. A notice of motion was issued by the plaintiff returnable for 25th July, 2017 seeking liberty to enter final judgment against the defendant. The application was grounded on the affidavit of Mr. Seán Buckley, a manager in the arrears support unit of the plaintiff bank, sworn on 14th June, 2017.

4. Ms. Jacinta Enright, legal case manager and employee in the arrears support unit of the plaintiff bank, has also sworn an affidavit on 14th June, 2017. She avers that the defendant's loan accounts were at all material times maintained by the plaintiff in electronic format on its computerised mortgage account system, which constituted the plaintiff's bankers' book for the purpose of the Bankers' Book Evidence Acts. She confirmed that all entries made on the mortgage accounting system regarding the defendant's liabilities were made in the usual and ordinary course of business of the plaintiff. She also confirmed that the mortgage accounting system was and remains under the control of the plaintiff.

5. The defendant has brought four motions within these proceedings. In his first motion, dated 19th July, 2017, application is made to dismiss the case on jurisdictional grounds. It is claimed that the jurisdiction of the court has not been established nor has the jurisdiction of the Master been established. He further seeks an order that the matter be referred to the Director of Public Prosecutions/Garda Fraud Squad for criminal investigation, and for "*the Financial Instrument/Promissory note/lawful payment proffered to the said alleged Plaintiff under the said Bills of Exchange Act 1882*". In an affidavit grounding this application, sworn on 17th July, 2017, Mr. Ward makes a number of claims. Specifically, he makes the case that the plaintiff is acting unlawfully and criminally in withholding from inspection the original mortgage documents. He claims that the plaintiff has been guilty of fraudulent activity. Mr. Ward argues that there are no grounds for the claim and that it should be dismissed.

6. Ms. McGovern, a solicitor at McDowell Purcell Solicitors, who represent the plaintiff, avers that when this motion came before the Master on 24th October, 2017, there was no appearance by or on behalf of Mr. Ward and the motion was struck out.

7. The next application was by way of notice of motion dated 3rd December, 2017 and in which Mr. Ward sought the determination of certain points of law, including the applicability of the Bills of Exchange Act, 1882. It is his contention that he made a lawful payment to the plaintiff for value received in accordance with the provisions of the Bills of Exchange Act, 1882 and that this was accepted by the bank. This notice of motion is grounded on an affidavit sworn by Mr. Ward on 4th December, 2017. He complains that to date, the courts in these proceedings have permitted what he describes as unlawful, illegal and fraudulent affidavits to be admitted into evidence.

8. At para. 1(b) of the motion of 3rd December, 2017, it is claimed that the affidavits of the plaintiff in these proceedings are unlawful and invalid. It is alleged by Mr. Ward that the affidavits are fraudulent and amount to perjury because they do not comply with the provisions O. 40, rr. 1 to 33 of the Rules of the Superior Courts, 1986 and in particular r. 9 which provides:-

"Every affidavit shall state the description and true place of abode of the deponent..."

In addition, he relies on O. 40, r. 6, which provides:-

"Every commissioner to administer oaths shall express the time when and the place where he shall take any affidavit, or the acknowledgement of any deed, or recognisance, otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled without the leave of the court..."

It is claimed that the affidavits sworn by the deponents on behalf of the plaintiff do not specifically and expressly refer to their true place of abode. Mr. Ward emphasises the word "*true*" in his submissions. Further he maintains that the time of swearing is not stated in the affidavits. He seeks liberty to have an issue tried as to whether the affidavits should be allowed in evidence. It is claimed that until such time as these points of law have been fully addressed and tried, the Court has no jurisdiction to proceed and Mr. Ward states that this Court cannot and will not be recognised as a lawfully constituted court.

9. Mr. Seán Buckley, manager in the arrears support unit in the plaintiff bank, in an affidavit sworn on 12th January, 2018, exhibits a document entitled "*Lawful Notice / Private and Confidential*" dated 7th March, 2017 sent by the defendant, marked for the immediate attention of Andrew Keating, Group Chief Financial Officer, Bank of Ireland Head Office, enclosing a promissory note which outlined the

manner in which Mr. Ward proposed to discharge the sums due. Nothing which had been put before the Court at this stage suggests that that document, or the terms of any proposed settlement, were accepted by the plaintiff.

10. The matter came before the Master of the High Court. No order of the Master has been made available and the court has been told that there is a dispute as to whether the application was transferred into the High Court list.

11. A further motion was issued by Mr. Ward on 11th January, 2018, seeking a determination of certain points of law, specifically referring to two matters:-

(i) That the affidavits are not lawful and are inadmissible.

(ii) That the Master of the High Court had given assurances on the hearing of the application on 14th November, 2017 that he would issue a written court order transferring the proceedings to the High Court Monday list of 5th February, 2018. In the motion, it is maintained that the Master's Order has not been produced and therefore the defendant had been denied his right to appeal.

In this motion, Mr. Ward also seeks to have the plaintiff and legal counsel held in contempt of court for not addressing the defendant's conditional appearance as directed by the Master of the High Court at the hearing on 25th July, 2017. He further seeks a direction from the Court that until these points of law have been fully addressed and tried, this Court has no jurisdiction to proceed and cannot be recognised as a lawfully constituted court. An affidavit was sworn by Mr. Ward on 10th January, 2018 confirming the factual basis upon which this application is made.

12. Finally, a further notice of motion dated 9th February, 2018, was issued by Mr. Ward in which he seeks orders pursuant to O. 40, r. 1 and/or r. 31 of the Rules of the Superior Courts that the solicitors for the plaintiff produce Mr. Buckley and Ms. Enright for cross-examination. In the alternative, an order is sought that should the presiding judge refuse to make an order for cross-examination, the presiding judge:-

"...is to demonstrate and show via said Order the reason/logic behind said refusal, and to quote verbatim the LAW that said Judge has relied upon for said refusal to apply the letter of the LAW pursuant to SAID Order 40 Rule(s) 1 and or 31 of the Rules of the Superior Court."

This application is grounded on the affidavit of Mr. Ward sworn on 9th February, 2018. He avers that Article 15.2.1° of the Constitution provides that the sole and exclusive power of making laws for the State is vested in the Oireachtas, and that no other legislative authority has the power to make laws. He submits that the legislative power of the State may not be delegated to solicitors or to the judiciary. He refers to Article 15.4.2° of the Constitution which provides:-

"Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid."

Mr. Ward seeks to cross-examine Mr. Buckley and Ms. Enright on the basis that they have allegedly committed perjury on affidavit and have fraudulently misled the court. At this stage, no particulars of fraud are provided beyond the allegation that the jurat of the affidavits sworn by the deponents were incorrectly completed.

13. For the sake of completeness, it is to be noted that Mr. Buckley has sworn a supplemental affidavit on 14th February, 2018, in which he exhibits entries in the bankers' book within the meaning of s. 9(2) of the Bankers' Book Evidence Act, 1879 and confirms that the books, at all material times, have been under the control of the plaintiff. He avers that at no time has the defendant engaged in any meaningful way with the bank regarding settlement of the claim. He confirms that the defendant had not entered into an agreement with the bank regarding the debt and that no payments had been made in respect of the subject loan accounts since 20th March, 2013. At the time of the swearing of this affidavit, the total sum due was €782,482.27. A further affidavit was sworn by Ms. Enright on 14th February, 2018, updating the particulars of the amounts due and confirming that the entries made on the mortgage account system regarding the defendant's liabilities were made in the usual and ordinary course of business of the plaintiff.

14. The court has been informed that on 12th March, 2018, McDermott J. adjourned the motion to cross-examine to the Non Jury list on Monday 18th June, 2018. I have been informed that the defendant was directed within three weeks to file a further affidavit setting out the basis on which he sought to cross-examine Mr. Buckley and Ms. Enright. A perfected order to this effect has not been produced.

15. This matter first came before this Court on 18th June, 2018 and on the hearing of the application, I concluded that this Court has jurisdiction to hear the various applications. I adjourned the motions and granted the plaintiff four weeks in which to deliver submissions on further issues and the plaintiff four days to reply to them. The submissions were subsequently filed by the defendant by way of an affidavit sworn on 18th July, 2018 (which at hearing on 30th November, 2018, I deemed and accepted as being not only affidavit evidence but also his legal submissions before the Court). The plaintiff delivered outline legal submissions on 20th July, 2018.

16. Further oral argument took place on 30th November, 2018.

17. I have considered the submissions of the parties, both oral and written, and have also considered the affidavits and exhibits in this case.

18. It appears to me that the fundamental objection of Mr. Ward to the Court's jurisdiction is his contention that such jurisdiction does not arise because of the improper swearing of affidavits by deponents by and on behalf of the plaintiff. In addition, he states that as there is no perfected order of the Master, he is not in a position to appeal the transfer of the case to this list.

19. It is submitted on behalf of the plaintiff that it brings its application for summary judgment pursuant to the jurisdiction conferred on the court by O. 37 of the Rules of the Superior Courts, and as such is entitled to rely on averments contained in affidavits, where the deponents are in a position to swear positively to the facts relevant to establish the bank's claim.

20. The plaintiff relies on the decision of Supreme Court in *Ulster Bank v. O'Brien* [2015] 2 I.R. 656 where in summary proceedings the defendants argued that the plaintiff had failed to comply with the provisions of the Bankers' Books Evidence Act, 1879 and the plaintiff's affidavit contained inadmissible hearsay evidence. The defendants did not deny the debt nor did they adduce any evidence in defence of the claim. The Supreme Court dismissed the defendant's appeal. Laffoy J. observed at p. 663:-

"It is clear on the wording of [O. 37, r. 1] that, as regards proof of the claim, an affidavit sworn by a person other than the plaintiff who can swear positively to the relevant facts is sufficient. However, the later provisions of O. 37 are protective of the defendant. For instance, under r. 2, although it is stipulated that the motion for liberty to enter judgment under that order shall be heard on affidavit, there is a proviso that any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination, and 'unless such deponent is produced accordingly his affidavit shall not be used as evidence unless by ... special leave'. Further, under r. 3 it is provided that the defendant may show cause against the motion by affidavit."

21. Charleton J. also stated:-

"Civil proceedings for the enforcement of debt are an exercise of the constitutional right to litigate. Such a case carries procedural solemnity and is attendant with safeguards as to service. Within that context, the swearing of an affidavit and its service in court proceedings which make allegations that a sum is due, can be accepted in the absence of denial, where the form and the content of what is deposed to and the exhibits supporting it carry sufficient indications of reliability. Part of the matrix of facts to be considered is whether the documentary evidence establishes a relationship whereby the obligation to pay for goods or services, or to repay a debt, is properly referenced and exhibited. In that regard, the procedural safeguards of court proceedings as to service, coupled with the ability to make an appearance and to formally deny the existence of a debt, or otherwise to contest liability to pay by reference to a collateral contract or some defect in goods and services, or some other appropriate defence, may give rise to an ability in the court to act against the party failing to make any denial. As a matter of law, where circumstances indicate that a reasonable person would have responded to an allegation in the context of an appropriate commercial relationship where money is due, but does not so respond, an admission may be set up. The court may act in that situation."

22. Counsel for the plaintiff submits that the court is entitled to rely on the evidence of the deponents as their affidavits fulfil the requirements set out by the Supreme Court in *O'Brien*. It is also observed that the defendant challenges the admission of the affidavits themselves, and not the facts deposed to therein. It is submitted on behalf of the plaintiff that its deponents are entitled to rely upon the Bankers' Book Evidence Act, 1879 (as amended), and that they have complied with the requirements of the Bankers' Book Evidence Acts, as set out in *Ulster Bank v. Egan* [2015] IECA 85. It is submitted that in that case, the Court of Appeal held that the requirements of O. 37, r. 1 were satisfied where the deponent of the affidavit grounding the application had sworn positively to the facts showing that the plaintiff was entitled to the relief claimed, and stated that in his belief there was no defence to the action.

23. The plaintiff also observes that the defendant did not file a replying affidavit, although he was invited by the Master of the High Court to do so, rather, he brought four motions before the court including the application to cross-examine the deponents which was brought on 9th February, 2018, almost one year following the issuing of the summary summons and in excess of six months from the return date for the motion seeking liberty to enter final judgment. At no stage during the summary process did the defendant seek to serve a notice to cross-examine in accordance with O. 40, r. 31 and/or O. 37, r. 2. The defendant, it is submitted, has not set out on affidavit why he maintains that he is entitled to cross-examine the deponents and/or the issues on which he requires to cross-examine them.

24. Regarding deficiencies in the jurat, the plaintiff relies on a number of decisions including a decision the Court of Appeal which was delivered since this matter came before this court on the 18th June, 2018 and in which Mr. Ward was also a defendant, *Fennell v. Ward* [2018] IECA 270. There Mr. Ward brought two motions for determination in advance of his substantive appeals. He sought, *inter alia*, to have all proceedings against him dismissed, and his appeals allowed on the basis that all of the affidavits sworn by or on behalf of the receiver were not in compliance with the Rules of the Superior Courts 1986. In relation to O. 40, r. 9, the defendant had argued that the deponent stated his/her address as being the address he/she works at during the day, and not his/her 'place of abode', being the address at which they normally reside, their home address. In relation to O. 40, r. 6, Mr. Ward argued that the time of day must be noted and stated in the jurat. He submitted that the Rules of the Superior Courts must be given a literal interpretation, and that as they had not been complied with the affidavits should not have been admitted into evidence. He further argued that each and every judge who permitted the affidavits to be adduced as evidence, had facilitated fraud and/or perjury and by doing so were deemed to have vacated his/her office. He argued that the Court of Appeal had no jurisdiction to proceed in relation to his appeals.

25. Peart J. observed that those issues had not been raised in the High Court but that in any event, he concluded that the point was without any real merit. He stated that the Rules are not a penal statute requiring the kind of inflexible strict and literal interpretation urged by the defendant, and that they must be applied with common sense and practicality, being designed primarily to enable things to be done and not to prevent things from being done. Peart J. further noted that had these issues been raised in the High Court, the judge would have had discretion to receive the affidavits under O. 40, r. 15 which provides:-

"The Court may receive any affidavit sworn for the purpose of being used in any cause or matter notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received."

26. In his view, the construction of O. 40, r. 6 urged by the defendant would lead to a manifest absurdity. He cited with approval the judgment of Irvine J. in *Danske Bank v. Kirwan* [2016] IECA 99 where she stated:-

"I do not read Ord. 40, r.6 of the Rules of the Superior Courts as requiring a commissioner who witnesses the signature of a deponent to insert the time of day upon which they did so. Indeed, I find it hard to recollect any occasion upon which I have ever seen such information included in an affidavit. I am satisfied that the requirement of the rule has been properly met insofar as the Commissioner has inserted in the affidavit the date upon which he witnessed the deponent's signature. However, even if I am incorrect in this regard, the court has power under Ord. 40, r. 15 to receive an affidavit notwithstanding any irregularity in the form thereof. The failure to state the time on an affidavit is a defect of form only and can safely be regarded as a form of harmless error. I do not believe that any court would treat Ms O'Connell's affidavit as inadmissible by reason of the absence of this information as no prejudice is visited upon Mr Kirwan as a result of its omission."

Peart J. continued:-

"I agree, and would add this. If 'time' as expressed within r. 6 is to mean the time of day as opposed to the date, it would give rise to an absurdity since then the rule would read as meaning that while the time of day was required to be

inserted in the jurat, the date of swearing would not. That would make no sense at all, and cannot have been the intention of the drafters of the rules either in 1986, or the much earlier versions of the rules many of which were carried into the 1986 rules, including Ord.40, r. (6) and r. (9). In my view the word 'time' as used in the rule under scrutiny must be given a meaning that makes sense, and that must be that it means the date of swearing, and not simply confined to the time of day. But, as Irvine J. has stated, even if I be wrong to give the word 'time' such a purposive interpretation in the context in which it is used, it is an objection of such a technical nature and with no prejudice to the appellant that it comes well within the type of technical defect more than amply covered by Ord. 40, r. 15."

27. Peart J. also stated that the phrase 'place of abode' must be given a sensible meaning in line with its clear purpose, and that the insertion of a workplace address did not breach O. 40, r. 6.

28. The court is bound by the decision of the Supreme Court in *Ulster Bank Ireland Ltd. v. O'Brien* [2015] 2 I.R. 656 which has been reinforced by the decision of the Court of Appeal in *Fennell v. Ward* [2018] IECA 270 which was delivered on 31st July, 2018. With regard to the latter decision, Mr. Ward informed this Court that he was awaiting a copy of the perfected order of the Court of Appeal and intended to appeal it to the Supreme Court.

29. I have already accepted jurisdiction. I do not see any basis upon which it could be contended that this Court does not have jurisdiction to hear and determine an issue in the case solely on the basis that the allegation which was made is that either a form of compromise was arrived at (which the plaintiffs do not accept) or that the affidavits are improperly before the Court for the reasons alleged. In either eventuality, it seems to me that this Court has jurisdiction to hear and determine the issues before it. In so far as it may be contended that any issue arises by virtue of the fact that the Order of the Master of the High Court may be the subject of an appeal, the case has been transferred into this list and indeed Mr. Ward himself has brought applications to this court seeking to cross-examine deponents.

30. In the circumstances:-

(i) I am satisfied that I have jurisdiction to hear and determine these motions and I see no reason to depart from the order already made by this Court in this regard on 18th June, 2018 even if I had jurisdiction to do so.

(ii) I am satisfied this Court has a jurisdiction to admit in evidence the affidavits, even if they are not in perfect form, as per the *dicta* of the Court of Appeal and the Supreme Court as referred to above. No reasonable grounds have been advanced by the defendant, why, in the interests of justice, the affidavit should not be so admitted. Indeed, as counsel for the plaintiff submits, to refuse to admit the affidavits would result in a potentially grave injustice to the plaintiffs. Further and in so far as is necessary it appears to be that this is an appropriate case for the Court to exercise its jurisdiction to receive and admit the affidavits under O. 40, r. 15 of the Rules of the Superior Courts.

31. That an affidavit may not be in perfect form does not, in my view, in any event go to the root of the court's jurisdiction to entertain the proceedings or do deal with any applications which may be made within the proceedings particularly where such imperfection is capable of being dealt with by the court. I am satisfied therefore, on the law, not alone does the court have jurisdiction but no reasonable grounds have been adduced as a basis upon which the should exercise its jurisdiction otherwise than to admit the affidavit evidence. I am satisfied that the affidavits should be so admitted, subject to any entitlement of Mr. Ward to cross-examine the deponents of those affidavits.

32. This brings me to next issue to be addressed being whether the plaintiff is or should be entitled to cross-examine the deponents on their affidavits. It is true, that the rules would suggest that if notices are served within the time prescribed, that leave of the court is not required. I refer in particular to O. 37, r. 2 of the Rules of the Superior Courts:-

"2. Save in so far as the Court shall otherwise order, a motion for liberty to enter judgment under this Order shall be heard on affidavit: provided that any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination, and unless such deponent is produced accordingly his affidavit shall not be used as evidence unless by the special leave of the Master or the Court, as the case may be. In cases in which the Master has jurisdiction, he shall have the same power as the Court to hear oral evidence."

Also of relevance is O. 40, r. 31 which provides:-

"31. When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production. The notice shall be in the Form No. 21 in Appendix C."

33. On any analysis, the time has expired in respect of which a notice of cross-examination may be served as of right. Therefore, leave of the court is required. Ultimately, it seems therefore, that the issue which must be addressed is whether the interest of justice dictates that cross-examination should be permitted. I am willing to treat the application before the court as an application for an extension of time within which to serve notice to cross-examine the deponents in question. However, I see no good reason to depart from what are stated to be the directions given by McDermott J. that the defendant be required to place on affidavit the reasons why he wishes to have the deponents examined. A potential reason raised thus far, which one might interpret from the submissions to the court, is that Mr. Ward did not have the addresses of the deponents of the affidavits to enable him to serve proceedings on them because their true addresses do not appear in the affidavits; and he wishes to examine them on at least this aspect of the affidavit. There may be other reasons as he also submits at para. 25 of his written submissions that certain matters were not provided to him prior to the institution of the proceedings and that cross-examination will clarify the issues.

34. As a next step in these proceedings I therefore invite Mr. Ward to submit a further affidavit to the court and will extend the time within which to do so. I will hear submissions in relation thereto.