

THE HIGH COURT

[2005/271 COS]

**IN THE MATTER OF NATIONAL IRISH BANK LIMITED AND
IN THE MATTER OF NATIONAL IRISH BANK FINANCIAL SERVICES LIMITED AND
IN THE MATTER OF THE COMPANIES ACTS, 1963 – 2003 AND
IN THE MATTER OF AN APPLICATION BY THE DIRECTOR OF CORPORATE ENFORCEMENT PURSUANT TO SECTION 160(2) OF THE
COMPANIES ACT, 1990**

BETWEEN

THE DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND
BARRY SEYMOUR

RESPONDENT

Judgment of Mr. Justice Diarmuid B. O'Donovan delivered on the 16th day of November, 2006

1. In this case, the applicant has applied to the court pursuant to Order 75B, rule 7 and/or Order 40, rule 1 of the Rules of the Superior Courts and/or under the courts inherent jurisdiction for an order that the respondent herein do attend the trial of this action and be cross examined on his affidavits sworn and filed herein and that, if he fails to attend for cross examination, the said affidavits shall not be used at the trial of this action. For his part, the respondent maintains that his cross examination on his affidavits sworn herein is entirely inappropriate and, accordingly, he disputes the applicant's entitlement to the relief sought herein. In that regard;

2. Order 75B, rule 7 of the Rules of the Superior Courts provides:-

"Every application under the Act (the Companies Act, 1990 {my insertion}) shall be grounded upon the affidavit of the party making such application and shall be heard and determined on affidavit unless the court otherwise orders."

And

3. Order 40(rule 1) of the Rules of the Superior Courts provides:-

"Upon any petition, motion or other application, evidence may be given by affidavit, but the court may, on the application of either party, order the attendance for cross examination of the person making any such affidavit."

Order 75B, rule 9 of the Rules of the Superior Courts also enables a court to direct a plenary hearing "in any case in which the court considers that it is either necessary or desirable in the interests of justice to do so (the emphasis is mine)."

Background

4. In these proceedings, the applicant seeks an order that the respondent be disqualified from acting as a director of a company under s. 160(2)(b) and/or s. 160(2)(d) and/or s. 160(2)(e) of the Companies Act, 1990. This application arises from a report of inspectors appointed under s. 8 of the Companies Act, 1990, to investigate the affairs of National Irish Bank Limited and National Irish Bank Services Limited, which report was published by order of the High Court (Kelly J.) made on the 23rd day of July, 2004. The respondent was executive director and de facto chief executive of National Irish Bank Limited between the months of April 1994 and July 1996. In that report, there are findings of improper conduct on the part of National Irish Bank Limited and of National Irish Financial Services Limited and findings as to the responsibility of persons in the bank and in the financial services for this conduct. In particular, there were findings that internal audit reports, which had been copied to the respondent, pointed to the likelihood that the non-resident accounts therein referred to were in fact bogus and that the extent of reported documentary non-compliance was on such a scale that it constituted a further indication that a substantial proportion of the non-resident accounts could be bogus. Moreover, there were findings that the DIRT Theme Audit of December, 1994, highlighted the extent of the irregularities and that the respondent had been made aware of significant issues of documentary non-compliance, the lack of understanding at branches of the National Irish Bank's duty to satisfy itself on non-resident status and the resultant failure to deduct DIRT at the standard rate from interest paid or credited where the conditions for the operation of accounts whilst DIRT-exempt non-resident accounts were breached. Accordingly, the report concluded that the respondent should not only have been aware of the failure of the branches to hold properly completed non-resident accounts declarations, but should also have been aware of the fact that bogus non-resident accounts existed throughout the branch network. The report also found that, although the respondent attended meetings of senior management of National Irish Bank Limited convened to consider what corrective action was needed to remedy the situation disclosed by the DIRT Theme Audit, he failed to address or raise the question of potential liability of the bank to the Revenue Commissioners resulting from the irregularities. Furthermore, the report found that, despite corrective action taken by National Irish Bank Limited following the DIRT Theme Audit, there continued to be non-compliance in the branches with the requirements for DIRT-exempt status during the remainder of the respondent's term of office. While the report acknowledged the acceptance of a submission by the respondent that DIRT compliance procedures improved during his term of office, given that, as executive director, the respondent held ultimate responsibility to ensure that DIRT was deducted from interest paid or credited on all accounts subject to DIRT under the Finance Act, 1986, the respondent had failed to discharge that responsibility.

5. As I have already indicated, the said report was published by order of the High Court (Kelly J.) made on the 23rd day of July, 2004, following which, by notice of motion dated the 18th day of July, 2005 and grounded upon the affidavit of one Dick O'Rafferty, an officer of the Director of Corporate Enforcement, the applicant sought the relief sought in these proceedings. In that regard, the said affidavit of the said Dick O'Rafferty was sworn on the 18th day of July, 2005, in response to which the respondent swore a replying affidavit on the 29th day of September, 2005, to which Mr. O'Rafferty replied in an affidavit sworn on the 3rd day of November, 2005, which, in turn, was responded to by the applicant in an affidavit sworn on the 14th July, 2006, to which Mr. O'Rafferty replied in an affidavit sworn on the 14th July, 2006, which, in turn, was followed by a third affidavit sworn by the respondent on the 6th day of October, 2006. In each of the said affidavits, there is reference to exhibits which I do not consider it necessary to review for the purpose of this judgment.

Discussion

6. While the applicant concedes that, in the course of the several affidavits sworn by him as aforesaid, the respondent raises few (if any) material points of factual disagreement with the averments in the said affidavits sworn by Mr. O'Rafferty, it is clear that he

strenuously disputes all and any criticisms of his conduct in the said inspector's report. In particular, he disputes the inferences and opinions which the inspectors drew from the evidence which was before them and he maintains that it is not fair that he should be criticised for the fact that problems with DIRT compliance were not all eradicated by the time that he left the National Irish Bank Limited given that, as he asserts, once the problem was brought to his attention, he put in train a series of measures to correct the problem which, he says, did improve matters significantly. Accordingly, the respondent maintains that, as it is clear from the said affidavits sworn by him that he does not dispute any of the factual findings of the inspectors in the said report which are material to the relief sought by the applicant in these proceedings, it is not an appropriate case in which to direct a cross examination of the respondent on those affidavits.

7. 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. In this case, in an affidavit sworn herein on the 3rd day of October, 2006, to ground the applicant's application herein, Ms. Anne Keating, the principal solicitor at the office of the Director of Corporate Enforcement, purports to identify the issues raised by the respondent in the several affidavits which he has sworn herein which she suggests amount to areas of conflict which entitle the applicant to have the respondent cross examined on those affidavits. While the respondent has not sworn a replying affidavit to that of Ms. Keating, it is submitted on his behalf that the conflicts identified by her relate; not so much to matters of fact, but rather to inferences and opinions drawn and expressed by the inspectors in the said report which the respondent challenges and constructions which the inspectors have put on a variety of facts which the respondent accepts but rejects the construction put by the inspectors thereon. In that regard, having considered the several affidavits heretofore sworn by the respondent, it seems to me that there is substance to the suggestion that he does not dispute the facts relied on by the inspectors in support of their findings in any material way. However, while that may be so, does it follow that the applicant is not entitled to test, by way of cross examination, the respondent's interpretation of those facts or to challenge the adequacy of the steps taken by the respondent to eradicate the departures from acceptable practice of which the respondent accepts that he was aware? While the respondent may not dispute material facts upon which the inspectors base their findings, given that he challenges virtually every conclusion that the inspectors drew from those facts which reflect unfavourably on himself, is it reasonable to ask a judge to resolve that challenge in the absence of its being tested by cross examination of the respondent? The respondent would submit that, in the absence of a dispute on material facts, it is neither appropriate or desirable that he should be required to submit to cross examination on the several affidavits which he has sworn herein and he points to the fact that, if, in the course of the hearing, the trial judge was of the view that he ought to be cross examined on those affidavits, it would be open to the trial judge to so order.

Conclusions

8. The function of cross examination is to cast doubt upon the veracity, accuracy or reliability of evidence given by a witness. In this case, the issue to be determined by the court is, as laid down by Kelly J. in the course of an unreported judgment which he delivered on the 26th October, 2005, in a case of the *Director of Corporate Enforcement v. D'Arcy* the commercial probity of the respondent's conduct. In that regard, s. 22(b) of the Companies Act, 1990, provides that the report of an inspector appointed under s. 8 of the Act shall be evidence of the opinion of the inspector and, accordingly, it seems to me that, if that opinion is challenged, notwithstanding that the facts upon which the opinion is based are not disputed, the court is entitled to know the mindset of the challenger and, in my view, the only way that that can be ascertained is by confronting the challenger under cross examination. In that regard, it seems to me that the volume of affidavit material sworn by the respondent in defence of the applicant's claim herein, incorporating, as it does, a total rejection of the opinions and conclusions of the inspectors is, in itself, a justification for testing by cross examination of the respondent the reliability and, indeed, reasonableness of the contrary views expressed by him. In my view, in the absence of such a cross examination, it would be difficult, if not impossible, for the trial judge to come to a reasoned conclusion with regard the commercial probity of the respondent and, accordingly, it seems to me that the interests of justice require that such a cross examination be conducted.

9. In all the foregoing circumstances, I hereby direct that the respondent, Barry Seymour, attend the trial of this action for the purpose of being cross examined on his affidavits sworn and filed herein and, in the event that he fails to attend for such cross examination, the said affidavits shall not be used at the hearing.