Neutral Citation [2013] IEHC 295

THE HIGH COURT

COMMERCIAL

[2011 No. 3231 S.]

[2011 No. 232 COM]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION)

PLAINTIFF

AND

JOHN (ALSO KNOWN AS JOHNNY) MORAN

DEFENDANT

JUDGMENT of Mr. Justice Kelly delivered on the 14th day of June, 2013

Introduction

1. The defendant is a director of two companies. They are called JRM Hotels Limited and Blarney Inn Limited. They borrowed substantial sums of money from the plaintiff. It is alleged that those sums were personally guaranteed by the defendant. In this action the plaintiff seeks to recover €19,282,828.31 against the defendant on foot of those alleged guarantees.

2. The plaintiff was refused summary judgment and the action was directed to proceed to plenary hearing. The usual directions were given and pleadings have been exchanged.

3. The application which is the subject of this judgment arises in the context of the defendant's application for security for costs.

4. The plaintiff was formerly known as Anglo Irish Bank Plc. In October 2011, its name was changed to the current title.

5. By order of the Minister for Finance of 7th February, 2013, the plaintiff was placed in special liquidation pursuant to the provisions of the Irish Bank Resolution Corporation Act 2013. Messrs. Kieran Wallace and Eamon Richardson were appointed as special liquidators pursuant to ministerial order.

6. On 29th April, 2013, the defendant issued a motion seeking to have the plaintiff provide security for his costs in defending these proceedings. The application is made pursuant to s. 390 of the Companies Acts or alternatively pursuant to O. 29 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court.

7. That application was grounded upon an affidavit of 29th April, 2013. That affidavit was in turn responded to by Mr. Wallace by an affidavit sworn by him on 14th May, 2013. That in turn gave rise to a further affidavit sworn by the defendant on 22nd May, 2013, with a response thereto on 29th May, 2013 and a further affidavit of the defendant of 6th June, 2013.

8. The application for security for costs was to have been heard on 5th June, 2013, but it was intimated in advance of that date that the defendant wished to have Mr. Wallace cross examined on his affidavit evidence.

9. As this is a case where there is no entitlement to cross examine as of right, I gave directions for the bringing of the necessary motion seeking the leave of the court to do so.

10. This is my judgment on that motion.

11. Before considering the merits of the application, I propose to sketch out briefly the jurisdiction which is being invoked by the defendant on this application.

Cross Examination on Affidavit

12. In *Irish Bank Resolution Corporation & Ors v. Quinn & Ors* [2012] IEHC 510, I had to deal with the same issue as arises in this case. In the course of my judgment, I said the following:-

> *"30. The Rules of the Superior Courts expressly provide for a deponent to be cross examined in respect of affidavit evidence proffered by him. The extent of the entitlement to cross examine depends on the nature of the proceedings or application in which the affidavit has been sworn.*
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> *31. In the case of affidavits in support of a summary or special summons the entitlement to cross examine is absolute (see O. 37, r. 2 and O. 38, r. 3). In such cases, a party who wishes to cross examine a deponent simply serves a notice to that effect. The deponent must then be produced for cross examination. Unless that is done, his affidavit cannot be used as evidence except by leave of the court. No leave of the court is necessary to serve such a notice to cross examine.*
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> *32. The position is different in respect of petitions, motions or other applications where evidence may be given by affidavit. There the court may, on the application of either party, order the attendance for cross examination of the person making any such affidavit (see O. 40, r. 1 RSC). No absolute right to cross examine arises in such cases.*
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> *33. The leading authority in this jurisdiction on the circumstances where cross examination on an affidavit will be*

permitted by the court pursuant to O. 40, r. 1 is the decision of O'Donovan J. in Director of Corporate Enforcement v. Seymour [2006] IEHC 369.

34. In that case, the Director of Corporate Enforcement sought a disqualification order pursuant to s. 160 of the Companies Act 1990 against the respondent arising from the report of inspectors who had been appointed under s. 8 of the Companies Act 1990 to investigate the affairs of National Irish Bank Limited and a related company. A number of adverse findings had been made against the respondent. He had been the chief executive of the bank for a period of a little over two years. Mr. Seymour swore a number of affidavits in response to the application. He did not materially dispute the facts averred to in the affidavits sworn on behalf of the Director. But he strenuously disputed the inferences drawn from those facts and the opinions which the inspectors had formed. The Director applied for leave to cross examine Mr. Seymour on those affidavits in relation to such inferences and opinions. O'Donovan J. had to consider whether as a matter of discretion he ought to allow that application.

35. In the course of his judgment he pointed out that the applicant conceded that Mr. Seymour raised few (if any) material points of factual disagreement with the averments in the Director's affidavits. It was clear that he disputed all and any criticisms of his conduct in the report and the inferences and opinions which the inspectors drew from the evidence before them. The judge said this:-

> *'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.'*

36. In expressing his conclusions, the judge, having pointed out that s. 22(b) of the Companies Act 1990 provides that the report of an inspector shall be evidence of the opinion of the inspector, said:-

> *'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.'*

Cross examination was ordered in that case.

37. This decision was criticised by counsel for the respondent as having gone 'beyond what the existing case law provided for'. I do not believe that to be correct. There can be no argument but that the court is invested with a discretionary power to order cross examination of a deponent in an appropriate case. O'Donovan J. in the case just cited has identified what the approach of the court ought to be on such an application."

13. Reference was made during the hearing of this motion to the decision of the Supreme Court in *Bula Limited v. Crowley (No. 4)* [2003] 2 I.R. 430 at p. 458 where Denham J. said in the context of cross examination on an application made pursuant to s. 316 of the Companies Act as follows:-

> *"However, a s. 316 application is an entirely different matter to a trial on affidavit. There are opposing parties in an adversarial trial. In contrast, this is a motion. The receiver has applied to court to obtain the court's consent, if appropriate, for a sale. Parties are put on notice and may present evidence but it is not an adversarial trial by affidavit. Instead, the court, in exercising its judicial discretion on the application, may also exercise a judicial discretion as to whether there may be cross-examination….*
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> *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. In such exercise of discretion the court did not err in considering the matters which it did."*

14. That passage from the judgment which was cited to me seems to do no more than confirm the discretionary jurisdiction which the court has to direct cross examination in circumstances where there is no absolute right to such. That is precisely the position which obtains here and is reflected in the wording of O. 40, r. 1 which provides that:-

> "*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*." (My emphasis)

15. It is incumbent upon an applicant for such an order to demonstrate (1) the probable presence of some conflict on the affidavits relevant to the issue to be determined and (2) that such issue cannot be justly decided in the absence of cross examination.

16. I now turn to a consideration of whether the defendant has met those criteria on this application.

Security for Costs

17. At the outset, I should point out that I am not here trying the question of whether or not the defendant is entitled to have security for his costs provided by the plaintiff. That will be dealt with on another day.

18. I am merely dealing with the application for leave to cross examine Mr. Wallace in the context of the application for security for costs.

19. It is the defendant's contention that there are conflicts of evidence on the affidavits which have been exchanged on that application and that cross examination is necessary in order to enable the court to justly decide whether security for costs should be given or not.

20. Before considering those alleged conflicts of evidence it is, I think, sensible to set out the facts which are not in dispute and which have a relevance to that issue. They are as follows:-

> (1) The plaintiff is insolvent.
>
> (2) The plaintiff is in special liquidation and Mr. Wallace is one of the joint liquidators appointed by order of the Minister for Finance.
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> (3) It is unlikely that there will be sufficient funds in the plaintiff's winding up to meet the claims of unsecured creditors.
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> (4) The liquidators are retaining at least €50m in cash in the special liquidation until the conclusion of the present proceedings and that sum will not fall below €50m pending the conclusion of this action.
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> (5) That sum of €50m is set aside solely for the purpose of meeting the costs of this and any other litigation in which the plaintiff is engaged.

21. There are two issues which will have to be decided by the court on the application for security for costs. They are, first, whether the defendant has a *prima facie* defence to the plaintiff's claim and second, whether the plaintiff will be able to pay the costs of the defendant if successful in his defence.

22. As to the first of these issues it is quite clear from the first replying affidavit of Mr. Wallace that whilst he does not believe that the defendant has any valid defence to the claim, he is not seeking to suggest that the defendant has not demonstrated a *prima facie* defence in that regard. Thus, the court's attention will be exclusively concerned with the second issue, namely, the ability of the plaintiff to pay the defendant's costs if he is successful in his defence.

23. The undisputed facts which I have already recited appear to me to be highly pertinent to that question.

24. Both in the course of his affidavit evidence and through the submission of his counsel the defendant has identified material which, notwithstanding those undisputed facts, he says are in dispute and are relevant to the substantive security for costs issue. I will deal with them in turn.

25. In his grounding affidavit the defendant points out that he queried whether the €50m proposed to be retained was in cash and whether it was unencumbered by any charge or security. He accepts that the special liquidator has clarified that the sum of €50m is in cash but that it is subject to a floating charge. He says that the liquidator did not deal with the issue as to whether the sum was designed solely to meet the costs of this litigation or alternatively to meet the costs of all litigation in which the plaintiff is currently involved.

26. The evidence from the liquidator is that the sum of at least €50m is being retained in order to cover any costs orders which may ultimately be made against the plaintiff in respect of any proceedings to which it is a party. Furthermore, that figure will be topped up from time to time as may be necessary so as to provide what the liquidator described in his supplemental affidavit as a firm and concrete figure that is available for the purpose of meeting any adverse costs award. In addition, the special liquidator has said that in his view the sum of €50m represents more than sufficient funds to cover any costs orders which may ultimately be made against the plaintiff in respect of any proceedings to which it is a party. That figure is a minimum sum that will be retained and is earmarked solely for the payment of costs. In fact the liquidator goes further because in the first replying affidavit at para. 12 he said:-

> *"I can confirm that the JSLs (the liquidators) are willing to retain at least €50m in assets in the special liquidation until the conclusion of the within proceedings and that the assets in the special liquidation, pending the conclusion of the within proceedings, will not fall below the said €50m in assets. Thus there is a fund of €50m available to meet whatever costs the defendant may obtain in the event of him defending these proceedings successfully." (My emphasis)*

27. That factual position also covers the second contention which is made to the effect that the liquidator failed to clarify the plaintiff's potential exposure to other claims made against it. It is said by the defendant that "*it may well be that the plaintiff would not be in a position to meet an order for costs in these proceedings notwithstanding the undertaking given by Mr. Wallace*". I cannot see how that contention is maintained in the light of the evidence from the liquidator and certainly it would not justify his cross examination.

28. The next point which is made by the defendant is likewise, in my view, fully answered and would not justify ordering cross examination of the liquidator. The defendant says that he has raised an issue as to whether the sum of €50m would be used for the purposes of discharging any judgment obtained against the plaintiff in addition to any costs liability. This matter is dealt with in the affidavit sworn by Mr. Wallace where he makes it perfectly clear that the sum of €50m is being retained solely for the purposes of discharging costs. It will not be utilised in order to discharge any judgment which may be obtained against the plaintiff. He also makes the point, and in my view correctly, that any judgment against the plaintiff will rank as an unsecured debt in the liquidation and thus will be treated in the same manner as all unsecured debts.

29. The next issue identified by the defendant in respect of which he says cross examination of the liquidator is necessary arises from his contention that the liquidator has not stated whether he is acting under the instruction of the Minister for Finance in taking the action which he has indicated in his affidavit. The defendant contends that it is not clear whether the Minister has directed or authorised that the €50m be kept aside in respect of costs. He says "*it is not clear whether Mr. Wallace has the authority to do so*". Because of that he says that cross examination of the liquidator on this issue is necessary.

30. I am not satisfied that a case has been made out for the cross examination of the liquidator on this issue. The question of the liquidator's entitlement to set aside this €50m is a question of law. That issue can be thrashed out on the substantive hearing of the application for security for costs. It is clear from the submissions that I have heard that it will be argued that the liquidator has a statutory power under s. 281 of the Companies Act 1963 as modified by s. 10(3) of the Irish Bank Resolution Corporation Act 2013, to

set aside the monies in question and that there is no necessity for any consent to be obtained from the Minister for Finance in that regard. This is a purely legal argument. It does not require any factual issue to be elucidated by way of cross examination of the liquidator.

31. The next issue identified as warranting cross examination arises from the view expressed by the liquidator that it is unlikely that the plaintiff will be wound up prior to the conclusion of these proceedings. The defendant contends that it is not clear how long the present proceedings might take and therefore it is necessary to clarify what steps, if any, have been taken to ensure that the plaintiff will continue in existence.

32. It is, of course, correct to say that the liquidator is expressing an opinion on this topic and that is all that he could be expected to do. However, he has confirmed in open court and by means of an undertaking to the court that, in the event of there being any change in circumstances which might affect the availability of the retained sum of €50m, he will give 21 days notice of such change to the defendant. Such being the case, I cannot identify any issue which requires cross examination. The defendant's rights are fully protected because one such notice is given (if it ever happens) the defendant may make whatever application is appropriate in respect of security for costs or otherwise so as to protect his position within that time frame.

33. The next issue arises from an alleged failure on the part of the liquidator to explain the situation concerning other creditors of the plaintiff and to what extent their position is impaired by his undertaking to retain the sum of €50m.

34. As the defendant does not carry a lance for other creditors, that issue appears to me to have no relevance on the motion for security for costs and still less on an application to cross examine the liquidator.

35. The next issue identified by the defendant arises from the alleged failure on the part of the plaintiff to provide a statement of affairs. The defendant is under a misapprehension in this regard. He says in the course of his affidavit that he is "*advised that s. 224 of the Companies Act 1963 (as amended) requires the plaintiff to file a statement of affairs*". He says it is necessary to cross examine the liquidator in order to establish the true financial position of the plaintiff.

36. The obligation to provide a statement of affairs under the relevant statutory provision is one which is visited on the directors of the plaintiff. It is not an obligation of the plaintiff and I cannot see how any cross examination of the liquidator can either assist or be of relevance in the context of security for costs.

37. The defendant also contends that it is necessary to cross examine the liquidator in order to establish what he calls the "*true financial position*" of the plaintiff. It is accepted that the plaintiff is insolvent. It is in liquidation. The sole issue that the court will be concerned with on the hearing of the application for security for costs is whether the plaintiff will be able to pay the costs of the defendant if successful in his defence. In that regard it is not in issue but that the liquidators are retaining at least €50m in cash and that that sum will be maintained until this litigation is concluded. The question therefore of what is described as the "*true financial position*", of the plaintiff is not relevant. Consequently no cross examination of the liquidator would provide any material which would be of use to the court in considering the security for costs issue.

38. The next point which is identified arises from what is described as the joint liquidator having "*purported to authorise the continuation of these proceedings*" on behalf of the plaintiff. It is said that the maintenance of these proceedings "*will necessarily involve, whatever the outcome, a very substantial depletion of the company's assets*". Because of that assertion the defendant wishes to have the liquidator cross examined as to the consideration he has given to that question.

39. Again I am unable to ascertain how this matter has the slightest relevance to the question of security for costs in the context of this case.

40. The next point which is raised by the defendant concerns the number of proceedings in which the plaintiff is engaged and its potential costs liability should it prove to be unsuccessful in all such proceedings. He has conducted a search in the High Court Central Office and has been able to count 360 cases which involve the plaintiff in some form or other. These are cases in the High Court and do not include those in other courts. He then conducted a simple mathematical exercise of dividing the 360 cases into the €50m and concludes that that gives a figure of €138,089 per case which he says would be insufficient to meet any costs order made in his favour here. He wishes to cross examine the liquidator on this aspect of the matter.

41. This approach on the part of the defendant fails to take into account the actual evidence put before the court by the liquidator to the effect that €50m fund will be maintained and not be allowed to go below that sum for as long as the instant proceedings are in being. Thus, cross examination on the hypothetical basis that the plaintiff will fail in every single one of the 360 cases and will have costs awarded against it in each such case can have no relevance in the context of the actual evidence put before the court concerning the maintenance of €50m while this litigation is extant.

42. A further point was made to the effect that the ultimate decision as to what is to happen to the plaintiff resides not with the liquidator but with the Minister. Cross examination of the liquidator as to what the ministerial intent may be would be futile. In any event, the liquidator has indicated that if there is any change in circumstances, the 21 day notice to which I have already referred will be given to the defendant.

43. It is accepted that there is a floating charge which was granted by the plaintiff in favour of the Central Bank of Ireland in October 2012. That was subsequently assigned to the National Asset Management Agency. The defendant contends that this has a relevance for the security for costs issue. The plaintiff contends otherwise and says that any order for costs in favour of the plaintiff would rank ahead of the holder of a floating charge. That concession is made in ease of the defendant. In any event the question of the ranking of a costs order in a liquidation is a pure question of law and will not be assisted by any cross examination of the liquidator.

Conclusion

44. The defendant is not entitled to the order which he seeks. He has not demonstrated any or any sufficient conflict on the affidavits on any issue relevant to the question of security for costs to warrant the cross examination of the liquidator. The application is dismissed.