

# THE HIGH COURT

[2024] IEHC 290

[Record No. 2016/2053P]

**BETWEEN**

**SEÁN COYNE**

**PLAINTIFF**

**AND**

**ULSTER BANK IRELAND LIMITED**

**AND**

**KIERAN WALLACE**

**DEFENDANTS**

**JUDGMENT of Mr Justice Kennedy delivered on the 15<sup>th</sup> day of May 2024.**

1. The Plaintiff seeks leave to cross-examine deponents who have sworn affidavits on behalf of the Defendants in the context of the latter's application seeking, *inter alia*, to strike out the proceedings on the basis that they are "*frivolous, vexatious, bound to fail and/or an abuse of process*" ("the Defendants' Application").

2. The application has been brought under Order 40, rule 36 of the Rules of the Superior Courts ("the RSC"), but I will deal with it under O.40, r.1 because rule 36 relates to cross-examination at trial rather than at an interlocutory hearing, whereas rule 1 provides that:

*“Upon any ... 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.”*

3. The Plenary Summons identifies the substantive claim as a claim for damages for trespass and nuisance. The Plaintiff issued proceedings on 7 March 2016, followed by an injunction application on 2 December 2022, but the latter was struck out on consent on 1 December 2023, by which time the dismissal application had issued.

4. The thrust of the Plaintiff’s evidence and submissions was that he was entitled to test the Defendants’ case. His affidavits in support of the application did not identify specific conflicts of evidence but his counsel’s submissions referenced “*huge differences*” in the affidavits, differences so great that a “*100-page affidavit*” would have been required if all such variations had been enumerated. Faced with such a daunting task, the Plaintiff went to the other extreme, failing to identify specific conflicts of evidence which would give rise to a need for cross examination for the purposes of the motion. In oral submissions, the Plaintiff denied having entered into the mortgage or having received the loan (which underpinned the First Defendant’s appointment of the Second Defendant as receiver) but his position was not articulated with clarity in his Statement of Claim or his affidavits grounding his application.

5. The Plaintiff’s submissions also raised the possibility of fraud on the part of the Defendants. No such claim was articulated in the Plenary Summons. The nearest the Plaintiff seems to have come to pleading such a serious allegation was the suggestion in (one of two competing versions of) the statement of claim that the Defendants acted “*negligently or fraudulently*” by enforcing the alleged mortgage over the Plaintiff’s property. However, the Plaintiff has not provided the particulars required to ground any such plea in accordance with the Rules of the Superior Courts.

6. The Plaintiff gave no meaningful indication as to the subject matter of the proposed cross examination. Paragraph 2 of his grounding affidavit refers in general terms to the affidavits exchanged on his (abandoned) injunction application, but he failed to identify conflicts of evidence requiring resolution for the purposes of the Defendants' application. He explained at paras. 8 - 9 of his affidavit:

*“8. I would wish to set out in full the paragraphs and the averments to which I would wish to confine by cross examination. However, I say that the four Affidavits are so voluminous and convoluted that it would be extremely prolix if I were to particularise each instance of a material and relevant fact upon which there are bone fides and direct contradictions, and which lack credibility and reliability, and the source of knowledge and basis of belief for which is unclear, and to which, I say, the Court should give no weight.*

*9. However, I say that I only wish to cross-examine on those Affidavits, and on those averments within those Affidavits, as set out in the Notice attached hereto, that contain bone fides contradictions of evidence on material and relevant facts, and upon the source of knowledge or basis of belief, where that appears to me to be unclear or not well founded, and where the evidence tended by the Deponents lacks credibility and reliability.”*

7. The Plaintiff's grounding affidavit concluded:

*“11....it is incumbent upon me to cross-examine the Deponents concerned and to put to the Deponents the basis on which I say that their evidence lacks veracity, credibility and reliability, and where the source of knowledge or the basis of belief is unclear or not well founded.*

*12. In all the circumstances, I say it is in the interest of Justice that I should be permitted to cross-examine the Deponents and I therefore pray this Honourable Court for orders in terms of my Notice of Motion herein.”*

8. I have considered affidavits sworn by the Plaintiff in support of the application to cross examine in response to the Defendant's application to dismiss and in respect of his abandoned injunction application, and I have reviewed both versions of the Statement of Claim. However, I find it difficult to comprehend the basis for the

Plaintiff's claim, save that he appears to deny that he entered into the mortgage on which the Defendants rely. However, according to para. 4 of the undated Statement of Claim (which differs from the 18 October 2016 version), he acknowledges that he sought a loan from Ulster Bank in 2005 and that:

*“At the first named defendant's request a draft mortgage deed was signed by the plaintiff and monies advanced for the purchase of the property”.*

Accordingly, the Plaintiff appears to accept that he: (i) signed what he characterises as a “draft mortgage”; and (ii) received monies for the purpose of the purchase of the property, but he claims that:

*“No substantive mortgage deed was completed or signed by the plaintiff or on behalf of the first named defendant and there was no meeting of minds on a finalized mortgage deed.”*

**9.** The Plaintiff also alleges that:

*“On or about July 2006 to January 2007 all the plaintiff's personal and company loans, including monies advanced for the purchase of the property, were bought over by Danske Bank trading as National Irish Bank”,*

and that accordingly the First Named Defendant was no longer a creditor of the Plaintiff.

**10.** On that basis, the Plaintiff claims damages for negligence, fraud, trespass, nuisance and unlawful interference with the Plaintiff's economic interests. By contrast, the Defendants rely on the deed of mortgage to assert a lawful right to occupy the premises and a valid appointment of the receiver and as a complete answer to the Plaintiff's claim for trespass and nuisance.

## **The Law**

**11.** There are significantly different rules pertaining to cross examination depending on context. For example, Order 37 RSC provides for the hearing of claims brought by

special summons. It is envisaged that such proceedings should generally be dealt with on affidavit. However, the effect of Order 37, rule 2 is that any party may serve a notice requiring the production for cross examination of any deponent who has sworn an affidavit. If such deponents are not produced for cross examination, then the affidavits may not be used without special leave of the Court. Accordingly, the default position in a summary summons context is that an application is not required in the first instance – it is sufficient to serve a notice requiring the deponents’ production for cross examination and their affidavits will then only be admissible with special leave unless they are produced for cross examination (but such special leave may still be forthcoming where cross examination is considered unnecessary, as in *Ulster Bank Ireland Limited v Michael and Brigid Quinn* [2015] IEHC 376 (“*Quinn*”) and *AIB Mortgage Bank v Alan Lynskey* [2017] IEHC 197 (“*Lynskey*”).

**12.** By contrast, there is no automatic or presumed entitlement to cross examine in the context of an interlocutory application. An application to the Court is required under Order 40. The Court has a discretion as to whether to allow cross-examination in the circumstances. It may be ordered if necessary to resolve material conflicts of facts which need to be resolved for the purposes of determining the particular application. For example, in *McElhinney v Williams* [1995] 3 IR 382 (“*McElhinney*”), the Court rejected a motion to cross examine an official from the Northern Ireland Office who had sworn an affidavit in the proceedings (while reserving the right to consider the matter further as the case developed). Costello J. (as he then was) observed that:

*“in a case of this sort the court is not called upon to decide controversial questions of fact. The court considers the claim made on the pleadings, and I have done so. ...matters raised in this affidavit are in a number of instances not relevant to the issues which I had to decide and there was no need to consider controversial issues of fact in reaching my conclusion – and I did not do so. Therefore I will refuse the plaintiff’s application”.*

13. Denham J. (as she then was) recognised the judicial discretion in *Bula Limited v Crowley (No. 4)* [2003] 2 IR 430 at 459 (“*Bula*”) and discussed considerations relevant to its exercise, including delay in seeking to cross-examine.

14. In *Director of Corporate Enforcement v Seymour* [2006] IEHC 369, O’Donovan J. held that cross-examination should only be allowed if required to resolve the issues the Court was required to determine.

15. In *Irish Bank Resolution Corporation Ltd v Moran* [2013] IEHC 295 (“*Moran*”), Kelly J. (as he then was) stated (at para. 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 issues to be determined and (2) that such issue cannot be justly decided in the absence of cross examination.”*

16. In *IBRC v Quinn* [2012] IEHC 510 (“*Quinn*”), Kelly J. observed at paras. 30-32:

*“30. ... The extent of the entitlement to cross examine depends on the nature of the proceedings or application in which the affidavit has been sworn.*

*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). ...*

*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.”*

17. In the *Governor and Company of Bank of Ireland v Gerry Ward* [2019] IEHC 235 (“*Ward*”), MacGrath J. applied a similar approach, observing at paras 12-14 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 factor piece of evidence sworn by the deponents... is contested.*

*13... Mr Ward confirmed that substantive issues remained...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 requirement for the exercise by the 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 this court has to determine no such material conflicts of fact or apparent from the affidavits which have been submitted.”*

**18.** Ward also cited an *ex-tempore* ruling in which Irvine J (as she then was) stated that:

*“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”.*

**19.** The Plaintiff relied on *Quinn, Lynskey and Allied Irish Banks plc v Joe O’Callaghan & Ors.* [2021] IEHC 14 (“*O’Callaghan*”) as examples of cross examination being ordered to resolve conflicts of evidence in the context of applications for summary judgment. However, such authorities generally concerned applications for special leave under Order 37 RSC, in the context of the hearings of summary summons proceedings, as opposed to Order 40 applications, in the context of interlocutory applications. In any event, special leave to use affidavits without cross examination was granted in *Quinn*. One of the reasons such special leave was forthcoming (dispensing with cross examination) was that:

*“there is no issue of fact that is identifiable from the affidavits, the understanding or resolution of which could reasonably give rise to an arguable defence... I do not consider that the court would be in any way assisted by the cross examination of Mr O’Shea in the absence of a relevant conflict of fact.”*

**20.** Special leave was also forthcoming in *Lynskey*, permitting the use of the affidavits without cross examination – there seemed to be no necessity for such cross examination even on a summary judgment application (because Eagar J. considered that the defendant had established an arguable defence in any event).

**21.** By contrast, Simons J refused special leave in *O’Callaghan*, with the result that the plaintiff’s affidavits could only be used if the deponents were produced for cross examination. In that case, the deponents had joined issue with one of the defendants:

*“on matters which are directly relevant to the grounds upon which he seeks leave to defend the proceedings. The bank’s replying affidavit contains a number of sweeping statements which go well beyond the mere citation of, or comment upon, the content of documents which have been exhibited in the proceedings. Mr Neligan is entitled to cross-examine the deponent on his sweeping statements. Cross-examination will also be allowed in respect of the first deponent because of the link between the two affidavits...”*

**22.** In order to assess the requirement, if any, for cross examination, it is necessary to consider the nature of the Defendants’ motion and the issues to be resolved on that motion. As *Delany & McGrath on Civil Procedure* (5<sup>th</sup> Ed, 2023) (“*Delany & McGrath*”) observe at para. 16-02:

*“Until recently Order 19, rule 28 provided for a relatively narrow jurisdiction, exercisable by reference to the pleadings only, to strike out proceedings which disclose no reasonable cause of action or which were frivolous or vexatious. This jurisdiction was supplemented by the exercise by the court of an inherent jurisdiction, the existence of which was confirmed by *Barry v Buckley*, to strike out or stay proceedings which, on the basis of the evidence before the court, were frivolous or vexatious or bound to fail. Order 19, rule 28 now provides for a wider*



*jurisdiction to strike out proceedings which effectively amalgamates the two previously separate jurisdictions and enables a court to strike out any claim or defence that has no reasonable prospect of success or that constitutes an abuse of process”.*

**23.** Order 19, rule 28 RSC provides as follows:

*“The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.”*

**24.** The current iteration of the rule combines its predecessor with the inherent jurisdiction recognised in *Barry v Buckley* [1981] IR 306 to dismiss proceedings if they were frivolous or vexatious, an abuse of process or bound to fail.

**25.** The courts have repeatedly confirmed the default position that proceedings should go to trial. The Supreme Court emphasised in *Aer Rianta CPT v Ryanair Limited* [2004] 1 ILRM 241, in respect of the court’s jurisdiction (under the original version of O.19, r.28), that courts should be slow to exercise that jurisdiction and should use caution in doing so. As Clarke J. observed in *Moylist Construction Limited v Doheny* [2016] 2 IR 283 (“*Moylist*”), at p. 290, the parties should only be deprived of a full trial:

*“when it is clear that there is no real risk of injustice in adopting that course of action”.*

**26.** Clarke J. also noted in *Keohane v Hynes and Anor.* [2014] IESC 66 (“*Keohane*”), at para. 6.2, that:

*“the extent to which it is appropriate for the Court to assess the evidence and the facts on a motion to dismiss as being bound to fail is extremely limited”.*

**27.** In *Lopes v Minister for Justice, Equality and Law Reform* [2014] 2 IR 301, Clarke J. considered the distinction between the jurisdiction under the original O.19,

r.28 and the court's inherent jurisdiction (both jurisdictions now arguably combined for practical purposes by the current version of O.19). Clarke J. observed at pp. 309-310:

*“In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in Sun Fat Chan v. Osseous Ltd [1992] IR 425, at p.428, that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance.”*

**28.** After summarising the authorities in *Keohane*, Clarke J. observed, at para. 6.6 that:

*“all of the jurisprudence emphasises that the jurisdiction is to be sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law.”*

**29.** The Court's ability to assess the merits in such cases is limited. As Clarke J. noted in *Moylist*, at para. 3.1:

*“That the facts, and in particular an analysis of documents, can be addressed at least to some extent in the context of such an application is clear from the judgment of this Court in Keohane v Hynes [2014] IESC 66...”*

**30.** As *Delany & McGrath* observes at para. 16-21:

*“While the court can engage with the facts of the case there are ‘significant limitations’ on the extent to which is appropriate.”*

**31.** *Devrajan v KPMG* [2006] IEHC 81 concerned an application similar to the Defendants' motion in this case. As Hanna J. observed:

*“if there is a dispute on facts between the parties, this must be resolved in favour of the party against whom the application to strike out has been brought”.*

**32.** *Delany & McGrath* (at para. 16-01) notes that:

*“The constitutional right of access to the courts which is guaranteed by Article 40.3 has been interpreted as encompassing the right “to litigate claims which are justiciable” and to “initiate litigation in the courts”. However, it is necessary for the courts to balance the constitutional rights of the plaintiff to institute and prosecute proceedings with the interest of defendants who should not be forced to defend proceedings that are vexatious and bound to fail. So, as McKechnie J stated in Ewing v Ireland, there “is no duty to allow the continuation of unstateable cases to full hearing”. The courts also have a duty to uphold the integrity of the judicial system by declining to adjudicate on matters that constitute an abuse of the process of the courts. As O’Donnell J pointed out in Nowak v Data Protection Commissioner, “[w]hen used appropriately, the power to dismiss proceedings in limine saves court time, avoids delay and, just as importantly, prevents the court process and the inevitable delays involved therein from being used merely to bring pressure to bear on the other party, and thus become a bargaining counter in negotiations”.*

## **Discussion**

**33.** In my view, the Plaintiff’s submission that there is an absolute right to cross examine goes too far. It is clear that there is no such automatic right in the context of interlocutory applications (see Denham J.’s observations in *Bula*, at p. 459, and Kelly J.’s comments in *Quinn, supra*). I accept the Defendants’ submissions that, in order to establish a conflict of evidence necessitating cross examination, the applicant must file an affidavit challenging the accuracy of the other party’s evidence on the matters upon which cross-examination is sought. Cross-examination will not be ordered so that the deponent can be cross-examined generally as to factual matters that are not addressed in his affidavit on the application or which need not be resolved for the purpose of the substantive application. Nor will cross examination be ordered in respect of issues that are unsustainable, speculative or irrelevant in the context of the particular application.

**34.** To determine whether cross-examination is required, I must consider the principles which will determine that the Defendants' Application. The position is clear. The application can only succeed in the absence of a meaningful dispute as to relevant facts. The dismissal jurisdiction cannot be exercised if there is a credible dispute as to facts. If the application depends on the resolution of a meaningful conflict of evidence, then any such conflict must be presumed to be resolved in favour of the Plaintiff. The claim can only be struck out if it is clearly unsustainable and bound to fail.

**35.** The Defendants opposed the application to cross-examine on the basis of: (i) the Plaintiff's delay in bringing the motion; (ii) his failure to identify the matters in dispute; and, most importantly, (iii) the absence of any matters in dispute which required cross-examination, for the purposes of dealing with the Defendants' Application. I consider that each of those objections is well founded but am less convinced by the alternative submission that the cross-examination should be refused in this case solely on the basis of the delay in bringing the motion. There certainly has been such delay and, as *Bula* confirms, applications may be refused on that basis. However, it was arguably appropriate to complete the exchange of affidavits before seeking to cross-examine.

**36.** I am inclined to dismiss the application on the basis of the Plaintiff's failure to identify with sufficient specificity, in his affidavit, issues which would need to be the subject of cross-examination. There was no real attempt to do so in his affidavits. His oral submissions seem to envisage a mini-trial of the merits, which would be inappropriate, expensive and unnecessary for the resolution of such applications.

**37.** However, the nature of the Defendants' Application is the major reason I consider that cross examination is unnecessary. The Court will not embark on a detailed investigation of the merits on such an application. If credible evidence suggests the

existence of a stateable claim which is not vexatious or an abuse of process, then the application will fail irrespective of the countervailing evidence on the part of the Defendants. I refer to a conflict of “credible evidence” because it may not be enough for a Plaintiff to oppose an application purely on the basis of broad, unparticularised assertions, especially if such assertions are contradicted by detailed and cogent evidence, particularly uncontroverted contemporaneous documentary evidence. Also, the authorities recognise the greater scope for the summary interpretation of contractual documents (see *Kelly v AIB* [2019] IESC 72). However, if a genuine conflict of evidence arises in respect of an issue material to the Defendants’ Application, then the motion will fail and the matter will progress in the usual way. Conversely, the Court may be in a position to reach a decision without cross-examination if there is largely uncontradicted credible evidence (see *Re McInerney Homes* [2011] IEHC 4). The onus rests with the Defendants to satisfy the Court that the proceedings should be dismissed. The judicial discretion will be exercised sparingly.

**38.** If cross-examination was to be allowed for such dismissal applications, they would, in effect, become additional plenary hearings, but hearings conducted without the benefit of discovery and other necessary pretrial procedures. This would greatly increase the time and cost involved in litigation, defeating the object of the procedure.

**39.** The authorities cited by the Plaintiff concerned summary judgment applications which involve a final disposition, including a summary assessment of the merits. Those decisions are not comparable to the Defendants’ Application in these proceedings. The test as to whether cross-examination is generally required for normal interlocutory proceedings (including the Defendants’ Application) was laid down by Kelly J. (as he then was) in *Quinn*. It is exceptional for cross-examination to be permitted on

interlocutory motions. I see no basis for the Plaintiff's application since the Defendants' Application will fail in the event of a conflict of credible evidence as to a material issue.

**40.** The Plaintiff also asserted a general right to "test" the Defendants' evidence as part of the undoubted right of access to justice and to the Courts. However, such rights are not unlimited, and they do not extend to the pursuit of any claims that are found to be unstateable or an abuse of process. The very purpose of the Defendants' Application is to determine whether or not the proceedings fall into that category. In support of the "right" to cross-examine, the Plaintiff cited *Re Haughey* [1971] IR 217, but that decision arose in the very different context of an Oireachtas inquiry with the potential to make findings adverse to the Plaintiff's good name without affording him the right to cross examine the witnesses whose testimony was relied upon. I do not accept that there is a general right to cross examine in respect of an Order 19, rule 28 application.

**41.** In summary, having considered the nature of the Defendants' Application and the proceedings as a whole, I do not consider that cross examination is required to deal with the dismissal application. For the avoidance of doubt, I make no determination as to the sufficiency of any evidence adduced by either party to date (whether in terms of the Defendants' Application or the proceedings as a whole). The Plaintiff's application will be refused.