THE HIGH COURT

[2021] IEHC 278

[2019 No. 202 Sp.]

IN THE MATTER OF SECTION 67 OF THE TRADE MARKS ACT, 1996, AS AMENDED
AND IN THE MATTER OF AN APPLICATION TO RECTIFY THE IRISH TRADE MARK REGISTRATION NO. 239459 GAA IN THE NAME OF

CUMANN LÚTHCHLEAS GAEL

ON THE APPLICATION OF
TOMÁS Ó RIAIN AND SEOSAMH Ó BAOILL

APPLICANTS

JUDGMENT of Mr. Justice Allen delivered on the 23rd day of April, 2021

Background

1. This is a skirmish in a long running and complicated war about a trade mark. I will try not to get bogged down in the detail but to identify the bare bones of the dispute.

2. The trade mark is a word "*GAA*" which was registered in the name "*Cumann Lúthchleas Gael, a sporting association"* on 27th November, 2007 in respect of a number of Nice classes, including class 25, clothing; footwear; headgear.

3. Savanagh Securities Limited ("*Savanagh*") is a private company limited by shares. Its registered office is at Pine Lodge, Castlebar, County Mayo, and it carries on business in the name T-Rex Clothing from premises at Breafy Road, Castlebar, County Mayo.

4. On 12th May, 2015 the secretary of Mayo GAA County Board wrote to Savanagh to complain that Savanagh was offering products for sale carrying the official Mayo GAA County crest trademark, which it was not licensed to reproduce, and which, it was said, amounted to an infringement.

5. On 4th June, 2015 F. R. Kelly, European Patent and Trademark Attorneys, wrote to Savanagh on behalf of Cumann Lúthchleas Gael, which they asserted was the owner of the GAA and GAA Logo trademarks. They made the same complaint in relation to the Mayo county jerseys and complained that Savanagh was offering for sale t-shirts for all 32 counties which infringed the GAA and GAA Logo trademarks. They required that Savanagh should immediately cease and desist from doing so and threatened High Court proceedings if it did not. There was an exchange of correspondence in relation to the Mayo county crest and GAA Logo. Savanagh said that it had the permission of the Mayo Ladies LGFA to use the crest but confirmed that it had ceased all advertising and production of all alleged infringing items.

6. By letter dated 8th July, 2015 F. R. Kelly made a new complaint that Savanagh was infringing the word mark "*GAA*" which was the subject of Irish Trade Mark Registration No. 239459 and alleged that that constituted an infringement and passing off.

7. On 27th August, 2015 Tierney IP, European Intellectual Property Consultancy, on behalf of Savanagh, wrote to F. R. Kelly. They suggested that the registered owner of the Mayo county crest, Trade Mark No. 233583, was not Cumann Lúthchleas Gael but the officers

for the time being of the Mayo County Board of the Gaelic Athletic Association, and that their client had permission from "*a part of the GAA*" to use that mark.

8. On 19th January, 2016 Tierney IP followed up with a letter protesting that they had not had the courtesy of a reply to their letter of 27th August, 2015 and making a new point, which was that the trade mark registrations showed the owner of others of the marks as Cumann Lúthchleas Gael. Cumann Lúthchleas Gael, it was said, is an unincorporated association which is incapable in law of holding property. That being so, it was said, Cumann Lúthchleas Gael did not have and could never have had *locus standi* to bring infringement proceedings. The claims of infringement were said therefore to be groundless, and Cumann Lúthchleas Gael was said to be liable to pay damages to Savanagh for loss said to have been sustained by its groundless threat of infringement proceedings.

9. On 6th February, 2016 Savanagh applied to the Controller of Patents Designs and Trade Marks for a declaration of invalidity in respect of Trade Mark No. 239459 "*GAA*" on the ground that the registration had contravened s. 8(3)(a) and/or (b) of the Trade Marks Act, 1996.

10. The basis of that application was that the GAA, as an unincorporated association, was incapable of holding property – specifically registered trademarks – and that the registration was contrary to public policy and/or deceptive. A short counterstatement was filed on behalf of Cumann Lúthchleas Gael and in a decision dated 14th March, 2018 the Controller rejected the application but observed that what he characterised as the administrative oversight which had led to the application being lodged in the name GAA rather than the trustees for the time being of the GAA should be rectified by a formal application for registration of the mark in the ownership of the trustees, in accordance with its own rules.

11. By special summons issued on 13th June, 2018 (2018 No. 315 Sp.) Savanagh appealed to the High Court against the decision of the Controller. The summons identified Savanagh as plaintiff and named the Controller, Cumann Lúthchleas Gael ("*the Association*") and Iontaobhas Corporáideach Cumann Lúthchleas Gael Cuideachta Faoi Theorainn Rathaiochta – the GAA's corporate trustee – ("*the Corporate Trustee*") as defendants. According to the Association, the Controller's decision is unimpeachable and Savanagh's appeal is misconceived and procedurally flawed. However, it says, if the register were to be rectified, that would dispose of the appeal.

These proceedings

12. By special summons issued on 13th May, 2019 (which are the proceedings in which the application now before the court has been made) Tomás Ó Riain and Seosamh Ó Baoill, applied for an order for rectification of the register to record ownership of the mark in the name of Mr. Ó Baoill. Mr. Ó Riain is the director general of the Association and Mr. Ó Baoill was one of the trustees of the Association in 2007, when the application for registration was made. The title to the summons identifies Messrs. O'Riain and O'Baoill as applicants but does not identify any respondents. The special indorsement of claim,

however, identifies the Controller as "*the first notice party*" and Savanagh as "*the second notice party*" and the summons was served on them. The special indorsement of claim very clearly sets out the applicants' case and portends that in circumstances in which, it is said, the rectification of the register would dispose of all issues in the appeal without the need for the court to hear the appeal, the applicants will ask that the rectification application and the appeal be listed to be heard consecutively, with the rectification application going first.

13. The principal affidavit grounding the summons in the rectification application was sworn by Mr. Ó Riain, who identifies himself as the director general of Cumann Lúthchleas Gael and makes the applicants' case for rectification.

14. Mr. Ó Baoill swore a short supporting affidavit setting out his long connection with the Association and deposing to having been one of two trustees elected for three years at the Association's congress, which is its annual general meeting, in 2006. He said that while the GAA rules contemplated that the trustees elected at the Association's annual congress would hold property, it was more commonly the trustees designated at club and county board level who did so. Mr. Ó Baoill recalled that his duties as trustee tended to concern dealing with Association expenses and signing cheques and generally dealing with expenses incurred in the course of the general business of the Central Council. He said that he understood his role to have encompassed whatever the Association generally might properly require.

15. In response, Mr. Tomás Comerford swore quite a long affidavit on behalf of Savanagh, which was filed "*on behalf of the second notice party*". A good deal of what Mr. Comerford has to say about Mr. Ó Riain's evidence is argument. He deals very briefly with Mr. Ó Baoill's affidavit, which he dismisses as having no evidentiary value.

16. A second affidavit of Mr. Ó Riain was filed on behalf of the applicants, and a second affidavit of Mr. Comerford and an affidavit of Mr. Tierney, on behalf of Savanagh.

17. In the meantime, by notice of motion issued on 4th February, 2019 in the appeal proceedings, the Association and the Corporate Trustee had applied for the substitution of "*Tomás Ó Riain, defending in a representative capacity for the members of Cumann Lúthchleas Gael",* as the second defendant and of "*Seosamh Ó Baoill, defending as trustee for and on behalf of the members of Cumann Lúthchleas Gael*", as the third defendant. That motion was hotly contested and ultimately came before O'Connor J. on 5th February, 2020, when an order was made joining, rather than substituting, Messrs. Ó Riain and Ó Baoill.

18. In the ordinary way, the special summons in these proceedings was returnable before the Master and it was adjourned from time to time as the exchange of affidavits continued. By 4th February, 2020 the exchange of affidavits was complete, and the summons was sent forward to the Chancery 2 list, where it first appeared on 9th March, 2020. At that time the court was told that Savanagh wanted to cross-examine Mr. Ó Baoill but no notice had been given requiring his production for cross-examination and the applicants

challenged Savanagh's entitlement to do so. On the hearing of the motion before me, counsel were unable to give a full account of what, if any, arguments were then made but there was clearly an issue as to whether Mr. Ó Baoill should or should not be produced for cross-examination. In a busy Monday list the court directed that the issue should be brought before the court by a motion to be issued on behalf of Savanagh.

19. And so, eventually, I come to the application now before the court but as I will explain, the procedural history is of some relevance.

The motion

20. By notice of motion issued on 12th March, 2020 Savanagh applies for:-

> *"(a) An order pursuant to Order 38, rule 8 RSC directing the presence of the second named applicant at the trial of the action for cross-examination on his affidavit of the 10th May, 2019.*
>
> *(b) In the alternative, an Order pursuant to Order 38, rule 3 RSC granting leave to the second named notice party to serve written notice requiring the production of the second named applicant at the trial of the action for cross-examination in relation to his affidavit of 10th May, 2019."*

21. The motion is grounded on the affidavit of Ms. Jean Hourigan, Savanagh's solicitor. The language used is sometimes rather partisan, but Ms. Hourigan gives a summary of the two sets of proceedings and explains why Savanagh wants to cross-examine him. It is said, on the one hand, that what was required of Mr. O'Baoill under the Association's rules was not done and that his evidence does not identify what, if any, action he took in relation to his alleged trusteeship of the mark, and on the other, that what the Association required of him as trustee and what he actually did appear to be at odds. It is said that Mr. Ó Baoill's evidence is not relevant to the issue of the true ownership of the mark; that there is no reliable evidence as to the existence of the trust relied on by the applicants; that there is no evidence of the consent of the trustees to act or the parameters of their role; and that there is no evidence of any connection between Mr. O'Baoill's role and the registration. The applicants, it is said, have *"sought to advance their position in a contrived information vacuum with the barest of averments*" and Savanagh asks that liberty to cross-examine should be granted.

22. Ms. Hourigan identifies five issues which she suggests arise from what she describes as Mr. Ó Baoill's generalised averments, which are:-

> (a) What property vested in him as trustee and when?
>
> (b) In his role as the alleged trustee of the Association's intellectual property, what did Mr. Ó Baoill understand that role to encompass?
>
> (c) As alleged trustee of the mark, what role did Mr. Ó Baoill have (if any) in relation to the application, registration, ownership, enforcement and/or third party dealings (such as licensing and sponsorship rights) of the mark?

(d) In terms of his role as the alleged legal owner of the Association's key registration, did Mr. Ó Baoill appreciate that his ownership was to last indefinitely and, if so, what did he understand his responsibilities were in this regard following the cessation of his role as appointed trustee in 2009?

(e) As alleged trustee and legal owner, what involvement has Mr. Ó Baoill had in relation to the proceedings taken to date regard[ing] the mark?

23. The replying affidavit was sworn on behalf of the applicants by their solicitor, Mr. Paul Keane. Mr. Keane suggests that there is no conflict of fact on the affidavits that would justify Savanagh's application, and that the matters identified by Ms. Hourigan as the proposed areas of enquiry are not relevant to the issues in the proceedings and would not assist Savanagh in any way. In Mr. Keane's belief, none of the five questions identified by Ms Hourigan is relevant to any part of the applicants' case or any defence to it.

24. There was another round of affidavits but, with no disrespect, they did not really advance matters.

25. Elaborate written submissions were filed on both sides.

26. I confess that when I first read the papers for this application I was puzzled as to what it was all about. It appeared plain enough to me that Mr. Ó Baoill's evidence is that he was one of the men who happened to be the trustees at the time of the application for registration but knew nothing about it. Someone in the GAA other than Mr. Ó Baoill asked F. R. Kelly to lodge an application for the registration of Cumann Lúthchleas Gael as the owner of the mark and it appears to be common case that that was a mistake.

27. The Association's position is that Savanagh's appeal is misconceived and bound to fail, yet it wants to forestall the hearing of the appeal by having the rectification application heard first. Savanagh's position is that the evidence which has been tendered in support of the rectification application is insufficient to allow the rectification order to be made, yet it wants to elicit additional evidence. The Association's position on the cross-examination motion is that there is nothing that Mr. Ó Baoill could be asked that would advance Savanagh's case or damage the Association's case, yet it has gone to very great trouble and expense to seek to prevent him being asked anything. Rightly or wrongly, it appears to me that Savanagh's determination to cross-examine Mr. Ó Baoill has been fuelled by the Association's determination that he should not be.

28. Moreover, I was puzzled as to why Savanagh might be seeking an order for the production of Mr. Ó Baoill which on the face of O. 38, r. 3 did not appear to be required.

29. By the way, it is interesting to contemplate how Cumann Lúthchleas Gael might not have the legal capacity to hold the mark but does have sufficient capacity to be named as a party to the invalidity proceedings and the appeal, and in due course to answer a claim for damages for groundless threats of infringement: but that is not an issue with which I have to grapple at this stage.

The arguments

30. On the hearing of the motion, Mr. Martin Hayden S.C., for Savanagh, explained that the motion was in the form in which it was by reason of the direction of the court on 9th March, 2020 that the issue should be brought before the court on a motion issued by Savanagh, and that his position was that leave was not required. He referred to *Lehane (Official Assignee in the estate of Sean Dunne) v. Gayle Dunne* [2016] IEHC 96 in which Costello J. explained that the entitlement of a party to cross-examine a deponent depends on the nature of the proceedings or the application in which the affidavit has been sworn:-

> *"10. The Rules of the Superior Courts expressly provide for a deponent to be cross-examined on any affidavit filed by him. The extent of the entitlement of a party to cross-examine a deponent depends upon the nature of the proceedings or the application in which the affidavit has been sworn. Where the procedures are by way of summary summons or special summons or, in the case of proceedings commenced by a plenary summons, a trial on affidavit has been directed, a party who wishes to cross-examine a deponent can serve a notice to cross-examine on the party who filed the affidavit requiring that the deponent be produced for cross-examination at trial. Unless a deponent is produced for cross-examination, his affidavit cannot be used as evidence except by leave of the court. Leave of the court to serve such a notice is not required.*
>
> *11. On interlocutory applications and proceedings commenced by petition or originating notice of motion, a notice to cross-examine may only be served with leave of the court. The court may order the attendance for cross-examination of the person making the affidavit (see O.40, r.1 of the Rules of the Superior Courts). There is no absolute right to cross-examine a deponent even if the relief sought is the dismissal of the proceedings. It was emphasised by Denham J., in Bula Limited v. Crowley (No. 4) [2003] 2 I.R. 430 at p. 459, that a trial judge has a discretion in relation to such an application and in general leave will only be granted if there is a conflict of fact upon the affidavits that it is necessary to resolve in order to determine the proceedings."*

31. Mr. Hayden pointed to the dictum of O'Donovan J. in *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369 that "*[t]he function of cross-examination is to cast doubt upon the veracity, accuracy or reliability of evidence given by a witness*" and to the observation in the same case that where it is debateable whether or not cross-examination is necessary or desirable, the court should lean towards permitting the cross-examination. He referred also to the judgment of Kelly J. (as he then was) in *Irish Bank Resolution Corporation Ltd. v. Quinn* [2012] 4 I.R. 381 in which the court emphasised that in the case of affidavits sworn in support of a special summons, the entitlement in O. 38, r. 3 to cross-examine is absolute and that a party who wishes to do so need only serve a notice to that effect.

32. There was, said Mr. Hayden, a difference between the submission made on behalf of the Association to the Controller and Mr. Ó Baoill's evidence to the High Court, but the

beginning and the end of the matter was that Savanagh was entitled to challenge the evidence of Mr. Ó Baoill even if there was no conflict.

33. It was acknowledged that while a party to a special summons is entitled to serve notice to cross examine, this did not mean that the court must always permit such cross-examination but had a jurisdiction to ensure that the process was not abused or uselessly prolonged: *Permanent TSB plc v. Donohoe* [2017] IEHC 143. But this, it was said, is not such a case.

34. To a large degree the thrust of the written submissions filed on behalf of the applicants was that the invalidity proceedings before the Controller and the appeal to the High Court were and are unstateable and that "*Savanagh's entire project … has become patently vexatious"*, but to attempt to decide a procedural application by reference to what is said to be the inevitable outcome of the substantive proceedings would be to put the cart before the horse: and in the event – quite rightly – that was not the basis on which the motion was argued.

35. There are two strands to the argument made by Mr. Peter Bland S.C., on behalf of the applicants. He submitted first, that Savanagh does not come within the entitlement to cross-examine in proceedings brought by special summons and secondly, that in the circumstances of the case, the court should exercise its inherent jurisdiction to refuse permission to cross-examine.

36. Order 38, r. 3 of the Rules of the Superior Courts provides:-

> *"3. Save in so far as the Court shall otherwise order, proceedings commenced by special summons 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 Court."*

37. Mr. Bland focusses on the words "*opposite party*". He says that while Savanagh may be a "*party*" to the application for rectification in the sense that it was served (and so comes within the definition of "*party*" in O. 125) it was so served because the rectification application relates to the rectification of the mark the subject of the appeal. It is said that Savanagh is not a defendant, that it has no interest in the mark, and the applicants seek no relief against Savanagh it is said that Savanagh "*wishes to involve itself in the proceedings to try to persuade the court that the Association should not be allowed to rectify the registration details of its own Mark*."

38. In support of the argument that Savanagh is not an "*opposite party*" Mr. Bland refers to the judgment of the Court of Appeal in *In the matter of Sean Dunne, a bankrupt* [2017] IECA 304 as establishing that the court should closely examine the capacity in which

persons are participating in proceedings for the purpose of assessing their entitlement, or otherwise, to serve a notice to cross-examine "*under particular rules of court*".

39. *In the matter of Sean Dunne, a bankrupt* was a case – as the applicants' written submissions spell out – in which a bankrupt sought to compel the attendance for cross-examination of the Official Assignee. The court was concerned with the correct construction of O. 76, r. 76 – which concerned persons requiring the attendance of the Official Assignee to give evidence in his official capacity – and O. 76, r. 73 – which the court found did not permit the bankrupt to serve a notice to cross-examine the Official Assignee on the affidavits sworn by him in support of an application in bankruptcy. I cannot see how it avails the applicants.

40. The second strand of the applicants' argument is based on the decision of McDermott J. in *Permanent TSB plc v. Donohoe*. That was a case in which the plaintiff mortgagee claimed an order for possession of two properties. The defendant had delivered first an affidavit which was "*couched in the same pseudo-legal terminology used in previous correspondence which [lacked] any factual or legal relevance or substance: much of it is mischievous, frivolous and vexatious"* and nine months later a "*somewhat prolix affidavit"* running to 128 paragraphs. Later again he served what appears to have been a jumbled "*special notice for production of your deponent for cross-examination*" in a form other than that provided for by the rules. McDermott J. said, at para. 29:-

> *29. The defendant is entitled under O. 38, r. 3 to serve a notice to cross-examine in proper form in respect of any deponent whose affidavit is relied upon by the plaintiff in special summons proceedings. This does not mean that the court must as a matter of course always permit such cross-examination to take place. In most cases, a notice to cross-examine is issued on reasonable grounds. However, the court has a jurisdiction to control its own proceedings and to ensure that its process is not subject to abuse or prolonged time consuming litigation which is not addressed to the central issues of the case. I am satisfied that the contents of the affidavits furnished by the defendant in many respects constitute an abuse of the court's process. Apart from the fact that they contain detailed legal submissions (as do some elements of the affidavits filed on behalf of the plaintiff), they also contain a considerable amount of frivolous, vexatious and scandalous material which, if allowed to be the subject and basis of a cross-examination of Ms. O'Brien would undoubtedly protract the proceedings unnecessarily and waste the court's time and limited resources. In addition, I am entirely satisfied having considered the affidavits sworn by Mr. Donohoe and the exhibits therein contained, that no issue of fact of any relevance or substance upon which Ms. O'Brien could properly be cross-examined has emerged from those affidavits. I am satisfied therefore that to permit cross-examination of Ms. O'Brien notwithstanding the issuing of a notice to cross examine would constitute an abuse of process. I am also satisfied that the proposed cross-examination is unnecessary in order to determine the issues in the case because of the absence of any evidence in Mr. Donohoe's affidavits relevant to the core issue or constituting a core denial of the central facts relied upon by the*

plaintiff. It seems to me that as matters presently stand on the affidavits there is no issue to be determined by way of cross examination. (See McElhinney v. Williams [1995] 3 I.R. 382 at p. 390-391 and Bank of Ireland v. O'Donnell [2015] IEHC 149 per Mc Govern J. applying Director of Corporate Enforcement v. Seymour [2006] IEHC 369).

41. Without getting bogged down in the detail, the applicants argue that the five issues identified by Ms. Hourigan are answered in the evidence already given and that Savanagh was not entitled to point to alleged conflicts in the affidavits filed on behalf of the applicants on the substantive application and the affidavit of Mr. Keane: which latter affidavit was said to have been sworn in the context of the cross-examination motion and would not be before the court on the substantive application. It was, it was submitted, simply a mystery as to what evidence Savanagh sought to obtain from Mr. Ó Baoill.

42. Mr. Michael Vallely appeared on behalf of the Controller in the role, in his own words, of hurler on the ditch. He did offer the view that if he rectification application were to succeed, the appeal would wither.

Discussion

43. I took a little time to explain the procedural genesis of this application which I think goes some way to explaining the confusion that I believe has crept in between O. 38, r. 3, O. 41, r. 1, and O. 76, rr. 73 and 76.

44. Order 41, r. 1 applies to affidavits filed on "*any petition, motion, or other application*" and allows the court, on the application of either party, to order the attendance for cross-examination of the person making any such affidavit. In such a case, the onus is on the party making the application to justify the making of the order sought. The authorities, specifically *Lehane (Official Assignee in the estate of Sean Dunne) v. Gayle Dunne* and *Irish Bank Resolution Corporation Ltd. v. Quinn*, are quite clear that the rules applicable to petitions, motions and other applications are different to those which apply to the hearing of proceedings which are commenced by summary summons or special summons.

45. Order 76, rr. 73 and 76 apply to bankruptcy applications.

46. I listened carefully, and I have carefully considered the argument that Savanagh, although it "*may*" be a party, is not an "*opposite party".* I cannot accept it. In the first place, Savanagh is a party. There is no may about it. Secondly, Savanagh is plainly an opposing party to the rectification application in that it has filed three affidavits. Mr. Tierney, quite properly, offers his evidence without agitating for any particular outcome, but Mr. Comerford asks that it be dismissed with costs. Thirdly, while the applicants' position is that Savanagh is an interloper which "*wishes to involve itself in the proceedings*" the objective fact of the matter is that Savanagh was joined by the applicants. It was suggested variously that the rectification application is an application in rem and that Savanagh has no interest in the mark, but if it has no interest in the proceedings there would have been no justification for joining it as a party. The fact that

Savanagh had not been named in the title and had not been identified as a defendant is neither here nor there.

47. Apart from the substance of the rectification application, the declared intention of the applicants is to ask that their later summons will be heard first, to the end that if the rectification application succeeds, Savanagh's appeal will be moot. If that were to happen – and I do not say that it will or will not – Savanagh would have an immediate interest in defeating the rectification application to preserve its appeal.

48. On a cross-examination motion I could not say – certainly on this cross-examination motion I am not prepared to say – that the appeal is doomed, or the rectification application guaranteed to succeed.

49. I do not overlook the decision of the Supreme Court in *Bula Ltd. (In receivership) v. Crowley* (Unreported, Supreme Court, 11th April, 2003) to which Mr. Bland referred. That was the second of two judgments in which the Supreme Court dealt with seven appeals which, as Denham J. (as she then was) put it, were "*part of a long line of litigation between the parties stretching over decades.*" The four appeals the subject of that judgment arose directly and indirectly out of a decision of the High Court given on an application by the receiver of Bula under s. 316 of the Companies Act, 1963, the prescribed procedure for which, in those days, was a special summons. The judgment shows that before the application for directions was listed for hearing on 23rd April, 2002, it had been, by consent of the parties, the subject of a procedural hearing before the President of the High Court at which time directions had been given for the exchange of affidavits and the trial date set. No issue was raised at the procedural hearing in relation to cross-examination but on the very eve of the trial date an application was made for cross-examination. The substantive application under s. 316 was an application for the approval of a proposed sale of property which, for the reasons given, was a matter of great commercial sensitivity. The issue of the plaintiffs' entitlement to cross-examine appears to have been argued under O. 40, r. 1, rather than O. 38, r. 3, and I think that it is of considerable significance (as the judgment shows at p. 35) that the application before the High Court on 23rd April, 2002 was an application for time to prepare for cross-examination. While it is true that Denham J. contrasted the issue of cross-examination on a s. 316 application with the right to cross-examine as expressed for trials on affidavit, the first reason given by the court was that the plaintiffs had failed to meet the heavy burden on them to intervene in the High Court's decision not to adjourn the case.

Conclusions

50. I am satisfied that Savanagh, as a party to proceedings commenced by special summons, was entitled to serve notice to cross examine.

51. I accept – indeed it is common case – that a party who serves such a notice does not have an absolute right to cross-examine but, as Murray J. put it in *Pepper Finance Corporation (Ireland) Ltd. v. Macken* [2021] IECA 15, Savanagh is presumptively entitled

to cross-examine the applicants' deponents and any departure from that position has to be justified by the applicants.

52. Thus the second strand to the applicants' argument – that in the circumstances of the case, the court should exercise its inherent jurisdiction to refuse permission to cross-examine – is founded on the mistaken premise that the second notice party needs permission.

53. I am far from convinced that the issues identified by Ms. Hourigan would have been sufficient to justify permission to cross-examine, if that was required. The first is a legal question, which Mr. Ó Baoill is not competent to answer. The second and fourth are based on Mr. Ó Baoill's subjective understanding of his role, which is surely irrelevant. I do not see any conflict of evidence as to the role which Mr. Ó Baoill had in relation to the application – he signed a cheque for F. R. Kelly's fee without knowing what work they had done – and I do not see the relevance of his role in relation to registration, ownership, enforcement and licensing, the answer to which is surely none. But the point is that Savanagh is entitled to test his evidence. If the cross-examination uselessly adds to the costs, the trial judge will be in a position to make an appropriate order.

54. I am not satisfied that the applicants have discharged the onus of proof of showing that cross-examination ought not to be permitted. It might have saved time and might very well have better focussed the argument if Savanagh had served notice to cross-examine before the summons came into the judge's list, but it is clear that it had before then flagged its intention to cross-examine. Mr. Bland argues that if Savanagh had served its notice before 9th March, 2020, he could have moved to set it aside, or he could have waited and dealt with the issue at trial. That is true, but the simple answer is that the applicants could have acquiesced in, or called for, the service of notice to cross-examine and then taken their course.

55. It is true, as Mr. Bland observed, that the hearing of the substantive case has been delayed by a year because of this application, but the motion was necessary because the applicants contested the second notice party's right to cross-examine.

56. The inherent jurisdiction of the court identified in *Permanent TSB plc v. Donohoe* is jurisdiction to ensure that its process is not abused, or its time wantonly or deliberately wasted. I am not persuaded that the cross-examination of Mr. Ó Baoill is not necessary for the fair and proper disposal of these proceedings. Whether it will get Savanagh anywhere remains to be seen. On the applicants' case it will not take long because he will have little or nothing to add to the evidence he has already given. The only issue that arises at this stage is whether the applicants have established that the proposed cross-examination would be an abuse of process, and I am quite satisfied that they have not.

57. In the circumstances which I have described, the form of the motion is wrong. Subject to hearing counsel, it seems to me that the appropriate order on the motion is a declaration that the second notice party is entitled to serve notice on the applicants' solicitors for the production of Mr. Ó Baoill for cross-examination on his affidavit filed on 10th May, 2019,

and a declaration that the applicants have failed to establish that the circumstances are such that he should not be cross-examined.

58. If Savanagh has not in form obtained an order in the terms sought, it seems to me nevertheless that it has been entirely successful on the motion and to be entitled to its costs. Provisionally, I would be inclined to stay execution on foot of the order for costs pending the determination of the substantive proceedings.

59. I will list the motion for mention this day next week at 10:30 a.m. and will hear counsel as to the form of order proposed and if necessary in relation to the question of costs.