

THE HIGH COURT

[2022] IEHC 52

[RECORD NO. 2021/6178 P]

BETWEEN

PATRICK CONNOLLY

PLAINTIFF

AND

O'DWYER SOLICITORS LLP

DEFENDANT

JUDGMENT of Mr. Justice Dignam delivered on the 25th of January, 2022.

Introduction.

1. This is an application by the Plaintiff, by way of Notice of Motion dated the 10th December 2021, for leave of the Court to cross-examine a Mr. Evan O' Dwyer on an affidavit which he swore on the 19th November 2021 in response to an earlier motion issued by the Plaintiff.
2. The background is as follows. It appears that the Plaintiff is involved in separate proceedings where he is suing other parties. The Court was given very little information in relation to those proceedings save that they concern certain lands owned in whole or in part by the Plaintiff and the appointment of a receiver over those lands and that O'Hanlon J made interlocutory orders in the proceedings on the 28th May 2021 on the application of the Plaintiff, Mr. Connolly. The Defendant in the instant proceedings, O' Dwyer Solicitors LLP, previously acted for the Plaintiff in respect of certain land transactions. The Plaintiff says that he needs documents concerning those transactions in order to properly prosecute the separate proceedings and that he sought the documents from the Defendant, his former solicitors, but they have not been transferred to him. He therefore issued these proceedings against the Defendant by way of Plenary Summons of the 8th November 2021 in which he seeks, inter alia:

"An order for an injunction, including a permanent injunction, directing the Defendant to transfer all his files and papers to include in electronic and digital format or otherwise in connection with and arising from the purchase and mortgage of lands comprised in Folios MY 31763, Folio MY 22335F, MY 47074F and Folio MY 46909F and house Number 14 Cornaroya Manor, Ballinrobe, Co. Mayo to his new solicitors, Swaine Solicitors at 14 Radharc na Farrage, Ballymoneen Road, Galway.

An Order preserving all files and papers to include in electronic and digital format or otherwise in connection with and arising from the purchase and mortgage of lands comprised in Folios MY 31763, Folio MY 22335F, MY 47074F and Folio MY 46909F and house Number 14 Cornaroya Manor, Ballinrobe, Co. Mayo pending further order of this Court."

3. He then issued a motion on the 9th November 2021 seeking reliefs in precisely the same terms. That led to an exchange of affidavits including an affidavit sworn by Mr. Evan O' Dwyer on behalf of the Defendant on the 19th November 2021. The Plaintiff issued the instant motion on the 10th December 2021 for leave to cross-examine Mr. O' Dwyer on that affidavit which the Plaintiff contends is necessitated by that earlier motion and the

need to resolve conflicts of fact which he says arises on the affidavits filed in relation thereto.

4. I return to the basis for this contention at paragraph 11 below.
5. I have not been asked to determine the earlier motion and I do not do so; nor should anything I say in this judgment be taken as expressing a view as to the merits of that application but, given that the instant motion is brought in the context of that earlier motion, I have found it necessary to refer to that motion.
6. The Plaintiff did not file a grounding affidavit in relation to the instant motion and therefore the affidavits that were opened were those filed in relation to the earlier motion. I have considered these in full but, as they are directed towards the reliefs sought in that earlier motion, I do not consider it necessary to set out their contents in detail. I deal with the portions which are most relevant to the instant motion below.

Submissions

7. The parties were agreed that the principles in relation to an application for leave to cross-examine on a motion for interlocutory relief were as set out by the Court of Appeal in *Bank of Ireland v O'Donnell* [2016] 2IR 185. Counsel for the Defendant referred me to paragraphs 81 and 82 of the judgment and Counsel for the Plaintiff did not disagree that these paragraphs set out the relevant principles. The Court of Appeal said:

"[81] The High Court judge's attention was drawn to the following passage from Delany and McGrath, Civil Procedure in the Superior Courts (3rd Ed. Round Hall, 2012), at para. 20-87, where the authors state in relation to interlocutory applications:-

'[20-87]... a notice to cross-examine may only be served with the leave of the court. It was emphasized by Denham J in [Bula Ltd v Crowley (No. 4) [2003] 2 IR 430 at p.459] that a trial judge has a discretion in relation to such an application. 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.'"

[82] The court is satisfied that the above is a correct statement of the relevant principles in relation to leave to cross examine on a motion for interlocutory relief in accordance with the judgment of Denham J in Bula Ltd v Crowley (No. 4) [2003] 2 IR 430 provided the reference to "the proceedings" is understood as being the motion seeking the interlocutory injunction or other relief. The court also considers it consistent with the principles in the judgment of O'Donovan J in Director of Corporate Enforcement v Seymour (Unreported, High Court, O'Donovan J, 16 November 2006) which did not relate to an application for interlocutory relief."

8. Paragraph 85 of *Bank of Ireland v O'Donnell* [2016] 2IR 185 concluded that:

"the court considers that the High Court judge was entitled, in the exercise of his discretion, to refuse cross examination upon the basis he did, namely, that it was

not necessary for him to determine any disputed fact for the purpose of deciding the respondent's application for an interlocutory injunction, having regard to the relevant criteria set out by the Supreme Court in Campus Oil v The Minister for Industry (No. 2) [1983] IR 88. Accordingly, the court rejects the appeal against the refusal to allow cross examination of Mr. O'Connor and the Receiver."

9. The Plaintiff contends that there are a number of what were described as conflicts of fact arising from the affidavits and that it is necessary to resolve these in order to determine the earlier motion. On the invitation of the Court counsel for the Plaintiff identified the following as the relevant conflicts:

(i) Mr. O' Dwyer said in his affidavit of the 19th November 2021 that the Defendant has long since destroyed the files in question: at paragraph 3 of his affidavit he stated that "*As I have advised the plaintiff's solicitors in open correspondence prior to the institution of these proceedings, this firm has long since destroyed the files in question.*"; at paragraph 8 he stated that "*It is the practice of this firm to remove all conveyancing files from the office to an offsite storage shortly after the files are closed and the transactions completed. We regularly review the files that we hold at this storage facility. All conveyancing files which are more than six years old are, as a matter of routine, shredded to make room for new files. This is in accordance with the guidelines for the retention of historic files issued by the Law Society of Ireland.*"; and in paragraph 10 Mr. O' Dwyer confirms that the Defendant firm acted for the Plaintiff and his partner in relation to the sale of a large number of houses and that "*all of those files were closed several years ago. They have been since shredded in accordance with the procedure I have described.*"

However, the Plaintiff, in his replying affidavit, exhibited guidance from the Law Society in respect of "Data retention and destruction of paper and electronic files" which states that solicitors should retain conveyancing files for 13 years. He describes this as the "*Law Society mandated time periods for the retention of files which is 13 years for conveyancing files and not 6 years as deposed*" and makes the point in paragraphs 25 and 26 of his affidavit that the time period is not as deposed to by Mr. O' Dwyer and that the Defendant's practice is not in accordance with the Law Society guidelines. Counsel contends that the relevant point for the purpose of this current motion which arises from this is that the fact that the Plaintiff did not comply with the mandatory time period "calls for an explanation". He accepts that the Court can not be asked to make a finding as to whether Mr. O' Dwyer's evidence is credible without Mr. O' Dwyer being called to give oral evidence and he referred to paragraph 7 of Clarke's J judgment in *RAS Medical Ltd v RCSI* (Supreme Court, 5th February 2019).

(ii) Even if the period for retention of files is six years, there were transactions within the previous six years so Mr. O' Dwyer's reliance on the period of six years is not credible.

(iii) Mr. Connolly states on affidavit that he called to the Defendant firm's office on several occasions to collect the files: at paragraph 10 of his affidavit he states "*...I have repeatedly made numerous efforts personally to procure the relevant files and papers from the*

Defendant to include physically attending at their office on numerous occasions... – all in vain.”; whereas Mr. O’ Dwyer says on affidavit that he only called once. In this regard, Mr. O’ Dwyer said *“at paragraph 10 of his [Mr. Connolly’s] affidavit, Mr. Connolly deposes that he ‘made numerous efforts personally to procure the relevant files and papers’ from the defendant’s office. This is not true. He attended our office on one occasion in March 2021 and he has never sought an appointment by prior arrangement to hand over the signed authority and collect any file we may have retained and which has a vintage of within the past 6 years. Because he did not make an appointment, I was unable to see him. He did not subsequently make an appointment...”*. At paragraph 38 of Mr. Connolly’s replying affidavit of the 30th November 2021 he repeats that he *“attended at [Mr. O’ Dwyer’s] office on several occasions to collect my files.”* Mr. O’ Dwyer in his second affidavit, sworn on the 8th December, repeats his position that Mr. Connolly only called to the Defendant’s office on one occasion.

- (iv) Mr. O’ Dwyer states on affidavit that Mr. Connolly has not shown why he needs the documents for the other proceedings.
 - (v) Mr. O’ Dwyer only informed the Plaintiff that the Defendant had no files for the first time seven months after the initial request and this is at odds with the fact that he swore that he had informed the Plaintiff six months earlier that the Defendant had located the file for one of the parcels of land. In particular, the Plaintiff points to the fact that by letter dated the 2nd November 2021 the Defendant stated *“We have no file. This transaction happened 13 years ago and files from that time are no longer retained by this office. We told you this before”* whereas by an earlier letter of the 22nd March 2021 the Defendant had stated *“We have now located the file for 14 Cornaroya from storage.”*
 - (vi) Mr. O’ Dwyer had to correct some of the contents of his first affidavit in his second affidavit but has not explained how he had come to make errors in his first affidavit. For the most part, this relates to the fact that Mr. O’ Dwyer states in his first affidavit that all of the files the subject of these proceedings related to property transactions which concluded in or about 2004 whereas, having been corrected by Mr. Connolly, he acknowledged that there were transactions between 2005 and 2008 and two in 2012.
10. While it is questionable whether some of these matters are conflicts of fact rather than inconsistencies or matters for argument or matters from which the Court might be invited to draw inferences (for example, the Defendant’s alleged non-compliance with the Law Society Guidelines referred to by the Plaintiff), the Defendant did not dispute that these were conflicts of fact – though he did submit that they were not conflicts of fact which required to be resolved for the resolution of the interlocutory motion - and I therefore proceed, for the purpose of determining the application, on the basis that they are all conflicts of fact properly so-called.
11. Having identified these as the relevant conflicts, the Plaintiff then argued that it was necessary to resolve these conflicts in order to determine the interlocutory application. His point as to necessity is that it is necessary to resolve these conflicts in order to establish whether the Defendant in fact has any documents because the interlocutory

relief sought in the original notice of motion is equitable in nature; that it is a principle of equity that the court should not make or be asked to make an order in vain; and that if the Defendant does not have any documents then the Court risks making an order in vain.

12. Counsel for the Defendant submitted that the Plaintiff is not entitled as of right to cross-examine Mr. O' Dwyer on an interlocutory motion, that he can only do so with the leave of the court, whether or not to grant such leave is a matter for the discretion of the court and that it is clear from the authorities that this discretion is not as broad as might first appear from a consideration of Order 41 of the Rules of the Superior Courts. Having opened *Bank of Ireland v O'Donnell*, he submitted that it is not necessary to resolve any conflicts of fact in order for the Court to resolve the interlocutory motion, particularly having regard to the nature of the relief sought in that motion. He submitted that the Court's role on a motion for interlocutory injunctive relief is limited to ascertaining whether a fair question has been established, and where the balance of convenience or justice lies. He described it as a holding exercise which seeks to minimise injustice until the trial when the evidence will have been led and tested. He described it as a necessarily inchoate assessment of the parties' opposing contentions and that it is not necessary to determine conflicts of fact. In essence he argued that it is no part of the Court's function at an interlocutory stage to determine what appear to be conflicts of fact or evidence; the court makes an assessment whether the criteria for an interlocutory injunction are satisfied on the basis of the evidence available to it. In support, the Defendant referred to *American Cyanamid Co v Ethicon* [1975] AC 396 (paragraph H) and *Charleton v Scriven* [2019] IESC 28 (pages 18 and 20). He also distinguished between the role of cross-examination in a trial on affidavit and the role of cross-examination on an interlocutory motion.

Conclusion

13. It is clear that a court should not allow an interlocutory application to turn into a mini-trial. The final determination of the parties' rights and obligations and the final determination of any conflicts of fact upon which those rights and obligations depend is a matter for the trial rather than for the interlocutory stage. However, it is clear from the terms of Order 41 of the Rules of the Superior Courts that cross-examination may be directed even on a "motion, or other application", which must include interlocutory motions and applications. Indeed, it is absolutely clear from the judgment in *Bank of Ireland v O'Donnell* that cross-examination may be permitted in respect of an interlocutory application - even where the application is for an injunction - where it is necessary to resolve a conflict of fact in order to resolve that interlocutory application. Of course, the question of whether it is necessary to resolve conflicts of fact in a particular instance will to a large extent depend on the nature of the particular interlocutory matter and therefore the nature of the exercise which the Court must undertake in dealing with it. This is what is touched on, in the context of an interlocutory injunction application, in the quote from *Bank of Ireland v O'Donnell* at paragraph 8 above where the Court of Appeal said: "*the High Court judge was entitled, in the exercise of his discretion, to refuse cross examination upon the basis he did, namely, that it was not necessary for him to*

*determine any disputed fact for the purpose of deciding the respondent's application for an interlocutory injunction, **having regard to the relevant criteria set out by the Supreme Court in Campus Oil v The Minister for Industry (No. 2) [1983] IR 88**" [emphasis added].*

14. I am not satisfied that it is necessary to resolve any of the conflicts of fact identified by the Plaintiff in order for a court to resolve the earlier motion for an injunction and an Order to preserve documents.
15. As stated above, the basis upon which the Plaintiff asks the Court to exercise its discretion to allow cross-examination is that if these conflicts are not resolved so as to conclusively establish whether or not the Defendant possesses documents then it risks the Court making an Order in vain in respect of the earlier motion
16. Firstly, at the level of general principle it is questionable whether it is necessary to first determine whether the Defendant has any documents. It seems to me that part of the exercise that the Court will have to engage in when considering the interlocutory motion is whether the Plaintiff has established a prima facie case or fair question that the Defendant has relevant documents that the Plaintiff is entitled to, not whether as a matter of fact the Defendant does indeed possess such documents, and if he does, what documents he actually possesses. An imperfect analogy may be an application for an injunction to restrain an alleged breach of a restraint of trade clause which is denied by the respondent. The Court is not required to find or determine that the respondent is actually in breach of the clause. If it is ultimately found at the trial that there was actually no breach it does not follow that the interlocutory order was made in vain. At the level of general principle the effect of the orders sought in the Plaintiff's earlier motion, if they are made in the terms sought, would be to compel the Defendant to preserve and transfer such documents as the Defendant holds which fall within the categories in the Notice of Motion.
17. It is in fact not necessary to resolve that question of general principle in this case because the fact is that Mr. O' Dwyer has stated on affidavit that the Defendant has two relevant documents. It is therefore unnecessary for Mr. O' Dwyer to be cross-examined to establish whether the Defendant has any documents which would be caught by an Order were one to be made because it is already admitted that the Defendant has such documents. Thus, on the admitted facts there are at least two documents to which an Order would apply. The Order would therefore not be in vain, if a Court decides to make an Order. It seems to me that this is fatal to the Plaintiff's application given the stated basis for the application.
18. If such an Order is made and if the Defendant only transfers two documents, the question of whether the Defendant has other documents which should be transferred or should have been transferred may become an issue between the parties in the context of compliance with that Order and cross-examination *may* prove necessary then (I express no view on this) but the question of what documents the Defendant actually holds is not a

matter which has to be resolved in order for the interlocutory application to be determined.

19. *Bank of Ireland v O'Donnell* makes it clear that the Court has a discretion to grant leave for cross-examination. No basis for the exercise of my discretion was advanced other than the one set out above and I am not satisfied that there is any other basis upon which I should exercise my discretion to grant leave for cross-examination.
20. In the circumstances, I refuse the relief sought.