APPROVED **[2021] IEHC 14**

THE HIGH COURT

2016 No. 1703 S

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

JOE O'CALLAGHAN
ANTHONY PEYTON
PADDY LAWLOR
BRENDAN NELIGAN

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 18 January 2021

INTRODUCTION

1. The plaintiff in these proceedings ("***the bank***") seeks to recover what it alleges is the outstanding balance owed to it pursuant to a loan facility granted to the defendants ("***the borrowers***"). The bank has chosen to pursue the matter by way of summary summons, and has since issued a motion seeking liberty to enter final judgment. The judge hearing that application will have to consider whether there is a fair or reasonable probability that the borrowers have a real or *bona fide* defence to the claim. That issue is not, however, yet before the court. Rather, the only matter which the court is currently concerned with is a narrower procedural question, namely whether the bank should be required to make its deponents available for cross-examination pursuant to Order 37, rule 2.

PROCEDURAL HISTORY

2. Insofar as relevant to the issues to be determined in this judgment, the procedural history can be shortly stated as follows. The proceedings relate to a loan facility said to have been made available to the borrowers in September 2008. The loan facility involved the restructuring of a previous loan facility, together with an additional advance of funds. The loan facility had been secured on lands ("***the mortgaged property***") upon which a number of apartments have since been erected by the borrowers.

3. The bank instituted these proceedings on 19 September 2016. Appearances have been entered on behalf of three of the four borrowers. The bank issued a motion seeking liberty to enter judgment on 29 March 2017. (Judgment has already been entered against the third-named defendant in the Central Office in circumstances where no appearance had been entered on his behalf).

4. One of the borrowers, Mr. Brendan Neligan, has filed two detailed affidavits setting out the basis upon which he seeks leave to defend the proceedings. First, it is said that the loan facility had been granted to the borrowers as a partnership, and that Mr. Neligan only held a 10 per cent shareholding in the partnership. The bank is said to have been on notice of the partnership arrangement, and of Mr. Neligan's limited exposure under the loan facility. Secondly, it is alleged that, as a result of misrepresentations made by the bank's senior management to its employees, Mr. Neligan was induced not to sell shares which he held in the bank. These shares were, seemingly, pledged as additional security under the loan facility. Thirdly, complaint is made as to the approach alleged to have been taken by the bank to the proposed sale of the apartments erected on the mortgaged property.

5. The bank has responded to the first, but not the second, of Mr. Neligan's affidavits. The response took the form of a replying affidavit sworn by Mr. Andrew Osborne. The relevant part of that affidavit reads as follows.

> "5. In respect of paragraph 7 of Mr. Neligan's Affidavit, I say and believe that the Plaintiff is a stranger to the allegations that they were aware of a partnership between the Defendants and that in any case the terms and conditions provide that the borrowings were advanced on a joint and several conditions (*sic*) as per the terms and conditions exhibited […].
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> 6. In respect of paragraph 8 of Mr. Neligan's Replying Affidavit, I say and believe that no advice was provided to the Deponent in respect of the value of his shares pursuant to the loan facility. I further say and believe that no such advice could have been provided to the Deponent in circumstances where, by their very nature shares will rise and fall.
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> 7. I say and believe that at no time was the Fourth Named Defendant induced to provide security as alleged or otherwise. I say that I have conducted a review of the Plaintiff's file and it is clear therefrom that there is no documentation to support the position averred to by the Fourth Named Defendant that any such advice was provided to the said Defendant in respect of his shares.
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> 8. In reply to paragraph 10 and for the avoidance of doubt, I say and believe that at no time was an agreed settlement entered into by the Plaintiff and *inter alia*, the Fourth Named Defendant as alleged or at all.
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> 9. In reply to paragraph 11 and 12 of the Fourth Named Defendant's Replying Affidavit, I say and believe that the delays alleged in the sale of the property were not as a result of any action or inaction on the part of the Plaintiff but were rather caused by the inability of the Defendants to obtain vacant possession of the property which was being rented by the Defendants."

6. As appears, the content of Mr. Osborne's affidavit consists of a mixture of sweeping statements of fact, and comments on certain documentation.

7. The solicitors acting on behalf of Mr. Neligan served a notice requiring the production of the bank's two deponents for cross-examination. This notice was issued pursuant to Order 37, rule 2 of the Rules of the Superior Courts. The notice is dated 24 October 2019.

8. The bank, in response to this notice, issued a motion on 4 March 2020 seeking the special leave of the court to use the affidavit evidence *without* producing either deponent for

cross-examination ("***the application for special leave***"). This motion ultimately came on for hearing before me on 17 December 2020.

9. It should be explained that the only matter before the court on that date was the bank's application for special leave. It seems that the borrowers had previously objected to a proposal on the part of the bank that both (i) the application for special leave, and (ii) the application for liberty to enter judgment, should be listed together for hearing. The intention being that, in the event that the court refused the bank's application to dispense with cross-examination, the deponents would be made available for cross-examination immediately. Counsel for the bank had submitted that it would be a more efficient use of court time to list the two applications together. This is because there would be a significant overlap in the affidavit evidence and documents which would have to be opened to the court on each application. The borrowers' objection to this proposal prevailed at a call over of adjourned cases on 8 October 2020. The High Court (Barr J.) characterised an application to block cross-examination as a fundamental application, and accepted a submission that the parties might wish to appeal the outcome of the application. The matter was sent forward for hearing on the basis of the bank's application for special leave alone.

10. Finally, for the sake of completeness, it should be recorded that leave to amend the summary summons was granted, on the consent of the parties, on 13 July 2020. This amendment had been necessary in light of the judgment of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84; [2020] 2 I.L.R.M. 423.

SUBMISSIONS BY THE PARTIES

11. Counsel on behalf of the bank cites the judgment of the High Court (McDermott J.) in *Ulster Bank Ireland Ltd v. Quinn* [2015] IEHC 376 in support of the proposition that the

requirement for "special leave" under Order 37, rule 2 does not place an onus upon the plaintiff in summary summons proceedings to demonstrate exceptional or unusual circumstances. Reliance is also placed on the judgment of the High Court (McDermott J.) in *Danske Bank v. Connotes Ltd* [2016] IEHC 183. The judgment is said to provide an example of the court refusing to allow cross-examination in respect of an affidavit which had been prepared on the basis of an examination of the books and records of the relevant bank in accordance with the provisions of the Bankers' Books Evidence Act 1879 (as amended). A similar approach appears to have been adopted by the High Court (Eagar J.) in *AIB Mortgage Bank v. Lynskey* [2017] IEHC 197. Perhaps tellingly, however, the judge expressed the view that it appeared to be appropriate to send the proceedings to plenary hearing.

12. Counsel submits that cross-examination will only be appropriate where there is a conflict of fact on issues which are relevant to the determination of the application to enter judgment. It is further submitted that no "prejudice" will be suffered by Mr. Neligan were the application to enter judgment to be considered on the basis of affidavit evidence alone, particularly in light of the fact that Mr. Neligan has averred to all matters in dispute between the parties. The court is said to be well positioned to consider all issues in dispute between the parties based on the comprehensive nature of the affidavits.

13. In response, counsel on behalf of Mr. Neligan carried out a careful analysis of the content of the affidavits, and sought to identify what his side characterises as conflicts of fact. In particular, it is submitted that Mr. Osborne's affidavit calls into question the reliability and credibility of Mr. Neligan's affidavit evidence, and in doing so relies on the averments previously made by the bank's other deponent, Ms. Muller.

14. Attention is drawn to *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4; [2019] 1 I.R. 63 which identifies the implications for a party of failing to challenge affidavit evidence.

15. Counsel submits that cross-examination is essential to determine the true position, so as to assist the court in determining the issues between the parties.

DISCUSSION

16. In practice, applications to enter judgment in summary summons proceedings are almost always heard on the basis of affidavit evidence, without any cross-examination. This is because a court, faced with a conflict of fact on the affidavit evidence on a relevant issue, will generally decide to remit the matter to plenary hearing rather than attempt to resolve that conflict of fact by directing cross-examination. The necessity for cross-examination will often imply the existence of a controversy which is unsuited for summary disposal.

17. Yet, the Rules of the Superior Courts expressly envisage that there may be cross-examination on an application to enter judgment. Order 37, rule 2 provides as follows.

> 2. Save in so far as the Court shall otherwise order, a motion for liberty to enter judgment under this Order 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 Master or the Court, as the case may be. In cases in which the Master has jurisdiction, he shall have the same power as the Court to hear oral evidence.

18. As appears, the default position is that a party who fails to produce a deponent in response to a notice to cross-examine will not be entitled to use that deponent's affidavit unless by the "special leave" of the court. The phrase "special leave" must be interpreted in the context of Order 37 as a whole.

19. As explained by the Supreme Court (*per* Hardiman J.) in *Aer Rianta cpt v. Ryanair Ltd (No. 1)* [2001] 4 I.R. 607, the overall principle is that the court must arrange for the determination of the issues in such manner as seems just. See pages 619-620 of the reported judgment.

> "Order 37, r. 7 provides:-
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> > 'Upon the hearing of any such motion by the Court, the Court may give judgment for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the question and issue in the action as may seem just.'
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> Rule 7 sets out the essence of the procedure. The last phrase expresses the overall principle: the court must arrange for the determination of the issues in such manner as seems just. The plaintiff, on a motion for summary judgment, may obtain liberty to enter final judgment but only for such sum or other relief as he, at this first stage, appears entitled to. Since it has earlier been provided (O. 37, r. 3) that the defendant may oppose the motion by affidavit, the plaintiff's apparent entitlement must subsist despite what the defendant has deposed to. Since the order provides for alternative, more searching and elaborate, methods of resolving the issues, the plaintiff's entitlement must appear clearly enough to render these unnecessary."

20. The ability to cross-examine was described as "protective" of a defendant by Laffoy J. in *Ulster Bank Ireland Ltd v. O'Brien* [2015] IESC 96; [2015] 2 I.R. 656 (at page 663 of the reported judgment).

> "It is clear on the wording of that rule that, as regards proof of the claim, an affidavit sworn by a person other than the plaintiff who can swear positively to the relevant facts is sufficient. However, the later provisions of O. 37 are protective of the defendant. For instance, under r. 2, although it is stipulated that the motion for liberty to enter judgment under that order shall be heard on affidavit, there is a proviso 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 … special leave'. Further, under r. 3 it is provided that the defendant may show cause against the motion by affidavit."

21. In adjudicating upon an application for special leave to rely on an affidavit (notwithstanding the non-production of a deponent in response to a notice for cross-examination), the paramount consideration for the court must be the interests of justice. The court must arrange for the determination of the issues in the proceedings in such manner as seems just.

22. Order 37 envisages that each party will, generally, be entitled to test the other party's affidavit evidence by way of cross-examination if they so require. This is especially important in the case of a defendant in circumstances where judgment is being sought against them without the benefit of a plenary hearing. The ability to cross-examine the plaintiff's deponents is intended as a protection for a defendant, and there must be some justification for dispensing with this protection. One such justification would be that there is no conflict of fact on any issue relevant to the determination of the application to enter judgment. In the absence of such a conflict, cross-examination would be unnecessary.

23. Any decision to grant special leave must be based on the actual content of the affidavits themselves, and not on any subsequent submissions which seek to downplay the meaning of those affidavits. If a deponent chooses to make sweeping statements on affidavit, then they may have to answer for those statements by way of cross-examination.

24. The time taken up by cross-examination in summary summons proceedings is likely to be short. This is because in most cases either (i) there will be no material conflict of fact (in which case cross-examination will not be necessary), or (ii) the material conflict of fact will be so significant that the appropriate course will be to remit the matter to plenary hearing (with the attendant procedural mechanisms of pleadings, particulars and discovery, as appropriate), rather than to attempt to resolve the conflict by way of cross-

examination alone. In a minority of cases, however, a short cross-examination may be of assistance in clarifying certain issues.

25. I turn now to apply these principles to the circumstances of the present case. Mr. Neligan has, in his two affidavits, outlined the grounds upon which he seeks leave to defend the proceedings as against him. The intended defence is based largely on Mr. Neligan's dealings with the bank, and, in particular, what he asserts was the bank's knowledge of the partnership between the borrowers and his own limited exposure to liability under the loan facility. Mr. Neligan also makes complaint as to what he alleges were representations made to him in respect of the continued value of his shares in the bank. A separate complaint is made to the effect that delay on the part of the bank resulted in a proposed sale of the mortgaged property being lost.

26. In response, the bank has filed an affidavit which seeks to refute the factual basis for the intended defence. Crucially, the bank's replying affidavit is not confined to merely exhibiting or commenting upon documents. Rather, Mr. Osborne has made a number of averments which appear, on their face, to contradict what has been averred to by Mr. Neligan. For example, Mr. Osborne states that no advice was provided to Mr. Neligan in respect of the value of his shares pursuant to the loan facility, and that at no time was Mr. Neligan induced to provide his shares as security. These are sweeping statements, and ones which go far beyond a mere recital of the content of documents which have been exhibited.

27. Mr. Osborne has made similarly sweeping statements in respect of more recent dealings between the bank and the borrowers, and, in particular, in respect of proposals to sell the apartments erected on the mortgaged property.

28. Counsel on behalf of Mr. Neligan has drawn attention to the judgment of the Supreme Court in *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4;

[2019] 1 I.R. 63. This judgment outlines, albeit in the context of the full trial of an action rather than in summary proceedings, the implications for a party of *failing* to challenge affidavit evidence. See, in particular, paragraph 113 of the reported judgment as follows.

> "However, in addition, I am also satisfied that it is inappropriate for either a trial court or an appeal court to reject sworn affidavit evidence by reference either to other sworn affidavit evidence or to documentary materials without giving the deponent concerned an opportunity to answer any reasons why the sworn evidence should not be regarded as credible or reliable. The onus is on a party who wishes to urge on a court that sworn affidavit evidence should not be accepted, in respect of any point of fact material to the court's final determination, to ask the court to take appropriate measures such as granting leave to cross-examine, so that questions concerning the credibility or reliability of the evidence concerned can be put to the witness and the court reach a sustainable conclusion as to the accuracy or otherwise of the evidence concerned."

29. There is some merit in the submission that a failure on the part of Mr. Neligan to seek to challenge the averments made by the bank's deponents by way of cross-examination might redound against him.

30. I am satisfied, therefore, that this is not an appropriate case in which to grant special leave to the bank to rely on its affidavits without any requirement to produce the two deponents for cross-examination.

31. In reaching this conclusion, I have carefully considered the case law relied upon by the bank (summarised earlier). In particular, it will be recalled that the bank had submitted that the requirement for "special leave" under Order 37, rule 2 does not place an onus upon the plaintiff in summary summons proceedings to demonstrate exceptional or unusual circumstances as to why it should not be required to make its deponents available for cross-examination. The judgment of the High Court (McDermott J.) in *Ulster Bank Ireland Ltd v. Quinn* [2015] IEHC 376 ("*Quinn*") is cited in support of the proposition. Whereas I have no argument with the bank's proposition that the requirement for special leave does not imply a threshold of "exceptional circumstances", it is incorrect to suggest, as the bank implies, that it is necessary for a defendant to demonstrate "prejudice" in

order to resist an application for special leave. Rather, for the reasons explained earlier, there must be some justification advanced by the plaintiff for dispensing with cross-examination.

32. More ambitiously, the judgment in *Quinn* is also cited by the bank in support of the proposition that the term "special leave" merely reflects the requirement for a plaintiff to bring a formal application, i.e. by motion grounded on affidavit, for leave to have the application for summary judgment heard on affidavit evidence only. This submission is incorrect. The rationale for the judgment in *Quinn* is narrower. It appears that the defendants, in that case, sought to have the court disregard the bank's affidavits entirely, on the basis of an alleged failure on the part of the deponents to attend before the Master of the High Court at an earlier stage. McDermott J. had not been satisfied that the original notice to cross-examine under Order 37, rule 2 was in proper form or served within a reasonable time such as to justify reliance upon it by the court in excluding the plaintiff from reliance upon the affidavits (paragraph 23 of the judgment). The judgment goes on to say *obiter dicta* that, in the absence of a relevant conflict of fact, the court would not be in any way assisted by the cross-examination.

CONCLUSION

33. The bank's application for special leave to be allowed to rely upon the two affidavits filed on its behalf without having to produce either deponent for cross-examination is refused. The bank has chosen to join issue with one of the borrowers (Mr. Neligan) 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 in terms of exhibited documentation.

34. It should be reiterated that this judgment is concerned solely with the application for special leave pursuant to Order 37, rule 2. This is because the defendants had, previously, made a successful objection to a proposal on the part of the bank that both its application for special leave and the application for liberty to enter judgment should be listed together for hearing. This court did not, therefore, have the option open to it of remitting the matter to plenary hearing.

35. Insofar as costs are concerned, the fourth-named defendant, Mr. Neligan, is entitled to his costs under Part 11 of the Legal Services Regulation Act 2015 and Order 99 on the basis that he has been "entirely successful" in resisting the bank's motion. (This costs order is subject to a stay on execution pending the determination of the proceedings (including any appeal)). No costs order will be made in favour of any of the other defendants in circumstances where, first, they have not served a notice to cross-examine, and, secondly, they did not file, within time, any affidavit in response to the bank's motion.

36. The proceedings will be listed for mention (remotely) before me on Monday 25 January 2021 at 10.45 am with a view to fixing a hearing date for the application for judgment. If requested to do so, I will arrange for the application for judgment to be heard by another judge.

Approved