THE HIGH COURT

[2023] IEHC 127

Record Number 2021/5661 P

Between

Jerry Beades

Plaintiff

-and-

KBC Mortgage Finance Unlimited Company, formerly known as IIB Homeloans Limited and Pepper Finance Corporation (Ireland) DAC

Defendants

THE HIGH COURT

Record Number 2022/729 P

Between

Jerry Beades

Plaintiff

-and-

James Anderson and Pepper Finance Corporation (Ireland) DAC

Defendants

THE HIGH COURT

Record Number 2022/730 P

Between

Jerry Beades

Plaintiff

-and-

James Anderson and Pepper Finance Corporation (Ireland) DAC

Defendant

Judgment of Mr Justice Dignam delivered on the 7th day of March 2023.

1. An application has been made by the defendants in each of these sets of proceedings to have the proceedings struck out or dismissed on various grounds. In response, the plaintiff ("*Mr. Beades*") has brought applications for leave to cross-examine the deponents of the grounding affidavits for those applications. This judgment deals with Mr. Beades' applications for leave to cross-examine. The applications were heard together and it is convenient and appropriate to deal with them in one judgment.

2. There is a very protracted history to these matters, all of which relates to two properties in Dublin: 31 Richmond Avenue and 21 Little Mary Street. It is not necessary to consider or set out that background in any detail. The starting point of that history is that an Order for possession in respect of those properties was made by Dunne J on the 23rd June 2008 by which Mr. Beades was directed to deliver up possession of the properties to Pepper Finance Corporation (Ireland) DAC in proceedings entitled *"IIB Homeloans Limited v Jerry Beades Record number 2006/623P*". Mr. Beades appealed against that Order and the Supreme Court affirmed it on the 12th November 2014. Since then, there have been a large number of applications and appeals including in the 2006/623P proceedings and in other proceedings issued by Pepper Finance Corporation (Ireland) Limited against occupants of the premises. It is stated in one of the grounding affidavits that "*Mr. Beades has issued no fewer than three sets of High Court plenary proceedings, six appeals in the Court of Appeal and Supreme Court and various applications for stays on High Court Orders…*"

3. On the 4th October 2021 Mr. Beades issued fresh proceedings, entitled *"Jerry Beades v KBC Mortgage Finance Unlimited Company (formerly known as IIB Homeloans Limited) and Pepper Finance Corporation (Ireland) DAC (Record number 2021/5661P)".* I will refer to these as the 2021/5661P proceedings. Mr. Beades seeks an Order setting aside the Order of Dunne J dated the 23rd June 2008 ordering him to deliver up possession of the two properties, a declaration that he is entitled to possession of those properties and damages for various wrongs.

4. On the 23rd February 2022, Mr. Beades issued both the second set of proceedings with which this judgment is concerned, entitled "*Jerry Beades v James Anderson and Pepper Finance (Ireland) Designated Activity Company (Record number 2022/729P)"*, and the third set, bearing the same title with record number 2022/730P. I will refer to

these as the 2022/729P and 2022/730P proceedings respectively. These two sets of proceedings are almost identical to each other but the first set concerns 31 Richmond Avenue and the second concerns 21 Little Mary Street. The Plenary Summons in these two sets of proceedings seek a large number of reliefs. I do not propose to set them out in full. In summary these are reliefs challenging the title of the second-named defendant to the premises, challenging the appointment of the first-named defendant as receiver over the properties on a number of grounds including that there was no valid mortgage and no valid deed of appointment, reliefs seeking to prevent the sale or letting of the properties or any dealing in respect of the properties, reliefs seeking to prevent the defendants from entering or interfering with the properties, and orders freezing any bank accounts that might contain the proceeds of any sale of the properties. This final relief arises because the premises have already been sold.

5. By Notice of Motion dated the 23rd February 2022 the first-named defendant in the 2021/5661P proceedings ("*KBC*") applied to dismiss those proceedings pursuant to the inherent jurisdiction of the Court on the basis that they amount to an abuse of process, are frivolous and vexatious and are bound to fail. This is grounded on an affidavit of Mr. Daragh Langan sworn on the 21st February 2022.

6. By Notice of Motion dated the 7th April 2022 the second-named defendant in the 2021/5661P proceedings ("*Pepper Finance*") applied to strike out or dismiss or place a stay on those proceedings pursuant to Order 19 Rule 28 of the Rules of the Superior Courts or the inherent jurisdiction of the Court on the grounds that the Plenary Summons does not disclose a reasonable cause of action or that the proceedings are frivolous and/or vexatious, constitute an abuse of process, are bound to fail, that their initiation and/or prosecution is prohibited by operation of the doctrine of issue estoppel, the rule in *Henderson v Henderson (1843) 3 Hare 100* and/or the doctrine of res judicata, and that the contents of the Plenary Summons are scandalous. They also seek what is commonly known as an "*Isaac Wunder Order*" prohibiting Mr. Beades from issuing any further proceedings without prior leave of the Court against certain named parties. This motion is grounded on an affidavit of Mr. Gerard McHugh sworn on the 6th April 2022.

7. By two identical motions dated the 7th April and the 20th April 2022 the defendants in the 2022/729P and 2022/730P proceedings ("*Mr. Anderson*" and "*Pepper Finance"*) applied to dismiss, strike out or stay those proceedings on the same bases as the 2021/5661P proceedings. These motions are grounded on an affidavit of Mr. Gerard McHugh sworn on the 6th April 2022 (which is the same in substance though not in detail

as his affidavit in the 2021/5661P proceedings). The application in the 2022/730P proceedings is also grounded on an affidavit of Ms. Pamela Keely. Ms. Keely simply adopts the evidence of Mr. McHugh in the aforementioned affidavit as the evidence in support of the application in the 2022/730P proceedings.

8. Mr. Beades replied to Mr. Langan's and Mr. McHugh's affidavits in the 2021/5661P proceedings by affidavit of the 21st April 2022 and a further affidavit dated the 16th May 2022. The first of these is only stated to be a reply to Mr. Langan's affidavit but I have taken it as being a reply to both Mr. Langan and Mr. McHugh's affidavits. Mr. Beades did not specifically swear a replying affidavit to the defendants' motions in the 2022/729P or 2022/730P proceedings but in his grounding affidavits to his motions the subject of these proceedings, he referred to having sworn them "*for the purpose of my application for the cross-examination of Darragh Langan and Gerard McHugh* ***and in respect of their affidavits sworn in the above matter***". [emphasis added]. I have therefore taken them as replying to Mr. Langan and Mr. McHugh's affidavits.

9. Mr. Beades then issued these motions on the 5th July 2022 in each of these sets of proceedings seeking leave to cross-examine the deponents. His motion in the 2021/5661P proceedings to cross-examine Mr. Langan and Mr. McHugh was grounded on an affidavit dated the 20th June 2022; his motion in the 2022/729P proceedings to cross-examine Mr. McHugh was grounded on an affidavit also dated the 20th June 2022; and his affidavit grounding his application for leave to cross-examine Ms. Keely in respect of her affidavit in the 2022/730P proceedings was dated the 19th June 2022. Ms. Keely swore a replying affidavit. Mr. Beades swore a replying affidavit to Ms. Keely's affidavit on the 28th June 2022 (the copy furnished to the Court was unsworn but this seems to have been the date of swearing). Mr. Beades set out twenty-three questions which he wished to ask Ms. Keely.

10. Mr. Beades seeks leave to cross-examine Mr. Langan, Mr. McHugh and Ms. Keely pursuant to Order 40 Rule 1 of the Rules of the Superior Courts. It provides:

> "*Upon any petition, motion, or other application, evidence may be given by affidavit, but the Court may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.*"

11. Much of the argument during the course of the hearing was directed more at the underlying motions to dismiss/strike out so it is important to emphasise that this judgment is concerned solely with the applications for leave to cross-examine.

12. I am satisfied that there is no basis upon which I should grant leave to cross-examine any of the three deponents.

13. There are three overarching considerations. The first is that the underlying applications are normally heard on affidavit (this is understandable given the test to be applied to such applications); the second is that no material conflict of fact which requires to be resolved is disclosed on the affidavits in those underlying motions; and the third is the nature of the test to be applied when determining whether proceedings should be dismissed or struck out on the basis contended for in the underlying motions.

14. The mere fact that an application is of a type that is normally determined on affidavit is, of course, not a bar to cross-examination. That is clear from Order 40 Rule 1 itself. However, a hearing on affidavit is the starting point and the Court must be satisfied that there is a reason to depart from determining the matter on affidavit.

15. That reason normally is that there is a conflict of fact upon the affidavits that is necessary to resolve in order to determine the proceedings. In *The Governor and Company of the Bank of Ireland v O'Donnell [2015] IECA 73* Finlay Geoghegan J said on behalf of the Court of Appeal:

> "*The High Court judge's attention was drawn to the following passage from Delaney & McGrath 'Civil Procedure in the Superior Courts'…where the authors state in relation to interlocutory applications:*
>
> > *'…a notice to cross-examine may only be served with the leave of the Court. It was emphasised by Denham J in Bula Ltd v Crowley (No. 4) …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…'*
>
> *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) 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…which did not relate to an application for interlocutory relief."

16. As adverted to in that quote, *O'Donnell* was an interlocutory application. It has been confirmed that these principles also apply to all applications in respect of which leave to cross-examine is sought. In *Lehane v Dunne [2016] IEHC 96* Costello J stated:

"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) …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."

17. Costello J's decision was overturned on appeal but this summary of the principles was not disturbed. Barrett J quoted the judgment in *Lehane v Dunne* with approval in *Ryanair Limited v Van Zwol [2016] IEHC 264* where he summarised the applicable principles including that there is no absolute right to cross-examine a deponent even if the relief sought is dismissal of the proceedings, that the Court has a discretion in relation to an application to cross-examine on an affidavit; in general, leave will only be granted if there is a conflict of fact upon the affidavit that it is necessary to resolve in order to determine the proceedings though it is not essential that the conflict be one of fact; the party seeking cross-examination of a deponent must demonstrate (i) the probable presence of some conflict on the affidavits relevant to the issue to be determined, and (ii) that such issue cannot justly be decided in the absence of cross-examination.

18. Of course, the judgment in *Bula Limited v Crowley (No 4)* was itself given in the context of an application for directions which were of a final nature.

19. In *Trafalagar Developments Limited & Ors v Mazepin & Ors [2021] IEHC 69* Barniville J referred to the judgment of Baker J in *Somague Engenharia SA & anor v*

Transport Infrastructure Ireland [2015] IEHC 723 in which she cited with approval the statement of principle outlined by O'Donovan J in *Director of Corporate Enforcement* v *Seymour [2006] IEHC 369* and summarised the statement of principle by way of a series of points:

> "*(a) cross-examination will be permitted if there are material conflicts of fact apparent from affidavits.*
> *(b) cross-examination may be required in order to allow a judge to resolve that material conflict.*
> *(c) the court should tend towards permitting cross-examination but*
> *(d) the discretion must nonetheless be exercised only if cross-examination is necessary for disposing of the issues.*
> *(e) there may be examined not merely facts taken in a narrow sense but also the construction, or interpretation, or conclusions that a person draws from those facts, and cross-examination may be permitted in those circumstances even if there is no real dispute as to those material facts.*
> *(f) thus, opinions and conclusions may be tested by cross-examination both as to their reliability or reasonableness as the case may be."*

20. Baker J went on to say that the "*…test is twofold: there must be a conflict of evidence on affidavit and it must be necessary to resolve that conflict in order to determine the issue before the Court."*

21. Barniville J said in *Trafalgar Developments* that the position was neatly summarised by Delany & McGrath at para. 21-04 where it is stated:

> "*The general approach of the courts has been that leave to cross-examine 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 or the application before the court. In order for the requisite conflict to arise, it would be necessary for the party seeking cross-examination to have filed an affidavit challenging the accuracy of the matters upon which cross-examination is sought. It follows that cross-examination will not be ordered so that the deponent can be cross-examined as to factual matters that are not addressed in his or her affidavit. Neither can cross-examination be used in an attempt to depose the deponent to obtain evidence for later use at trial."*

22. Barniville J also referred to the statement in paragraph 21-08 that "…s*ubsequent decisions have reiterated the orthodoxy that there has to be a conflict of evidence on affidavit, the resolution of which is necessary to decide an issue before the court in order for cross examination to be tried.*"

23. Thus, cross-examination will normally only be permitted where there is a material conflict of fact which requires to be determined, though the Court has a discretion to permit cross-examination on construction, interpretation or conclusions from "*facts in a narrow sense*" if that is necessary for the purpose of determining the proceedings (or an interlocutory application)

24. In relation to the third consideration - the nature of the test to be applied to an application to dismiss or strike out - the principles are well-established. The jurisdiction, whether under the Rules or the court's inherent jurisdiction, is subject to a number of overarching principles: first, it is a jurisdiction to be exercised sparingly, given that it relates to the constitutional right of access to the courts; second, the onus is on the moving party to establish that the pleadings do not disclose a reasonable cause of action or that the case is bound to fail or that it is an abuse of process and the threshold to be met is a high one; third, there is a difference between the jurisdiction which arises under Order 19 Rule 28 of the Rules and the inherent jurisdiction of the Court. In an application to dismiss proceedings as disclosing no cause of action under Order 19 Rule 28 the Court must accept the facts as asserted in the plaintiff's claim without inquiry or assessment whereas, on an application under the Court's inherent jurisdiction, there may be a limited analysis of the facts (*Salthill Properties Limited v Royal Bank of Scotland plc [2009] IEHC 207, Lopes v Minister for Justice, Equality and Law Reform [2014] IESC 21*). Furthermore, under its inherent jurisdiction the Court can, to a very limited extent, consider whether there is any credible basis for suggesting that the facts as asserted are true and if not then the proceedings may be struck out on the basis that they are bound to fail on the merits; fourth, the Court must take the plaintiff's claim at its high-water mark; fifth, the Court must be satisfied not just that the plaintiff will not succeed but cannot succeed; and sixth, the Court must be satisfied that the plaintiff's case would not be improved by an appropriate amendment to the pleadings or through the utilisation of pre-trial procedures such as discovery or by the evidence at trial.

25. The relevance of this to these cases is, of course, that insofar as there are any conflicts of fact the Court, when dealing with the applications to dismiss/strike out must, subject to the very limited scope to inquire into the facts on an application under the

Court's inherent jurisdiction, take the plaintiff's case at its height and must accept any facts pleaded by the plaintiff.

26. The fundamental consideration in this case is that there is no conflict of fact which requires to be determined in order to decide the underlying motions disclosed on the affidavits sworn in those motions.

27. In paragraphs 5 – 22 of Mr. Langan's grounding affidavit he sets out a summary of various steps in the previous proceedings in which the Order for possession was made by Dunne J on the 23rd June 2008. It is not necessary to recite the detail of these paragraphs but, in summary, they set out that on the 23rd June 2008, Dunne J granted IIB an Order for Possession of the two premises, that this was affirmed by the Supreme Court on the 12th November 2014, that Costello J granted leave to issue an execution order pursuant to the Order of the 23rd June 2008 on the 29th June 2018, and that Mr. Beades appealed the Order of Costello J by notice of appeal of the 18th September (the Court of Appeal also considered a separate appeal brought by Mr. Beades). Mr. Langan refers to and exhibits various Orders and the judgment of the Supreme Court of the 12th November 2014 and the judgment of Costello J of the 29th June 2018. Mr. Langan concludes in paragraphs 23 – 26 of his affidavit by expressing the belief and stating that he is advised that it is clear that the proceedings amount to an abuse of process as they offend against the rule in *Henderson v Henderson*, that they are an example of the type of litigation tactic which that rule prohibits, and that any matters which the plaintiff could argue in the proceedings have already been determined and are res judicata, and prays for an Order dismissing the proceedings as an abuse of process.

28. Mr. McHugh swore the affidavit on behalf of the first and second-named defendant in the 2021/5661P proceedings. In paragraph 14 he states that "*Mr Beades has issued no fewer than three sets of High Court plenary proceedings, six appeals in the Court of Appeal and Supreme Court and various applications for stays on High Court Orders to include an application seeking to strike out the Injunction Proceedings (as defined below). Mr. Beades has been heard by all of the Superior Courts on numerous occasions since the Possession Order was made on 23 June 2008 and, in all the judgments delivered to date against Mr. Beades, the same conclusions have been reached including the conclusion that any right of Mr. Beades to deal with or otherwise to purport to exercise any control or act of ownership in respect of the Properties was extinguished when the Possession Order was made on 23 June 2008 against Mr. Beades.*" He then goes on to set out a considerable level of detail of these other proceedings, applications and appeals in paragraphs 17 – 64 of his affidavit. In his

conclusion he expresses the belief that the proceedings are unmeritorious, bound to fail and represent an abuse of process and that time should not be devoted to the plaintiff's attempt to re-litigate matters relating to the two properties, particularly where he has been told that *"(a) since the making of the Possession Order, he has had the legal status of a trespasser; and (b) that it is not open to him to challenge the Possession Order nor to seek to agitate claims he did not make during the course of his 2008 Appeal."* Elsewhere in his affidavit Mr. McHugh states that he believes and has been advised that even were it procedurally permissible for Mr. Beades to impugn the Order of the 23rd June 2008, the proceedings would be frivolous, vexatious, bound to fail and an abuse of process where the Possession Order has already been the subject of an appeal to the Supreme Court. He also states in paragraph 10 that he is aware that Mr. Beades, during an application for a stay on an Execution Order that had been obtained by Pepper Finance from Costello J, asserted to the Court of Appeal that he did not sign the relevant mortgage which secured the properties in favour of IIB and/or that his signature was forged on the mortgage and that he believes these allegations were made by Mr. Beades again during the course of Mr. Beades' substantive appeals against the Execution Order and injunction Orders which had been made. He refers to the judgment of Whelan J where she stated:

> *"In all the circumstances, it is not now open to the appellant to seek to re-litigate the issue of the order for possession or otherwise to seek to use the within proceedings to launch a collateral attack on the order of the High Court as affirmed by the order of the Supreme Court made in November 2014 by attaching himself to this litigation."*

29. In paragraph 20 Mr. McHugh expresses the view that where the Supreme Court has already determined and dismissed Mr. Beades' appeal of the Possession Order *"…it is not open to him to exhaust further court resources and incur further costs by attempting to re-litigate matters that have already been decided upon."*

30. Mr. McHugh exhibits judgments, Orders and Notices of Appeal from the previous proceedings.

31. The affidavit sworn by Mr. McHugh in the 2022/729 and 730P proceedings follows the same format and the substance of the contents of the affidavit largely reflect those of the affidavit sworn in the 2021/5661P proceedings though they are not identical. Again, a number of previous judgments, Orders and Notice of Appeal are again exhibited. Mr. McHugh concludes by expressing his belief that the proceedings are

frivolous, vexatious, bound to fail and an abuse of process and emphasises that this is particularly so where the properties have been sold.

32. Ms. Keely also swore an affidavit in the 2022/730P proceedings but she simply says that "*The factual basis for* [the application to dismiss] *is detailed in an affidavit sworn by Mr. Gerard McHugh on 10 April 2022…. I hereby adopt the evidence of Mr. McHugh as my evidence in support of this application.*" She subsequently corrected the reference to Mr. McHugh's affidavit of the 10th April to clarify that she had intended to refer to his affidavit of the 6th April 2022.

33. The essence of the Defendant's applications in all three sets of proceedings is that the issues raised in these proceedings have already been determined by the courts or that they could have been raised by Mr. Beades in those earlier proceedings.

34. Mr. Beades' replying affidavit in proceedings 2021/5661P (which replies to Mr. Langan and Mr. McHugh's grounding affidavits) does not join issue with any of these factual matters averred to in these grounding affidavits. In paragraphs 3 – 15 he deals with, inter alia, the question of his signature on the relevant mortgage deed (ie. the mortgage on foot of which the Order for Possession was obtained) which is an issue raised in the Statements of Claim in the 2022/729 and 730P proceedings, a report of a documentation examiner who concluded that the signature on the mortgage deed was likely not that of Mr. Beades, and the legal effect of this. Mr. Beades refers to this as "*new evidence*" and it plays a central part in his argument that the proceedings are not bound to fail or an abuse of process. He also states that he had written to the receiver (the first-named defendant) on six occasions and that the Receiver had not responded to any of these letters. He states that the rule in *Henderson v Henderson* does not apply given "*the new evidence that has emerged and which was confirmed by the documentation expert that my signature was not mine and was signed by some other party.*" He also says that the proceedings were not frivolous and vexatious and that he believes that they constitute a full and valid claim against the defendants. He swore a subsequent affidavit referring to a number of authorities that he would like to refer to and deposing to his efforts to secure the engagement of the receiver.

35. As noted above, in the 2022/729 and 730P proceedings I am taking Mr. Beades' grounding affidavits to also be replies to Mr. McHugh and Ms. Keely's affidavit. He does not join issue with any of the factual averments made by Mr. McHugh or Ms. Keely.

36. The case that is sought to be made by the defendants in the underlying motions is that when one examines Mr. Beades' pleadings they disclose no cause of action; more particularly, the case is sought to be made what when one considers Mr. Beades' pleadings and the previous proceedings and, most importantly, the previous Orders and judgments, it is apparent that the matters pleaded by Mr. Beades are res judicata or are in breach of the rule in *Henderson v Henderson*. The defendants may be right or wrong about this but there is no conflict of fact about what is said by the deponents about the previous proceedings. Mr. Beades does not controvert a single factual averment about the background or the previous proceedings. His overall response is to adduce evidence which he says establishes that he did not sign the relevant mortgage on foot of which the original Order for Possession was obtained. This does not controvert what is said in the grounding affidavit and does not have to be resolved in order to determine whether that issue has already been tried or could have previously been raised by Mr. Beades. Thus, the defendants' case that the matters pleaded by Mr. Beades are res judicata or are in breach of the rule in *Henderson v Henderson* is to be determined by reference to uncontroverted evidence, pleadings, Orders and judgments of the High Court, the Court of Appeal and the Supreme Court, and the evidence of Mr. Beades. Cross-examination is not required for the Court to do so.

37. As discussed above, the nature of the Court's approach to a motion to dismiss or strike out is also directly relevant because the Court can not resolve any conflicts of fact and must take the facts asserted by the plaintiff to be true, subject to the limited scope to inquire into them when asked to exercise its inherent jurisdiction. The correct approach is particularly relevant to the case that is made by Mr. Beades that Mr. Anderson has not been validly appointed because his application was not by deed. I am satisfied that even if the Court has to consider this substantive issue, the question of whether this case is bound to fail or is an abuse of process can be resolved by an examination of the documentary evidence and does not require cross-examination of the deponents. (see *Salthill Properties Limited v Royal Bank of Scotland plc [2009] IEHC 207* and *Kingston v ACC Loan Management DAC [2016] IEHC 792*).

38. As noted above, there may be some circumstances other than a material conflict of fact where the Court might nonetheless consider cross-examination necessary and exercise its discretion to permit same. It seems to me that such circumstances will be limited. Mr. Beades sets out in his grounding affidavits to these applications and in his written submissions specific reasons why he says cross-examination should be permitted. He expanded further in his oral submissions. Some of these points were directed more towards the underlying motions and I do not deal with them because they

are a matter for the Court hearing those motions. For example, Mr. Beades referred to *Takhar v Gracefield Developments Ltd & ors [2019] UKSC 13* (in which Kerr LJ referred to *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2014] AC 160*. The paragraphs to which I was directed concerned with the operation of the rule in Henderson v Henderson. Mr. Beades also referred to *Donlon v Burns [2022] IECA 159* (including paragraphs 23, 40, 47, 48, 52, 58 and 87). This case concerned a challenge to the validity of a deed of appointment whereby two of the respondents were appointed as receivers. Thus, both of these cases and the arguments on foot of them are relevant to the underlying motions and not to the current applications.

39. In paragraph 6 of his written submissions, Mr. Beades says:

> "*I say that the evidence of the Witnesses lacks credibility and it cannot be relied upon to defend or ground any application. The reliability of the evidence is very significant in this case as it is vitally important given the consequences of the Witnesses applications in respect of the other proceedings between us. I believe that if the within application it will have significant bearing on the determination and the outcome of my applications [sic].*"

40. He relies on *Perrigo Pharma International DAC v John McNamara and Ors [2020] IEHC 552* in which reference was made to Halsbury LJ's statement in *Browne v Dunne (1893) 6 R.67*:

> "*To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity often to defend their own character, and not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.*"

41. He relies on *Perrigo Pharma* and on *RAS Medical Limited v The Royal College of Surgeons Ireland [2019] IESC 4* to argue that he is obliged to cross-examine the deponents because he is asserting that their evidence lacks credibility or reliability. He says that it would be an unfair procedure for him to suggest in argument that a witness's evidence should not be regarded as credible on a particular basis without giving that witness the opportunity to deal with the criticism of the evidence concerned.

42. It is entirely unclear what "*evidence*" Mr. Beades says "*lacks credibility*" or is unreliable other than the deponents' opinions. As discussed, Mr. Beades has not challenged, controverted or put in issue any of the factual evidence contained in the grounding affidavits so what he says is lacking credibility and is unreliable could only be the opinions of the deponents. A number of points must be made about this and his reliance on *Perrigo* and *RAS Medical*. Firstly, they are nothing more than opinions. It is a matter for the Court to determine whether the proceedings disclose no reasonable cause of action, are frivolous and vexatious, bound to fail or are estopped. Those opinions, and therefore, the Court's assessment and determination, can only be based on the factual evidence contained in the affidavits. Mr. Beades is perfectly free and able to argue that the opinions are unreliable and lacking credibility because they are not supported by the evidence and, therefore, the Court should not conclude that the proceedings disclose no reasonable cause of action, are frivolous and vexatious, bound to fail or are estopped. Cross-examination is not necessary for that. Secondly, the contexts of *Perrigo* and *RAS Medical* were very different to the current one. The obligation which was identified in those cases is the obligation not to ambush the other side by subsequently challenging their evidence without having given them an opportunity to deal with that challenge. For example, in *Perrigo*, a number of officers of the Revenue had sworn affidavits and at least one of them gave oral evidence, the plaintiff did not cross-examine them (and in the case of the witness who gave oral evidence, counsel for the plaintiff said that they had no questions for him) but then sought to "*attack what he had sworn about…"*. McDonald J held that this was impermissible. The position was even more stark in *McNamee v The Revenue Commissioners [2016] IESC 33*. In that case a number of officers of the Revenue had set out their position on affidavit and while notice to cross-examine had been served, the applicant chose to proceed with cross-examination of just one of the deponents and confined the cross-examination very narrowly to one relatively small issue. The applicant did not put internal Revenue documents to the witnesses, and then sought to rely on those documents with a view to demonstrating that, contrary to what the witnesses said on affidavit, there was, in fact, prejudgment on the part of the Revenue Commissioners. In this case, Mr. Beades has discharged the obligation of putting the deponents on notice that he is challenging the credibility/reliability of their opinions based on the factual evidence and they have resisted being cross-examined. They can not subsequently complain about not being given an opportunity to address Mr. Beades' challenge. Thirdly, in *Perrigo*, the burden of proving its case was on Perrigo. McDonald J said "*If it therefore wished to establish that the affidavits sworn on behalf of the respondents do not, to paraphrase Perrigo's counsel, give rise to a complete statement of the true facts, the proper way to pursue that case was by means of cross-*

examination…" In this case, it is not suggested by Mr. Beades that the factual evidence given by the deponents is not a "*complete statement of the true facts*". He appears likely to be saying that the opinions or conclusions drawn by the deponents should not be accepted by the Court. In circumstances where those opinions can only be said to be based on the factual evidence in the affidavits, the Court will be perfectly capable of assessing whether it agrees with those opinions without the need for cross-examination.

43. Mr. Beades states at paragraph 8 that the applications are an attack on his character as it is suggested that he is a serial litigant and that it would be a "*huge injustice*" were the witnesses allowed to make averments without him being permitted to challenge them on how they came to the opinions they express in their affidavits. This point is misconceived. Mr. Beades was and is permitted to challenge the deponents on how they came to the opinions they express in their affidavits. For the purpose of the underlying applications, they must be taken to have come to those opinions based on the factual matters set out in the affidavits and Mr. Beades had a full opportunity to reply to these affidavits and did not put any of the factual matters in issue. He will also have a full opportunity to make submissions at the hearing as to how those opinions are not well-founded and, indeed, as to how the factual matters which he has put before the Court in his replying affidavits mean that the Court should not conclude that the proceedings are an abuse of process or frivolous and vexatious or are estopped.

44. He also relies on *Trafalgar Developments Limited & ors v Mazepin & ors [2021] IEHC 69* and argues that he fits within the exceptional criteria requirements and that the standard should be set so that it is a level playing field and he is given every opportunity to defend himself. Mr. Beades did not expand on his reliance on this case. He appears to accept that cross-examination should generally only be permitted where there is a conflict of fact but that cross-examination can be permitted in other circumstances and he falls within such other circumstances.

45. He also referred to two passages from Simons J in *Allied Irish Banks plc v O'Callaghan & Ors [2021] IEHC 14*. At paragraph 22 Simons J said:

> "*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."

46. At paragraph 33 he said:

"*The bank's application for special leave to be allowed to rely upon the two affidavits filed on its behalf without having 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."*

47. It seems to me that the reliance on *O'Callaghan* is misplaced. First of all, that judgment was concerned with an application under Order 37 Rule 2 of the Rules of the Superior Courts and not Order 40 Rule 1. The structure of the two rules is very different. Simons J said at paragraphs 16 – 18:

"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."

48. Simons J went on to say at paragraph 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."

49. In *Pepper Finance Corporation (Ireland) Limited v Macken [2021] IECA 15* it was held that the parties are "*presumptively entitled*" to cross-examine each other's deponents by operation of Order 37 rule 2.

50. There is not the same presumptive entitlement in Order 40 Rule 1.

51. Secondly, and perhaps more importantly, there was a conflict of fact in *O'Callaghan* and this formed a central part of Simons J's decision. At paragraph 26 of his judgment Simons J stated:

"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."

52. He also set out the clear conflicts in paragraph 33 which is quoted above.

53. In those circumstances, I find *O'Callaghan* to be of limited relevance.

54. Mr. Beades also submits that the deponents have filed affidavits which rely on the statements of each other without "*real foundation as to what, why and how they come to those opinions*" or whether they "*examined all the documents…or just simply took what was averred to in one affidavit to make their averments.*" He also submits that new evidence has emerged since Dunne J made her decision. He also says that there are sweeping statements made by the deponents which need to be examined in further detail. It seems to me that these contentions miss the point of the affidavits sworn in the underlying motions. It is the affidavits and the exhibits which set out, and must be taken as setting out, the "*foundation as to what, why and how they come to those opinions.*" The defendants stand and fall on that. It also misses the point of the Court's function on the underlying applications. The Court (subject to the very limited ability under the Court's inherent jurisdiction to assess the evidence) will have to decide on the basis of the factual evidence, none of which is controverted (and even if was, it would have to be presumed to be as Mr. Beades pleads), whether the defendants have met the very high test required under Order 19 Rule 28 and the Court's inherent jurisdiction.

55. Mr. Beades' affidavits also set out specific reasons why he says cross-examination of each of the individuals should be permitted.

56. In relation to Mr. Langan he says that (i) Mr. Langan does not set out the basis upon which the 2021/5661P proceedings offend against the rule in *Henderson v Henderson* and (ii) he needs to cross-examine him as to his understanding of the new evidence which the plaintiff says has come to light and how that impacts on the plaintiff's entitlement to bring fresh proceedings. The new evidence referred to is the

evidence contained in the plaintiff's replying affidavits to the motions to strike out his proceedings in relation to whether or not he executed the mortgage. I do not believe that these provide a basis for cross-examination of Mr. Langan. Firstly, the basis upon which Mr. Langan says the 2021/5661 proceedings offend against the rule in *Henderson v Henderson* is the factual material contained in his affidavit and exhibits and therefore it is not correct to say that the basis is not set out. Secondly, Mr. Langan's "*understanding of the new evidence*" and how "*it impacts on the plaintiff's entitlement to bring fresh proceedings*" is very largely irrelevant. It is for the Court to assess whether what Mr. Beades describes as "*the new evidence*" impacts on the plaintiff's entitlement to bring the proceedings by reference to the test in respect of applications to dismiss/strike out.

57. In relation to Mr. McHugh, Mr. Beades makes a number of points which can be grouped together as follows. He points out that many of the paragraphs in Mr. McHugh's affidavit are identical to paragraphs in affidavits sworn by other people (presumably in the earlier proceedings). He also points out that Mr. McHugh avers to matters which occurred well before KBC (his employer) became party to the action. He also says that by referring to the previous proceedings he is relying on third party information which is hearsay. These points can be understood as a challenge to or queries about Mr. McHugh's means of knowledge. I do not believe that these are well founded in the context of the underlying applications and in light of the contents of Mr. Beades' replies. As discussed in detail above, Mr. Beades has not challenged the correctness of any of the factual averments in Mr. McHugh's affidavit so whether those contents come from third party information or hearsay is largely irrelevant.

58. The second category of points is that Mr. McHugh is not qualified to express the view that the proceedings are frivolous and vexatious because he is not a judge or to express the view that the prosecution of the proceedings is prohibited by the operation of the doctrine of estoppel because he is not legally qualified (or at least has not set out his legal qualifications). The contention that cross-examination is therefore required is misplaced. Mr. Beades is correct that only a judge can decide whether the proceedings are frivolous and vexatious or an abuse of process or precluded by the doctrine of estoppel. Thus, Mr. McHugh's lack of qualification does not mean that it is necessary to permit cross-examination in order for that issue to be determined. The second suggestion seems to be that the terms of the affidavit must have been advised by someone with legal training. This is clear from Mr. Beades' related point that he wishes to examine Mr. McHugh as to who advised him that on an objective basis there is no lawful basis for the proceedings. Even if that is correct, Mr. Beades could not cross-examine Mr. McHugh as to the substance of legal advice received by him.

59. Mr. Beades set out two specific bases as to why Ms. Keely should be cross-examined in the 2022/730P proceedings: firstly that Ms. Keeley purported to adopt the evidence of Mr. McHugh in an affidavit sworn on the 10th April 2022 but there is no affidavit of that date. In fact, Ms. Keeley subsequently corrected this to make clear that she was referring to the affidavit of Mr. McHugh sworn on the 6th April and that in fact this was the affidavit which she had originally exhibited. Secondly, he says that Ms. Keely has to give evidence herself of the knowledge that she has of the proceedings and be cross-examined on it to establish if her evidence can be relied upon to ground the application. I do not accept that this is correct. The factual evidence that Ms. Keely relies upon is set out in the affidavit of Mr. McHugh and the Court dealing with the motion to dismiss/strike out will have to decide the application on the basis of that evidence. There is no need to cross-examine Ms. Keely in order for the Court to do so.

60. In all those circumstances, I refuse the relief sought.