

# THE HIGH COURT

[2023] IEHC 153

[2021 2409 P]

**BETWEEN**

**MAURICE D. KIELY**

**PLAINTIFF**

**AND**

**U2 LIMITED**

**DEFENDANT**

## **JUDGMENT of Mr. Justice Brian O'Moore delivered on the 23<sup>rd</sup> day of March 2023**

1. This is my decision on an application by the plaintiff, Mr. Kiely, in which he seeks an order directing the defendant, U2, to respond to sixteen interrogatories raised by him. I will refer to the defendant as “U2”, notwithstanding the fact that the defendant is a limited liability company (and not a band). The interrogatories as phrased by Mr. Kiely seek an answer from Adam Clayton of U2, rather than an answer from the company or from the band.

2. This judgment is arranged under the following headings: -

- (i) The claim made by Mr. Kiely;
- (ii) The interrogatories sought;
- (iii) The law;
- (iv) The submissions of the parties;

(v) Decision.

**The claim made by Mr. Kiely**

3. The claim made by Mr. Kiely centres on the ownership of the song “A Man and a Woman” which appears on the U2 album “How to Dismantle an Atomic Bomb”. Mr. Kiely claims that in 1998 he composed the song while visiting Los Angeles, that he performed the song in Santa Monica during that visit and did so “in the presence of the iconic American model Cindy Crawford”.

4. Mr. Kiely goes on to plead that the lyrics of the song “address Mrs. Crawford and have a special significance for the plaintiff concerning his feelings for her and their relationship. . .”. He pleads that, upon returning to Ireland later in 1998, he recorded the composition, sent it to himself by registered mail, and did so in order “to secure his ownership of the copyright”.

5. Some years later, Mr. Kiely pleads that he became aware that U2 were sourcing material for the album “How to Dismantle an Atomic Bomb”. He offered the song to U2 for use on the album but on certain terms. These terms were that the song be used only on the album but would never be performed live by U2 nor registered as their own composition “in a copyright office”. This arrangement was reached between Mr. Kiely and Adam Clayton, a member of U2, in the kitchen of the parish centre of Donnybrook Church. Importantly, Mr. Kiely pleads in the statement of claim that: -

“A mutual acquaintance was present in Donnybrook as the plaintiff sang and Mr. Clayton recorded. This gentleman will testify as the plaintiff’s witness and will confirm the plaintiff’s Pleading”.

6. Mr. Kiely then pleads that he became aware that the agreement made with Adam Clayton was not honoured by U2, that the song was included in another release (apart from

the album “How to Dismantle an Atomic Bomb”), and was performed live by two of the members of U2 “at the Bill Clinton Foundation inauguration at the Hollywood Bowl in Los Angeles”. Mr. Kiely also asserts that U2, in his view wrongfully and in breach of agreement, claimed copyright in the song. He therefore seeks a compensatory award, namely damages of €8,000,000.00. He also seeks €4,000,000.00 in punitive damages against the defendant “given the personal net worth of” the individual band members in U2. A full defence, denying all Mr. Kiely’s claims, has been delivered on behalf of U2. There is a positive plea, at para. 4 of the defence, to the effect that: -

“The defendant pleads that the words of the Song were composed by Paul Hewson and the music of the Song was composed by the said Paul Hewson, Adam Clayton, David Evans, and Larry Mullen (the four of whom constitute the band known as ‘U2’).”

7. It should be noted that an extensive notice for particulars was raised on behalf of the defendant, and full replies provided by Mr. Kiely. I will return to the details of the particulars provided by the plaintiff in considering one of his submissions, namely that replies to interrogatories are required by him in order to establish the fact and detail of his discussion with Mr. Clayton at Donnybrook, notwithstanding that Mr. Kiely’s pleaded case is that he himself participated in that conversation.

### **The interrogatories sought**

8. Mr. Kiely asked the court to order U2 to answer the following interrogatories: -

(1) Is the defendant U2 Ltd., or more specifically, are any of the band members including you yourself concerned, within the parameters of this legal dispute or otherwise, that this registered letter containing a cassette tape will clearly show beyond a shadow of a doubt that I the plaintiff am the composer of the song AMAAW?

- (2) Did the band U2 or any member or members of the band U2 compose the song AMAAW?
- (3) Have you, Adam Clayton, ever attended a meeting or assembly of any type whatsoever in Donnybrook, Dublin 4 in the Roman Catholic Church for any reason whatsoever other than for a romantic date or to discuss the music business or any other business at which I, the plaintiff, was also present?
- (4) When and where did you, Adam Clayton, first hear the song AMAAW?
- (5) Did you, Adam Clayton, record myself the plaintiff in the kitchen of the parish centre of the Roman Catholic Church in Donnybrook, Dublin 4, singing a cover of Bruce Cockburn's song "Nicaragua" in which I substituted the words "Cindy Crawford" for "Nicaragua" in the lines "Don't let them stop you now Nicaragua"?
- (6) Did you pass this recording, engineered or otherwise, on to the iconic model Cindy Crawford for her listening pleasure?
- (7) Did I the plaintiff sing the song AMAAW in the kitchen of the parish centre of the Roman Catholic Church in Donnybrook, Dublin 4 while you recorded?
- (8) Did I offer the song AMAAW to U2 for inclusion on your album "How to Dismantle an Atomic Bomb" if the band found it suitable?
- (9) Was there an agreement made after you recorded me singing the song AMAAW between myself the plaintiff, and you, Adam Clayton, concerning the conditions for the use of the song by U2?
- (10) Was the payment of a sum of money to me by U2 if these conditions were ever breached at any time whatsoever in the future agreed by you as the basis of a valid business contract with perpetual validity between us?
- (11) Was anyone else present in the kitchen at the time I sang AMAAW and you, Adam Clayton, recorded?

(12) Are the assertions made in your Defense document that U2 are the composers of the song AMAAW true?

(13) Have you, Adam Clayton, ever come to the attention of the Gardai concerning the importation of narcotics into Ireland?

(14) Before this time, have you, Adam Clayton, ever spent time in prison for drugs related offences or for any other criminal offences?

(15) Have you, Adam Clayton, ever discussed the song AMAAW with the supermodel Cindy Crawford with reference to myself the plaintiff?

(16) If the American supermodel Cindy Crawford from DeKalb in Illinois and currently resident in California, stated publicly that I composed the song AMAAW in her presence in Santa Monica in 1998, and that my assertions concerning your recording in Donnybrook and my offering the song to U2 for inclusion on HTDAAB were true, would you, Adam Clayton, deny her assertions and continue to insist on the veracity of your own assertions?

**9.** It will be seen immediately that certain of these interrogatories have nothing whatsoever to do with the case described in the pleadings, even viewing them as broadly as one can. The interrogatories sought at paras. 13 and 14 of the notice are entirely irrelevant. Mr. Kiely has not explained why such wholly inappropriate interrogatories have been sought by him.

**10.** In his replying oral submission at the hearing of the motion, Mr. Kiely acknowledged that “I do appreciate that one or two is (sic) a little bit personal...”. The fact that an interrogatory might trespass on personal or confidential matters is not in itself reason to refuse it. However, the interrogatory must bear some relation to the issues raised in the proceedings. The two which I have selected do not even attempt to meet that threshold. I will return to the other specific interrogatories at the conclusion of this judgment.

## **The law**

11. Both parties delivered written submissions in advance of the hearing of the motion. In the written submissions on behalf of U2 counsel advanced, by reference to authorities, the following propositions: -

(i) The interrogatories were served without leave of the court, and this is required pursuant to O. 31, r. 1 of the Rules of the Superior Courts 1986.

(ii) Leave to deliver interrogatories will only be given if the moving party establishes:

- “(a) The information sought is relevant to the facts in issue in the proceedings;

(b) The interrogatories are necessary either for disposing fairly of the cause or matter or for saving costs; and,

(c) The interrogatories are not vexatious or oppressive and it would not be unfair to require a party to answer them”.

(Delaney & McGrath, in Civil Procedure (4<sup>th</sup> Ed. 2018) at paras. 12 – 23)

(iii) In considering the criterion set out at (b) above, the applicable rule is set out by Lynch J. in *Bula Ltd. v. Tara Mines Ltd.* [1995] 1 ILRM 401 at 405: -

“As I understand the law the basic purpose of interrogatories is to avoid injustice where only one party has knowledge and the ability conveniently to prove facts which are important to be established in aid of the opposing party's case, such opposing party not having such knowledge nor the ability to prove the facts either at all or without undue difficulty”.

(iv) “Interrogatories to be allowable must be as to facts in issue or facts reasonably relevant to establish facts in issue. Interrogatories as to mere evidence as distinct from facts or as to opinions or matters of law such as the meaning or effect of documents or statements or conduct are not permissible. Nor is it appropriate that unnecessary

interrogatories should be put such as to facts within the knowledge of and readily capable of proof by the interrogating parties”.

Lynch J., *ibid.*

(v) The onus is on the party seeking the interrogatories to establish in evidence that each interrogatory is appropriate. The burden is to be met by meaningful evidence, as opposed to boilerplate averments: - see Hyland J. in *Secansky v. Commissioner of An Garda Siochana* [2021] IEHC 731.

12. None of these principles were disputed by Mr. Kiely, either in his own written submissions or at the hearing of the motion. The various legal propositions on behalf of U2, which I have described earlier in this judgment are in my view well founded and constitute the relevant legal principles to be applied in considering the current motion.

#### **The submissions of the parties**

13. While Mr. Kiely’s written submissions were made after the written submissions of U2 were delivered and are in a large measure a response to them, as he is the moving party it is appropriate to set out first his submissions on the motion.

14. Mr. Kiely argues that he did not need the leave of the court to deliver the interrogatories in this case. He says that the nature of the agreement made between him and Mr. Clayton (on behalf of U2) was in the nature of a “settler/trustee agreement....”. He goes on to say that “the business transaction which occurred between the parties in Donnybrook [constituted] the establishment of a trust....”, and he is therefore not required to obtain leave to deliver the interrogatories.

15. In his oral submission, Mr. Kiely argued that “It could be argued that a trust and contract are quite synonymous nowadays...”. He went on to say that “A business contract and a trust are quite equal”. He then says that U2 were the beneficiaries of a trust (created and settled by Mr. Kiely) as they gained financial benefits from the management of his asset.

**16.** Mr. Kiely's submissions on this point are entirely unconvincing. There is no reference in the pleadings to a trust arrangement. This is despite the fact that the replies to particulars delivered by Mr. Kiely are lengthy and detailed, and the statement of claim is one into which considerable thought was put by Mr. Kiely. While I will not go so far as did counsel for U2 (who suggested that Mr. Kiely was trying to "sidestep his pleaded position"), I do accept that Mr. Kiely has plainly sought to recharacterize his case in order to address the submission on behalf of U2 that leave of the court is sought in respect of interrogatories unless either fraud or breach of trust is pleaded. In addition, Mr. Kiely has not sought to re – plead his case or indicated that he will at some time in the future apply to do so.

**17.** Strictly speaking, it would therefore be possible for me to decide this motion on the basis that the interrogatories were delivered without leave of the court, that leave is required, and that this motion is therefore at best premature or at worst an abuse of process (particularly given the interrogatories sought at 12 and 13, which I have already described). However, were I to decide the motion solely on that basis, it would be open to Mr. Kiely to then seek leave of the court or, alternatively, seek to re – plead his case so that it became the sort of proceeding in respect of which leave of the court is not required for the delivery of interrogatories. I will therefore consider each of the interrogatories individually as though this were, in fact, an application for leave to deliver them. This is the most expeditious use of court time and of the parties' resources. I am also struck by the fact that this claim, which undoubtedly is a claim for breach of intellectual property rights, is the sort of claim which on the face of it would qualify for admission to the Commercial Court. Were this a Commercial Court case, interrogatories could be delivered without leave of the court. This vagary in the Rules (as they currently stand) seems somewhat illogical, and is something that may be varied in due course by the appropriate body.

**18.** On the substance of the interrogatories, Mr. Kiely submits that (in general) the use of interrogatories encourages greater court efficiencies, and that in California (where the song was allegedly composed by him) interrogatories “in the form of depositions of the defendants and witnesses are an integral part of civil proceedings...”. With regard to the form of the interrogatories, Mr. Kiely describes the requirement that the answer to interrogatories be either yes or no as “legal chicanery”. In fact, the requirement that interrogatories admit of a yes or no answer has not been the law or practice in Ireland for some years. Finally, and most importantly, Mr. Kiely submits that the interrogatories are required because “HE HAS NO KNOWLEDGE OF FACTS *per se*”. Mr. Kiely then goes on to say that he has “rather only memories of occurrences he believes can have taken place”. The rules set out by Lynch J. in *Bula*, therefore, do not apply to the interrogatories raised by Mr. Kiely in these proceedings. He needs responses to the interrogatories in order “to establish these perhaps mistaken memories of what took place in the kitchen of the parish centre of the Holy Roman Catholic and Apostolic Church at Donnybrook between the plaintiff and Mr. Clayton....”.

**19.** I will return to this central submission of Mr. Kiely in the next section of the judgment.

**20.** In their submissions, counsel for U2 (having set out the legal propositions described earlier in this judgment) argue that Mr. Kiely has not reached the threshold identified by Hyland J. in *Secansky*. With regard to each of the individual interrogatories, counsel submit that they fall within what is characterised as the “*Bula* exclusion” in that the interrogatories deal with matters which are within the direct knowledge of the plaintiff. Counsel also submits that certain of the interrogatories seek to engage in debate rather than establish facts, look for the identity of witnesses, or alternatively seek the opinions of U2. Unsurprisingly, counsel finally submit that certain of the interrogatories are of a scandalous nature and should not be allowed (particularly since they are also irrelevant to the issues in the action).

## **Decision**

**21.** I have already indicated my view that leave to deliver these interrogatories should have been sought. For that reason alone, the motion could be dismissed.

**22.** However, even treating this as an application for leave to deliver interrogatories the motion would also fail. That is because of the nature of the interrogatories which it has sought to require the defendant to answer.

**23.** Interrogatory 1 asks if U2 is concerned or would be concerned about a potential item of evidence. That is not a proper interrogatory.

**24.** Interrogatory 3 asks if Adam Clayton ever attended at Donnybrook Church “other than for a romantic date or to discuss the music business or any other business”. Inasmuch as this does not relate to the specific alleged engagement between the plaintiff and Mr. Clayton, it is either entirely irrelevant or of remote relevance to the proceedings. Inasmuch as it asks Mr. Clayton to confirm his attendance at the meeting with the plaintiff, that on the face of it would breach the rule set out by Lynch J in *Bula*.

**25.** The recording referred to at Interrogatories 5 and 6 has nothing to do with the pleaded case. One struggles to understand the relevance of whether or not Mr. Clayton passed on a recording of a completely different song (“Nicaragua”) to Ms. Cindy Crawford “for her listening pleasure”.

**26.** Interrogatory 11 seeks the identification of a witness to the relevant discussion between Mr. Kiely and Mr. Clayton. This would appear to fall foul of the judgment of Lord Esher M.R. in *Marriott v. Chamberlain* [1886] 17 QBD 154 at 163, to the effect that: -

“It is not permissible to ask the names of persons merely as being witnesses whom the other party is going to call and their names not forming a substantial part of the material facts; and I think we may go so far as to say that it is not permissible to ask

what is mere evidence of the facts in dispute, performs no part of the facts for themselves”.

**27.** However, even if Interrogatory 11 did not breach this rule (endorsed by Costello J. in *Mercantile Credit Co. of Ireland v. Heelan* [1999] 2 IR 105) the identity of the witness is something not only known to Mr. Kiely but pleaded by him in replies to particulars.

According to those replies, the name of the person who witnessed the dealings between Mr. Clayton and Mr. Kiely is: -

“Jockser, otherwise known as Dubhdaleithe Oisin Thomais Donal Mór Muiraeirthaigh O’Conaire”.

**28.** This interrogatory is therefore needless and inappropriate.

**29.** Interrogatory 12 asks U2 about the truthfulness of averments in the defence, which again is not compliant with the principles set down in *Bula*.

**30.** Interrogatories 13 and 14 are entirely inappropriate for the reasons I have considered earlier.

**31.** Interrogatory 15 again does not address any issue in the pleadings. Equally, Interrogatory 16 is of very attenuated relevance (if any) to the issue in the proceedings. In the event that “American supermodel Cindy Crawford” is going to give evidence at the hearing of the action, then the interrogatory is entirely unnecessary. As it stands, however, the interrogatory asks U2 (in particular Mr. Clayton) to speculate as to what the reaction would be to a hypothesis. It is not a proper interrogatory.

**32.** The balance of the interrogatories are inappropriate and not ones which would be directed to be answered. This is because they fall foul of the judgment of Lynch J. in *Bula*. I have already set out how, in his written submission, Mr. Kiely seeks to avoid the application of the *Bula* judgment by saying that his memory of events may be mistaken, and that he

needs to establish what actually happened in his dealings with U2 and in particular with Mr. Clayton. At the hearing, Mr. Kiely elaborated upon this puzzling submission. He said that: -

“...I would ask counsel is it a fact that what she had for her breakfast this morning can be proved? It isn't, it's a memory, and in the same way that anything that's happened in my past are memories, there is no proof whatsoever where a physical object may even exist, but I can't prove that from the existence of the object, but it is the strongest proof that one would have a historical fact exists....

.... So, I really do have memories of events that occurred. I don't have knowledge, perfect knowledge of any facts and, therefore, I have asked Mr. Clayton to confirm my memories, and he would also have memories, but I mean, they would be sufficient, I believe, for the court to be viewed as factual enough to be taken into evidence and judged upon”.

**33.** This almost metaphysical approach towards memory and evidence does not justify a departure from the approach set out by Lynch J. in *Bula*. The submission is not one that lacks in imagination, but it does not really make sense. If Mr. Kiely's submission was correct, then the direct evidence of a witness about something that he or she saw would not be sufficient (as it could be a flawed memory) unless it was corroborated by the evidence of another person. As it happens, Mr. Kiely has identified another person who was present at the relevant discussion with Mr. Clayton. However, leaving aside the possible evidence of “Jockser”, Mr. Kiely can give his own evidence about his discussions with Mr. Clayton and the agreement which he says they reached. If Mr. Clayton does not give evidence in response, and on the assumption that Mr. Kiely's evidence is not fatally undermined by cross – examination, then it is likely that Mr. Kiely's evidence will be accepted. However, what is not required is for interrogatories to be delivered to U2 (and answered by them) to sustain or confirm Mr. Kiely's memory.

**34.** In any event, Mr. Kiely's memory does not seem to be as infirm as he suggests in his written and oral submissions. In the extensive replies to particulars, to which I have already referred, Mr. Kiely gives very detailed accounts of the following: -

(a) "The exact process undertaken by [him] in the composition of the song....". This includes his original encounter with Cindy Crawford, a word – by – word account of his first conversation with Ms. Crawford, a description of their trip for coffee at Trastevere "on the corner of Santa Monica Boulevard and 3<sup>rd</sup> Street", and their discussion about music, movies, fashion, work, business life, golf, filing systems, more music and Ms. Crawford's friends in Dublin.

(b) The exact nature of his relationship with Ms. Crawford.

(c) Notably, the discussion at Donnybrook Church between himself and Mr. Clayton. This is a discussion which he pleads he recalls clearly, and a portion of it is set out in a word – by – word basis.

**35.** Far from establishing that the responses to interrogatories are required because of potentially "mistaken memories" on his part, Mr. Kiely has put forward in this case a level of detail which suggests that he is perfectly capable of giving evidence about the interaction that he had with Mr. Clayton and, indeed, giving a range of evidence about matters which occurred some considerable time ago.

### **Conclusion**

**36.** For all of these reasons, the motion must fail on two grounds. Firstly, leave to deliver these interrogatories should have been sought. Secondly, each and every one of the interrogatories to which Mr. Kiely wants U2 to reply are inappropriate and are not ones to which the court should compel a defendant to respond. Treating this as an application for leave, therefore, such an application would be and is refused.

