Neutral Citation: [2014] IEHC 140

THE HIGH COURT

Record No. 2012/4093 S

Between/

ULSTER BANK IRELAND LIMITED

Plaintiff

-and-

PADRAIG DERMODY AND MICHAEL DERMODY

Defendants

Judgment of Ms. Justice Iseult O'Malley delivered the 7th day of March, 2014

Introduction

1. This is an appeal from a decision of the Master of the High Court dismissing the plaintiffs claim against the second named defendant (hereafter "the defendant"). While there may well be other matters in dispute between the parties, the central issue dealt with in the judgment on the appeal is whether this plaintiff was, in an application for leave to enter final judgment, entitled to rely upon a grounding affidavit sworn by an employee of Ulster Bank Limited. The latter company is related to the plaintiff company and deals, on its behalf, with its debt collection process. It is argued on behalf of the defendant that the employee in question cannot give admissible evidence to substantiate the claim. This argument turns on the provisions of the Bankers' Books Evidence Acts 1879-1959. The plaintiff contends that the Acts do not apply, or, if they do, that it has complied with the relevant provisions.

The evidence

2. The plaintiffs claim is stated to arise on foot of certain guarantees given by the defendant in respect of credit facilities given to two companies. The motion for liberty to enter final judgment against this defendant in the sum of €102,386.12 was grounded upon the affidavit of a Mr. Richard Evans, exhibiting what he averred to be copies of the guarantees, the letters of demand and statements of liabilities.

3. In the grounding affidavit, sworn on the 1st February, 2013, Mr. Evans gave his address as "Ulster Bank Ireland Limited" and described himself as being "employed by the Plaintiff as a Recoveries Clerk" and as being duly authorised to make the affidavit on behalf of the plaintiff. He gave his means of knowledge as being

> *"facts within my own knowledge and having perused the books and records of the Plaintiff, save where otherwise appears..."*

4. A subsequent affidavit sworn on the 17th June, 2013 (but not filed until the 9th July) gave Mr. Evans's occupation and address as "Recoveries Clerk, Collections and Recoveries Department, Danesfort, Stranmillis Road, Belfast BT9 SUB." In it Mr. Evans averred that he was in fact an employee of Ulster Bank Limited in Belfast and that the statement in the first affidavit that he was employed by Ulster Bank Ireland Limited was a typographical error. He did not otherwise alter any material averment from the earlier affidavit.

5. At a hearing of the plaintiffs application to the Master for liberty to enter final judgment on the 10th July, 2013 the defendant submitted *inter alia* that the evidence of Mr. Evans was inadmissible as being hearsay, having regard to the provisions of the Bankers' Books Evidence Acts 1879-1959. The Master struck out the plaintiff's motion on this ground (and one other that is no longer of concern).

6. Mr. Evans swore a further affidavit for the purposes of this appeal in which he averred that he was a "Level 1 Agent" in "the Collections and Recoveries Department situated in Belfast". In it he exhibits a power of attorney, executed in April 2011, by which officers of the plaintiff bank authorised, *inter alia*, persons holding his position and grade in Ulster Bank Limited to

> *"...sign Contracts for Sale, Conveyance or transfer of title documents and any related documents which are required to be completed by the Bank as part of the recoveries litigation process for the recovery of the Bank's secured and unsecured facilities and the enforcement of the attendant security for such facilities including but without prejudice to the generality of the foregoing, any deed or document required to appoint a receiver, receiver and manager or administrator over property mortgaged or charged in favour of the Bank by way of security or required to remove or release any receiver or receiver and manager so appointed."*
>
> [Emphasis added in affidavit.]

7. Mr. Evans says that he was therefore authorised to swear the grounding affidavit in these proceedings.

8. In this affidavit Mr. Evans goes on to set out the procedure followed by branch officials of the plaintiff bank in this jurisdiction where an account has gone into arrears. If resolution at branch level is not possible the account is sent forward to the Collections and Recoveries Department in Belfast. It is averred that the individuals dealing with the account in that Department have full access to the file and the full history of the account in question. (Mr. Evans has averred, for the avoidance of doubt, that he had such access to the second named defendant's file before swearing the affidavit grounding the motion in the Master's Court.)This process is described as

> *"simply a procedure which takes place within the internal operational administration of the Ulster Bank Group. Importantly, it is not a delegation or outsourcing of the Plaintiffs debts to some outside independent entity. Rather, the Collections and Recoveries Department operates like the Debt Collection department or section within any company, where such a department or section is charged with the responsibility of collecting a company's debts. The Collections and Recoveries Department is thus the "debt collection" department of the various entities making up the Ulster bank Group."*

9. The following averments are made by Mr. Evans:-

> *"I should also say that in the course of your deponent's employment with Ulster Bank Limited, and in particular in the Collections and Recoveries Department therein, I am familiar with the methods of book keeping and with the ordinary conduct of business in Ulster Bank Ireland Limited. I say in particular that lam familiar with the fact that at the time entries are made in the bankers' books, the books are the ordinary books of the Plaintiff. I say that I am in a position to prove same. I say also that I am familiar with the fact that entries into the bankers' books are made in the ordinary course of business of Ulster Bank Ireland limited and I say again that I am in a position to prove same. I further say that I am familiar with the fact that at the time of an entry into the bankers' books, that the books are kept in the custody or control of Ulster Bank Ireland Limited and I say that I am in a position to prove same."*

10. Finally, he says:

> *"I further say that in this case, I am in a position to prove that the copy of the entry into the bankers' books which is exhibited to your deponent's grounding affidavit has been examined with the original. I say that I am satisfied that it is correct and that I am in a position to prove same."*

11. An affidavit sworn by the solicitor for the plaintiff, Mr. Darragh Langan, sets out the relationships between the plaintiff, Ulster Bank Limited and the Ulster Bank group.

12. Mr. Langan avers that

> • Ulster Bank Ireland Limited is owned primarily by Ulster Bank Holdings (ROI) Limited, which owns 92.61%. Ulster Bank Limited owns 7.39%. A company called Hume Street Nominees Limited owns under 1%.
>
> • Ulster Bank Limited owns Hume Street Limited.
>
> • Ulster Bank Holdings (ROI) Limited is 100% owned by Ulster Bank (Ireland) Holdings. The latter company is owned primarily by Ulster Bank Limited and in part by Royal Bank of Scotland and Hume Street Nominees Limited.

13. The plaintiff is, therefore, said to be wholly owned by Ulster Bank Limited.

14. According to Mr. Langan, the Ulster Bank group transferred its banking business in this jurisdiction to Ulster Bank Ireland Limited in 2001. However, it is averred, the Collections and Recoveries Department in Belfast operates as the "debt collection" department of the various entities within the Ulster Bank Group.

15. Mr. Langan says that a number of persons are directors of both Ulster Bank Ireland Limited and Ulster Bank Limited. For some period of time the same person was company secretary for both entities.

The legislation

16. Sections 3 and 4 of the Bankers' Books Evidence Act, 1879 read as follows.

> *3. Subject to the provisions of this Act, a copy of any entry in a banker's book shall in a Illegal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts there recorded.*
>
> *4. A copy of an entry in a banker's book shall not be received in evidence under this Act, unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank.*
>
> *Such proof may be given by a partner or officer of the bank, and may be given orally or by affidavit sworn before any commissioner or person authorised to take affidavits.*

17. Section 5 of the Act, as substituted by s. 131 of the Central Bank Act, 1989 provides that:

> *5.(1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is further proved that-*
>
> *(a)in the case where the copy sought to be received in evidence has been reproduced in a legible form directly by either or both mechanical and electronic means from a banker's book maintained in a non-legible form, it has been so reproduced;*
>
> *(b) in the case where the copy sought to be received in evidence has been made (either directly or indirectly) from a copy to which paragraph (a) of this section would apply:*
>
> > *(i) the copy sought to be so received has been examined with a copy so reproduced and is a correct copy, and*
> >
> > *(ii) the copy so reproduced is a copy to which the said paragraph*
>
> *(a) would apply if it were sought to have it received in evidence;*
>
> *(c) in any other case, the copy has been examined with the original entry and is correct.*
>
> *[2] Proof to which subsection [1] of this section relates shall be given-*
>
> *(a) in respect of paragraph (a) or (b)(ii) of that subsection, by some person who has been in charge of the reproduction concerned,*
>
> *(b) in respect of paragraph [b](i) of that subsection, by some person who has examined the copy with the reproduction concerned,*

(c) in respect of paragraph (c) of that subsection, by some person who has examined the copy with the original entry concerned, and may be given either orally or by affidavit sworn before any commissioner or person authorised to take affidavits.

18. Section 6, as amended by the same section of the Act of 1989, provides that

' banker or officer of a bank shall not, in any legal proceeding, be compellable to produce any banker's book the content of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause."

19. It is, I think, important to note that before it was amended in 1989, s.6 applied only to legal proceedings to which the bank was not itself a party.

20. Section 9 of the Act of 1879, as amended by the Act of 1959 and the Act of 1989, defines the terms "bank", "banker" and "bankers' books". It is not necessary to set these out in full, but it may be noted that the expression "bank" specifically includes "Ulster Bank, Limited". Bankers' books include any records used in the ordinary course of business of a bank, including such as are kept in any non legible form (by the use of electronics or otherwise) capable of being reproduced in a permanent legible form.

Submissions

21. On behalf of the bank, it was submitted by Mr. John O'Donnell SC that, in the first place, compliance with the Bankers' Books Evidence Acts is not a necessary proof in the plaintiffs claim. The evidence in the case, it was contended, was not hearsay, because Mr. Evans was employed by Ulster Bank and had deposed to matters which were within his own knowledge from his own perusal of the file. Reliance was placed upon the judgments of Clarke J. in *Moorview Developments Ltd v First Active Plc* [2010] IEHC 275, Finlay Geoghegan J. in *Bank of Scotland PLC v Fergus* [2012] IEHC 131 and Ryan J. in *Bank of Ireland v Keehan* (16th September, 2013). The judgment of Peart J. in *Bank of Scotland v Stapleton* (29th November, 2012) which might be construed as taking a different approach and which is relied upon by the respondent, is distinguished.

22. With particular reference to *Fergus*, it was argued that the onus was on the defendant to say that the records were incorrect. If a challenge was made to their accuracy, Mr. Evans could be cross-examined and the question would then arise as to what weight should be attached to his evidence. His employment status was not what mattered- the issue was the extent of his knowledge and his authority to give the evidence.

23. As an alternative, the plaintiff says that having regard to the structure of the Ulster Bank Group, and to Mr. Evans' position within its debt collection department, he is an appropriate person to satisfy the requirements of the Acts. It was stressed by Mr. O'Donnell that this submission did not involve any question of piercing the corporate veil -rather, it was do with the way Ulster Bank Group structured its business. There were two corporate entities involved but both were part of "the Bank" and Mr. Evans was its employee. What happened to the defendant's account file was a "sending forward" and not a "sending out".

24. A final submission made on behalf of the plaintiff is that the word "*may*" as used in ss. 4 and 5 of the Act should be interpreted as enabling or permissory only.

25. On behalf of the defendant, Mr. Ross Maguire SC submitted that the fundamental issue in the case was the same as in *Stapleton*, in that the plaintiff was seeking to prove its case without adducing evidence from any person employed by it. Specifically, he argued that no-one had proved that the material examined by Mr. Evans related to the defendant's account with the plaintiff. It was stressed that the point being made was not the same as in *Moorview*, where the defendants had sought to argue that the official who signed the documentation had to be called in evidence.

26. With reference to the power of attorney, Mr. Maguire submitted that it did not relieve the plaintiff of the obligation to prove its case in the normal way, through an employee.

27. It was further submitted that evidence as to the relationship between the companies was irrelevant. In this regard the defendant referred to the authorities on "piercing the corporate veil" for the proposition that it was not open to a company to claim that the veil should be lifted simply because it suited its purposes.

The authorities

28. The first of the modern Irish authorities on the issue of the admissibility of bank records in debt collection cases is the decision of Clarke J. in *Moorview Developments*. The contested evidence in that case was proffered by a Mr. Collison, an employee of the bank who had been assigned to monitor and assess the facilities relevant to the defendant some years earlier. Mr. Collison gave evidence of having calculated the material liabilities himself, assisted by a colleague. He produced the vouching documentation underlying the calculations and stated that each item in the calculation was derived from the books and records of the bank. It was argued that some of the documents produced by him were not such as could be proved under the Bankers' Books Evidence Acts.

29. In rejecting that submission, Clarke J. referred to paragraph 1301, Volume 1 of the 1st edition of Halsbury's *Laws of England*, where the main object of the legislation was stated to be the relieving of bankers from the necessity to attend court with their books under a *subpoena duces tecum.* Clarke J. continued:

"The purpose of the Acts is not, therefore, to facilitate banks in proving matters. The purpose is to enable evidence to be given of the contents of other parties' bank accounts without the necessity for the attendance of a representative of the bank concerned and the production of the relevant books. However, in this case a representative of the bank did attend and gave evidence that the records which he produced to the court were taken from First Active's electronic books and faithfully recorded what was present in them. In those circumstances there is no need for the relevant records to conform with the Bankers' Books Evidence Acts. That legislation is irrelevant to a case where the contents of the bank's books are proved in the ordinary way by a witness who can give direct evidence of having analysed the books."

30. In the circumstances the challenge to the admissibility of the evidence was said to be "wholly misconceived".

31. A separate argument appears to have been made to the effect that Mr. Collison could not give evidence of matters in relation to which he was not personally involved. On this point Clarke J. said:

"What Mr. Collison gave evidence of was an analysis carried out by him of documents kept by the bank in the ordinary

way as part of the bank's records. Business records of that type are prima facie evidence of a course of dealing between parties, although, of course, any party is free to challenge the accuracy of any such records. However, the idea that a bank wishing to prove its case in debt against a customer has to produce a separate bank official who was personally involved in each transaction which gives rise to the customer's current debt is fanciful. A witness from a bank is entitled to give evidence of the bank's records showing the amount due by a customer of that bank. That evidence and those records provide prima facie evidence of the liability. If a specific element or elements of those records are challenged, then the bank might well have a problem if it could not produce a witness who could give evidence of the contested matter. The reason for that problem is not that the bank did not have evidence of the matter concerned. Rather it is the weight to be attached to that evidence."

32. In *Bank of Scotland v. Fergus*, the bank had in 2008 made demand on a company for repayment of all sums then due. The witness whose evidence was challenged was a Mr. Moroney who had been, until 31st December, 2010, a manager in the Customer Debt Management Division of the property team in the bank. He then became a senior manager in a company called Certus, which was engaged to provide "customer support and administration services" to the bank in relation to its customers in this jurisdiction. He swore the affidavit of discovery on behalf of the bank in February, 2011.

33. Having been called as a witness in the substantive hearing, he gave evidence of checking the electronic records of the bank in February 2011and of the figures underlying the bank's claim. He made it clear that he was relying on these records for an accurate statement of the amounts due. The plaintiff relied upon the passage from *Moorview* quoted in paragraph 30 above. Finlay Geoghegan J. agreed, saying

"In this case, Mr. Moroney, as a former official of the bank, is entitled to give evidence of the Bank's records in relation to the indebtedness of the Company to the bank. Those records include the electronic records of the Bank. That evidence is admissible evidence and is prima facie evidence of the liability of the Company to the Bank."

34. In *Bank of Scotland v. Stapleton*, the role of Certus was again in issue. The case concerned a mortgage given in 2005 by Bank of Scotland (Ireland) Limited. As and from the 1st January, 2011the assets of that bank had been transferred to Bank of Scotland, which had no physical presence in the State. It had therefore outsourced the management of its loan portfolio here to Certus. It was proposed to ground the application for an order for possession on the evidence of an employee of Certus. This witness, Ms. Finnegan, was specifically authorised by the plaintiff, in writing, to give evidence on its behalf in the case.

35. Ms Finnegan stated that she had had access to the records of Bank of Scotland and was able to give evidence from her knowledge of the books and records of the plaintiff.

36. In holding the proposed evidence to be inadmissible, Peart J. considered the provisions of the 1879 Act and the commentary thereon in Matthews and Malek: *Disclosure* (2000, Sweet & Maxwell) and Phipson on Evidence (2000, Sweet & Maxwell). He also considered the judgment of the Supreme Court in *Criminal Assets Bureau v. Hunt* (19th March, 2003).

37. The issue in Hunt was the admissibility of bank statements which had been provided pursuant to a statutory power to a Detective Garda, who in turn passed them on to an Inspector. The Inspector gave evidence that he had raised a tax assessment on foot of the contents.

38. Much of the argument in the case concerned provisions of the Criminal Assets Bureau legislation which are not relevant here. However, in holding that the documents were inadmissible, Keane C.J. (with whom the other members of the Court agreed) said

"It is clear that in accordance with the rules of evidence normally applicable in civil proceedings, the documents in question could be proved only by their authors giving sworn evidence and being subject to cross-examination unless advantage was taken of the provisions of the Bankers' Books Evidence Act, 1879-1959. The documents in question, accordingly should not have been admitted into evidence in the High Court, unless as the Bureau contend, they were admissible under [the provisions of the Criminal Assets Bureau Act, 1996]."

39. In *Stapleton*, Peart J. was also referred to *Moorview Developments*. Without disagreeing with Clarke J.'s analysis, he felt that the case was

"...certainly not an authority for the proposition that somebody other than an officer or employee of the plaintiff bank may come to court with a copy of the bank's records and prove the bank's entitlement to the amount claimed, simply because he/she has a written authority from the bank to give evidence on its behalf. In addition, Moorview cannot assist the plaintiff in these proceedings. The facts are completely different, as was the issue under discussion because the witness in Moorview was an officer of first Active Plc. He was not simply an employee of some company to whom the bank had outsourced its management of borrower's accounts."

40. Peart J. also held that the Bankers' Books Evidence Acts could not, on the facts of the case, assist the plaintiff.

"There is nothing within that legislation which relieves a bank from the strictures of the rule against hearsay. The purpose of that legislation was to relieve a bank of a burden which would otherwise exist if it was required to produce the original banker's books in court each time evidence as to their contents was required to be given. It facilitated the bank to the extent that a copy of those records was admissible as evidence. But the Act did not remove the necessity for the copy document to be proved. In fact it is specific in that regard."

41. The final case to which the court has been referred is the judgment of Ryan J. in *Bank of Ireland v Keehan*. In that case the plaintiff's application for liberty to enter final judgment was grounded on the affidavits of the Business Manager of the relevant bank branch. Objection was taken on the basis that there had not been compliance with the Acts.

42. Having considered *Moorview, Fergus and Stapleton*, Ryan J. noted that Peart J. had not disagreed with the earlier two decisions but had distinguished them. He considered that the proposition, implicit in the defendant's submissions, that the only way the bank could prove its case was by reliance on the Acts was not consistent with these authorities, which held that a witness could give evidence by reference to the books and records of the company in order to demonstrate prima facie liability.

43. In the course of his judgment Ryan J. said

"The judgments of Clarke J. and Finlay Geoghegan J. reflect an acknowledgment that the courts have to take judicial

notice of the obvious and commonplace facts and circumstances of ordinary life. Companies maintain computer records that are cited and exhibited in summary proceedings as evidence of debt Similarly with banks. The records are prima facie evidence that the defendant owes the money to the plaintiff. If the defendant contests the liability in whole or in part, the evidence required to prove the case depends on the issues raised. If a matter is not disputed, there is no need of proof. Where a party chooses to stay silent in the face of a claim, prima facie proof is sufficient...

...The authorities and the textbooks make it clear that the purpose of the 1879 Act was not to facilitate banks in making their claims on foot of unpaid accounts or loans but rather to provide a practical and efficient manner of gaining access to the information in bankers' books, particularly when sought by third parties. Obviously, a bank can invoke the Act to prove specific entries in its books. As Peart J. describes in Stapleton, this relieved the bank from bringing to court their heavy tomes in which the transactions were recorded and producing the witnesses who had made the entries.

Although the evidence of the contents of the bank's records does not conform to the formal specifications in the 1879 Act as amended in a number of respects, it is nevertheless apparent as a matter of legitimate inference that the evidence of the defendant's liability emanates from the bank's books and records and that the statements are printed from its computer records. The point, however, is that the case is not about the 1879 Act and a copy of a bank book but about a liability arising on a contract entered into by written agreement signed by him and witnessed by his solicitor and an overdrawn current account. The bank is proving its case that the defendant defaulted on a loan..."

Discussion and conclusions

44. The issues to be determined are, firstly, whether the records in this case are admissible by way of a common law exception to the rule against hearsay and secondly, if they are not, whether there has been compliance with the statutory formulation of the Bankers' Books Evidence Acts, 1879-1959.

45. It is clear from the judgments cited above that Clarke J., Finlay Geoghegan J. and Ryan J. are of the view that business records of this nature are admissible as prima facie evidence of the truth of their contents, without reference to statute. Unfortunately, I find myself unable to reconcile this with the decision of the Supreme Court in *Hunt* and I have not been referred to any other authority which includes such records as exceptions to the rule at common law. (It is true that a number of nineteenth century decisions pre-dating the Act of 1879 held that entries made in business records were admissible, but this appears to have been so only where the person who made the entries was deceased.)

46. The problems that can arise in non-banking cases as a result of the hearsay rule were highlighted in the decision of the House of Lords in the well-known case of *Myers v Director of Public Prosecutions* [1965] A.C. 1001. In the United Kingdom, legislation followed shortly afterwards in the shape of the Criminal Evidence Act, 1965. Since then the common law rules relating to hearsay in both the civil and criminal law spheres have been supplanted in that jurisdiction by a series of legislative measures which have significantly affected the rigidities of those rules.

47. In this jurisdiction, the Criminal Evidence Act of 1992 provides for the admissibility of business records in criminal cases. However, there has been no equivalent legislation in relation to civil matters and the common law exclusionary rule continues to apply save where modified by statute or by recognised, established exception.

48. In banking cases specific provision was made by the Bankers' Books Evidence Acts as amended. It is certainly the case that the original Act in 1876 (repealed and replaced by the 1879 Act) was intended to relieve banks of the inconvenience associated with a *subpoena duces tecum* in litigation between third parties. However, it is clear since, at least, the 1989 amendment (referred to in paragraph 18 above) the provisions of the Acts may also be availed of in proceedings to which a bank is itself a party. Both s.3 and s.6 are now applicable to all legal proceedings.

49. Following, as I am of course bound to, the Supreme Court decision in *Hunt*, I find that, in the instant case, the evidence of Mr. Evans is not admissible to prove the truth of the contents of the records unless it comes within the provisions of the Acts.

50. The issue that arises then is whether Mr. Evans can be said to be an "officer" of the plaintiff bank within the meaning of the Acts. In my view he cannot. I accept that for the purposes of the Acts an employee may be considered to be an officer of the bank. However, Mr. Evans is not an employee of the plaintiff, but of a separate legal entity. The plaintiff accepts that this is not a case in which the principles relating to lifting or piercing the corporate veil are relevant, but relies on the closeness of the corporate structure of the Ulster Bank Group. In my view the fact that the two companies are closely related does not alter their separate legal existence. I can see no legal or factual difference between the service that Ulster Bank Limited provides to Ulster Bank Ireland Limited in debt collection cases and that provided by Certus to Bank of Scotland, as considered by Peart J. in *Stapleton*.

51. This may be considered to be an artificial distinction, but the Ulster Bank Group structure (outlined in paragraph 12) may itself be said to be artificial. Presumably, that structure was created because it was thought to be advantageous to the participants. The benefits accruing to the existence of separate legal identities sometimes entail inconvenient consequences.

52. Finally, I do not consider that the word "*may*" as used in the Act should be read as simply enabling or permitting an officer or partner to give the evidence in question, while leaving open the possibility that some other, unspecified class of persons could do so in their stead. In my view it is clear that the intent of those sections is to restrict the class of witnesses to the categories mentioned. This contrasts with the provision in s.5 as amended, allowing evidence as to a comparison between an original and a copy to be given by "some person" who has examined both.

53. In the circumstances the appeal will not be allowed.