Neutral Citation [2012] IEHC 549

THE HIGH COURT

Record Number: 2012 No 25 CA

Dublin Circuit County of the City of Dublin

Between:

Bank of Scotland Plc.

Plaintiff/Respondent

And

Julia Stapleton

Defendant/Appellant

Judgment of Mr Justice Michael Peart delivered on the 29th day of November 2012:

1. On the 24th January 2012, the plaintiff bank obtained an order in the Circuit Court for possession of certain property, including a dwellinghouse, at Rathcoole, Co. Dublin. That property had secured certain borrowings advanced by the bank to the defendant and her now late husband by way of a Deed of Mortgage and Charge dated 9th September 2005. The defendant and her late husband fell into arrears with mortgage repayments, and in due course proceedings were commenced in the Dublin Circuit Court in which the bank sought an order for possession in order to enforce its security in respect of the loan.

2. The original mortgagee was Bank of Scotland (Ireland) Limited ("BOSI"), whose were then at Canada House, 65-68 St. Stephens Green, Dublin 2. Indeed, it was this company which is named as plaintiff in the said proceedings. However all the assets and liabilities of BOSI including the said mortgage transferred to Bank of Scotland with effect from after the 31st December 2010, and BOSI was dissolved without going into liquidation. In effect thereafter all the rights and obligations under the mortgage, including rights of enforcement, became vested in Bank of Scotland, who, by order of the Circuit Court made on the 22nd March 2011 were substituted as plaintiff in these proceedings in place of BOSI.

3. While the Defence delivered by the defendants contained a simple traverse, the issue raised both in the Circuit Court, and again in this Appeal to the High Court, is a legal issue.

4. That issue arises from the fact that BOS has no physical presence in this country following the transfer of the assets and liabilities of BOSI to BOS as and from 1st January 2011, and has outsourced the management of its loan portfolio here to an independent service company called Certus, which, according to the evidence of Joanne Finnegan, an employee of Certus, provides what she described as customer support to BOS borrowers, and administrative support to BOS. Certus is based in Dublin. She explained that customer support can take the form of dealing with queries from existing borrowers, dealing with mortgage accounts which are not in arrears yet, but where customers wish to discuss restructuring their mortgage, as well as dealing with mortgage accounts that are in arrears, such as that in the present case. Certus will make contact with borrowers whose mortgage is in arrears, and if necessary will liaise with solicitors here for the purpose of instituting proceedings in order to recover the amount due on foot of the mortgage, if that initial contact does not result in some agreed solution. All of that is perfectly understandable given that BOS does not have personnel on the ground here, yet would need to deal with these matters in this jurisdiction even though BOS itself has no physical presence here anymore. But that imperative does not mean that the normal and well-established rules of evidence can be bent or relaxed in order to avoid for BOS the trouble, inconvenience and expense of having to send over some employee of BOS to prove any facts which may be necessary for the purpose of proceedings against a borrower.

5. Ms. Finnegan was authorised in writing by BOS to give oral evidence on behalf of BOS both in the Circuit Court, and on appeal to this Court. Her capacity to give such evidence is challenged by the defendant on the basis that she is not employed by BOS and therefore her evidence must of necessity be hearsay, given that she has no personal knowledge of the books and records of BOS. Her letter of authority on Bank of Scotland headed paper which was used in this appeal is one dated 12th November 2012. The letter is not addressed to anybody in particular but bears the title and record number of these proceedings, and it purports to be signed by "Mr Gary Collins, Assistant Manager, Lloyds Banking Group, Princess Street, 1 Suffolk Lane, London EC45 0AX". It states:

> *"I, Gary Collins, Assistant Manager, Retail Credit, Ireland Business Support Unit, Lloyds Banking Group, Princess House, 1 Suffolk Lane, London EC4R 0AX, on behalf of Bank of Scotland plc having their registered office at The Mound, Edinburgh EH1 1YZ, Scotland, United Kingdom, and acting with its authority* ***HEREBY AUTHORISE*** *Ms. Joanne Finnegan, Manager, Certus, 124-127 St. Stephens Green, Dublin 2 to give evidence on behalf of the Plaintiff Bank of Scotland Plc in the above entitled action before the High Court."*

6. Ms. Finnegan has referred in her evidence to certain copy statements which she received from BOS and which relate to the defendant's mortgage account and showing the amount due. She has stated that from her PC in Certus she is able to access the records of BOS herself and therefore be satisfied as to the amount owing by the defendant, and feels that she can therefore give evidence from her own knowledge of the books and records of the plaintiff bank. She has stated that the amount shown in the statements produced to this Court the amount claimed to be due is due and owing by the defendant, thereby entitling the plaintiff bank to the order for possession sought.

7. The issue arising is whether this letter of authority is sufficient to render Ms. Finnegan a competent witness as to the arrears on the defendant's mortgage account, or whether her evidence in that regard is inadmissible hearsay.

8. David Quinn BL for the defendant has referred to certain provisions of the Bankers' Books Evidence Acts, 1879-1959 ("the Act"). The Bankers' Books Evidence (Amendment) Act, 1959 substituted a new section 9 into the Act of 1879 which defines "bank" and "banker", and also defines "bankers' books" in a manner which reflected more modern banking practices and procedures as they existed in 1959. Whereas the new definition of "bankers' books" refers to documents created by a mechanical process, including "by

any photographic or photostatic process", clearly and for obvious reasons it does not refer to copy documents downloaded or copied from a computer record. But if that was the only issue in the appeal, I imagine that commonsense would be sufficient to include within the relevant provisions a bank's computerised records.

9. The Act makes provision for, inter alia, the admission into evidence of a copy of an entry in a banker's book provided certain matters are established in relation to it. The purpose of that enactment in 1879 was to avoid a bank being required under *subpoena duces tecum* to bring to court the original banker's book in which in those days entries would have been made by hand, as the book inevitably would be in daily use at the bank, and the bank would be unable to perform its functions at all during any day in which the book was absent from the bank. The Act therefore facilitated the admission into evidence of a copy of any entry. In those days of course that would have been a copy made by hand. Hence it was necessary that among other matters to be proved before the copy would be admitted was that it had been compared with the original and was correct. Nowadays, the printing off of a page or pages of entries produces a facsimile copy and there is no need, for any practical purpose, to compare the facsimile copy with the original stored electronically. Nevertheless, the legislation has not kept pace with these developments, and still exists as it was enacted in 1879, and as amended, for the purpose of proving records for the purpose of court proceedings.

10. Sections 3, 4, and 5 of the Act are the relevant provisions:

> *"3. Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal 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 or control of the bank.*
>
> *Such proof may be given by a partner, or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.*
>
> *5. A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original and is correct.*
>
> *Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorised to take affidavits."(emphasis added)*

11. Sections 4 and 5 of the Act are commented upon in *Matthews and Malek: Disclosure* [2000] Sweet & Maxwell at para 8.39 as follows:

> *"In order for an entry to be admissible, section 4 and 5 of the Act require that it must be proved (either orally or on affidavit):*
>
> *(a) that the book was at the time of the making of the entry one of the ordinary books of the bank;*
>
> *(b) that the entry was made in the usual and ordinary course of business;*
>
> *(c) that the book is in the custody or control of the bank; and*
>
> *(d) that the copy has been examined with the original entry and is correct, such proof to be given by the person who has examined both copy and original entry.*
>
> *The evidence of (a), (b) and (c) must be by a partner or officer of the bank. However, the evidence of (d) need not be."*

12. The sections are similarly commented upon in Phipson on Evidence [2000] Sweet & Maxwell at para 36-46 as follows:

> *"Proof of entries in bankers' books may be given under the 1879 Act by a partner or officer of the bank, and either orally or by affidavit. But the copy must be an examined copy, proved orally or on affidavit by some person (who need not necessarily be an officer of the bank), who has examined it with the original entry, and a mere certified extract has been rejected". (emphasis added)*

That the person who examines the copy document to ensure that it is a true copy need not be a partner or officer of the bank (as opposed to actually proving the entries in the books themselves) does not need to be a partner or officer of the bank is made clear in *R v. Albutt* [1911] 6 Cr. App.R.55.

13. Consistent with all the above is the conclusion reached by Keane C.J. in *Criminal Assets Bureau v. Hunt*, unreported, Supreme Court, 19th March 2003. One of the issues raised on that appeal related to the admissibility of certain copy bank statements without the necessity of those documents being properly proved, they having been provided to the CAB by certain financial institutions pursuant to orders obtained pursuant to section 63 of the Criminal Justice Act, 1994. Mr Hunt contended that the bank statements were hearsay evidence which could be admitted only if they came within one of the recognised exceptions to the rule against hearsay. In the High Court, a Detective Garda had given evidence of having been so provided with the copy bank account statements, and that he in turn passed them to an Inspector who subsequently gave evidence and stated that it was on foot of that documentary evidence that he had raised the tax assessments which were the subject of the proceedings. In deciding that the documents ought not to have been admitted into evidence in the High Court, Keane C.J. stated:

> *"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 Acts, 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 to which I have referred.*
>
> *The precise scope of the abridgement of the rule against hearsay effected by those provisions is difficult to identify. However, it would certainly appear that, where it is a necessary proof in proceedings, whether under the 1996 Act or other legislation, that a bureau officer took certain actions as a result of information, documents or other material received by him from another bureau officer, the court may act on the sworn evidence of the bureau officer that he*

received the information, documents or other material from the other bureau officer. To that extent, the rule against hearsay is relaxed and the court is entitled to accept as truthful an unsworn statement made out of court by a bureau officer to the bureau officer who gives evidence that he acted on foot of the information in question……. .

However, it certainly does not follow from the fact that the unsworn out of court statement of the first bureau officer to the bureau officer giving evidence is admissible, that any evidence which he obtained, and of which he informs the bureau officer giving evidence, is also admissible …… In the present case, if Detective Garda Fleming had, for any reason, been unavailable to give evidence, the inspector would have been entitled to give evidence that he had made the assessments on foot of bank statements furnished to him by Detective Garda Fleming, <u>provided that the statements were properly proved but not otherwise</u>." (emphasis added)

14. Mr Donnelly for the plaintiff has sought to gain support from the judgment of Clarke J. in *Moorview Developments Limited and others v. First Active Plc and others*, unreported, High Court, 9th July 2010. In that case a point was made that an official from First Active Plc could not give evidence about aspects of the bank's dealings with the plaintiff group of companies where he was not directly and personally involved. That submission was rejected on the basis that he had given evidence of having carried out an analysis of the documents kept by the bank in the ordinary way as part of the bank's business. Clarke J. went on to state that the bank's records were prima facie evidence of the liability, but that where there was a challenge to some particular detail in the records, there may be some difficulty arising for the bank if it could not produce a witness who could give personal evidence of the item under challenge. But this case is 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 concerned 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 loans.

15. Ms. Finnegan during cross-examination accepted that she was neither a partner nor an officer of the plaintiff bank. She is not an employee of the plaintiff bank. The Bankers' Books Evidence Acts 1879-1959 are of no assistance to the plaintiff in this case. 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 the burden which would otherwise exist if it was required to produce the original bankers' 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. While it provides in Section 3 that a copy of an entry shall be received as prima facie evidence, Section 4 makes it abundantly clear that this is permissible only where it has first been proved, and that this proof must be provided by a partner or officer of the bank. That function cannot be delegated to an employee of some other company to which the bank has outsourced, inter alia, its debt collection, even where that other company has direct access to the plaintiff's computerised banking records. I appreciate that it is an inconvenience for the plaintiff bank to have to provide oral testimony where that is required, in circumstances where they no longer have a presence in this jurisdiction. But there are many corporate entities who transact business from abroad with persons or corporate entities in this jurisdiction, and where litigation ensues must travel to this jurisdiction for the purpose of giving evidence in order to prove their case or defend it. They cannot simply delegate the task of giving evidence to some other person who is appraised of the relevant facts, and is authorised in writing to give the evidence for them. They must do it themselves. The fact that it is inconvenient cannot absolve the bank from complying with the normal rules of evidence. There is no exception to those rules by means of anything contained in the Bankers' Books Evidence Acts 1879-1959.

16. Where a bank needs to prove by sworn testimony the amount it is due by a defendant customer, that evidence must be provided by an officer or partner of the bank – in other words an employee of the bank itself, and not some person employed by some other company to whom the task of a or collecting the debt has been outsourced for whatever reason. To allow otherwise would be akin to a foreign bank engaging a solicitor here to collect the debt, and that solicitor coming to court and giving evidence as to the amount due to the bank, having been authorised to do so by the bank. The evidence is necessarily hearsay and inadmissible. It offends first principles, and in my view there is no basis in law for permitting it.

17. For these reasons, I will allow the appeal, and vacate so much of the order of the Circuit Court dated 24th January 2012 that ordered that the plaintiff do recover from the defendant/appellant possession of the land and premises therein referred to, and awarded the costs of the proceedings to the plaintiff,