



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 85

**Peart J.
Irvine J.
Mahon J.**

[Appeal No. 2014/001136]

[Appeal No. 2014/001149]

[Appeal No. 2014/001156]

Between

ULSTER BANK IRELAND LIMITED

PLAINTIFF/RESPONDENT

AND

CON EGAN AND THERESA EGAN

DEFENDANTS/APPELLANTS

Judgment of the Court delivered on the 29th day of April 2015 by Mr. Justice Mahon

1. These appeals are against orders for summary judgment made by the High Court on the 3rd March, 2014, (O'Neill J.) for €121,232.67 (Appeal No. 1), €128,845.80 (Appeal No. 2) and €127, 808.52 (Appeal No. 3) respectively. The orders in each case also provided for interest at the statutory rate from the date of judgment and for the payment of the plaintiff's costs by the defendants. Each order also provided for a stay on its execution for a period of two months from the date of judgment.

2. The first judgment was against both defendants, while the second and third judgments were against, separately, Mr. Con Egan and Ms. Theresa Egan respectively. The judgment as against both defendants jointly arises from their guarantee of bank debts due to the plaintiff by Key Cars Limited up to the sum of €120,000 (and interest from the date of demand). The judgment against the defendant, Mr. Con Egan relates to his loan accounts with the plaintiff. The judgment against the defendant, Ms. Theresa Egan relates to her guarantee of monies owing to the plaintiff by Mr. Con Egan, up to the sum of €165,000 (and interest from the date of demand).

3. In each of the cases, the defendants objected to the High Court granting summary judgment and in all cases sought a referral to plenary hearing.

4. In each of the cases, the plaintiff initially applied to the Master of the High Court for liberty to enter final judgment in the relevant amounts. In due course the Master transferred the proceedings into the Judge's List in the High Court. The applications for liberty to enter final judgment were grounded on the affidavits of Mr. Garry Holbrook. Replying affidavits were in each case sworn by the defendant, Mr. Con Egan, on his own behalf and on behalf of Ms. Theresa Egan. Further affidavits were (subsequent to the notice of appeal to this Court) sworn by the defendants' solicitor, Mr. Hugh Campbell, and Mr. Garry Holbrook.

5. In each of the cases the amounts claimed by the plaintiff are admitted and acknowledged as payable to the plaintiff by the defendants. Mr. Egan's affidavits refer to the defendants' difficult financial circumstances, their limited income and the desire to reach a compromise with the plaintiff in relation to their indebtedness, and to seek "a significant stay on the entry and execution" of orders made by the High Court.

6. The central issue in these appeals is the status of the deponent of the plaintiff's grounding affidavits, Mr. Holbrook. The defendants maintain that the grounding affidavits fail to prove the defendants' indebtedness to the plaintiff in that the requirements of the Bankers Books Evidence Act 1879, as amended, are not met.

7. In the grounding affidavit relevant to Appeal No. 1 which was sworn on the 9th November, 2012, Mr. Holbrook states himself to be "of Ulster Bank Group Centre, Georges Quay, Dublin 2 . . .". He describes himself as:-

" . . . a Recoveries Clerk employed by the plaintiff in its Debt Recovery Department based at Belfast Recoveries Centre, Danesfort, Stranmillis Road, Belfast BT9, 5UB," and that he has "access to the computer and other Bankers Books and records of the plaintiff bank herein relating to the accounts and liabilities to it of the defendant."

8. In the grounding affidavit relevant to Appeal No. 2, Mr. Holbrook introduces himself as being "of Ulster Bank, Danesfort, Stranmillis Road, Belfast BT9 5UB . . .", and in paragraph 1 he states the following:-

"I am a Recoveries Clerk employed by Ulster Bank Limited in its Debt Recovery Department based at Belfast Recoveries Centre, Danesfort, Stranmillis Road, Belfast BT 9 5UB", and that he has "access to the computer and other bankers books and records of the plaintiff bank herein relating to the accounts and liabilities to it of the defendant."

Mr. Holbrook swore this affidavit on the 14th March, 2013, approximately four months after swearing the affidavit relevant to Appeal No. 1.

9. In the grounding affidavit relevant to Appeal No. 3, Mr. Holbrook stated that he was "of Ulster Bank Limited, of Ulster Bank Danesfort, Stranmillis Road, Belfast BT9 5UB . . .", and in paragraph 1 he described himself as:-

" . . . a Recoveries Clerk employed by the plaintiff in its Debt Recovery Department based at Belfast Recoveries Centre, Danesfort, Stranmillis Road, Belfast BT 9 5UB," and that he has "access to the computer and other Bankers books and

records of the plaintiff bank herein relating to the accounts and liabilities to it of the defendant."

This affidavit was sworn by Mr. Holbrook on the 18th January, 2013, that is approximately two months after he swore the grounding affidavit relevant to Appeal No. 1 and approximately two months prior to swearing the grounding affidavit relevant to Appeal No. 2.

10. The plaintiff in these proceedings is Ulster Bank Ireland Limited. In his first grounding affidavit sworn on the 9th November, 2012, (Appeal No. 1), while Mr. Holbrook states that he is a Recoveries Clerk employed by the plaintiff (Ulster Bank Ireland Limited), in his grounding affidavit sworn on the 14th March, 2013, (Appeal No. 2) he maintains that he is a Recoveries Clerk employed by Ulster Bank Limited, rather than the plaintiff, Ulster Bank Ireland Limited. In his grounding affidavit sworn on the 18th January, 2013, (relevant to Appeal No. 3), Mr. Holbrook says he is a Recoveries Clerk, *employed by the plaintiff* (Ulster Bank Ireland Limited).

11. Ulster Bank Ireland Limited, the plaintiff in these proceedings and Ulster Bank Limited, although associated companies are nevertheless separate legal entities. In his grounding affidavit relevant to Appeal No. 1, Mr. Holbrook states his address to be "Ulster Bank Group Centre, Georges Quay, Dublin 2". In his grounding affidavit relevant to Appeal No. 2, Mr. Holbrook states his address to be "Ulster Bank Danesfort, Stranmillis Road, Belfast BT9 5UB". In his grounding affidavit relevant to Appeal No. 3, Mr. Holbrook states his address to be "Ulster Bank Ireland Limited, of Ulster Bank Danesfort, Stranmillis Road, Belfast BT9 5UB". It is noteworthy that in this affidavit, the word "Ireland" in the bank's title has been crossed out, and this alteration is initialled by Mr. Holbrook.

12. The defendants maintain that the differences apparent in the three grounding affidavits relating to Mr. Holbrook's address, and his statement as to the identity of his employer, and the fact that in one of his grounding affidavits (relevant to Appeal No. 2) he states that he is employed by a company other than the plaintiff in these proceedings, Ulster Bank Ireland Limited when, considered together, and having regard to the proximity in time between the swearing of the three affidavits and the related nature of the three sets of proceedings are inadequate proof of the sums being claimed in each of the proceedings, and as such ought not to have been accepted by the High Court as proof of the debts.

13. On the 13th December, 2013, the defendants' solicitor wrote to the plaintiff advising it that its applications for summary judgment were not correctly grounded, because they did not comply with the Bankers Books Evidence Act 1879, as amended. No explanation was received by the defendants as to the apparently inconsistent information relating specifically to Mr. Holbrook in the three grounding affidavits. The defendants did not seek to have Mr. Holbrook cross-examined in relation to his affidavits.

14. Submissions made on behalf of the defendants to the High Court were broadly similar to the submissions now being made to this Court. In the High Court, counsel for the defendants stated as follows:-

"... my argument is essentially that where he has said he is of Ulster Bank, and where he has highlighted the fact that he is not of Ulster Bank Ireland Limited, the plaintiff, but is in fact of Ulster Bank Limited, he is seeking to rely on the fact that maybe plaintiff has close links with Ulster Bank Limited, but that are not the same company ... this is not a situation where I am coming before the court and suggesting that on the Bankers Books Evidence Act, the documentation before the court is in issue. I am saying that all of the evidence that is before this Court is hearsay on the basis he is not an employee of the bank and that he is in fact of Ulster Bank Limited, a very separate company ..."

15. The defendants' case is therefore quite straightforward. If Mr. Holbrook was not, at the time he swore his affidavits, an employee of Ulster Bank Ireland Limited, but was in fact an employee of a separate company, Ulster Bank Limited, he cannot prove the debts on behalf of the plaintiff, Ulster Bank Ireland Limited.

16. In a recorded note of his judgment on the 3rd March, 2014, O'Neill J. stated the following:-

"Now if I take the first two cases first and the issue here is and the objection is taken on the basis that, Mr. Holbrook, by his own identification of himself, disqualifies himself as an officer of the plaintiff for the purposes of giving evidence under the Bankers Books Evidence Act 1879. However, the problem here from the defendants' point of view is that there is a very express averment in para. 1 to the effect that he is employed by the plaintiff and that is not challenged on affidavit, not even put in issue on affidavit, and therefore in my view, there is, all that is required is that there be prima facie evidence of the contention in question. I am quite satisfied that the evidence on affidavit, the very positive averment by Mr. Holbrook that he is employed by the plaintiff is sufficient evidence on a prima facie basis to establish that he is an officer of the plaintiff for the purpose of giving evidence pursuant to the provisions of the Bankers Books Evidence Act 1879 and therefore so far as this first case is concerned the point fails. Exactly the same thing can be said about the second case. Now that brings me on to the third case, were there is a slightly different formulation, but again this is a matter for evidence and I have to have insofar as it is a matter of evidence, it is not a technical matter. It is a matter to be established on the balance of probabilities. Is Mr. Holbrook for the purpose of this third case, an officer of Ulster Bank Ireland Limited? As I have drawn a distinction between the formulation used in para. 1 in this affidavit to the other two cases where he does not use the word "plaintiff" he uses the expression "Ulster Bank Limited". I think that is probably no more than perhaps a slightly careless use of language. It is quite clear from all of the affidavit evidence, that Mr. Holbrook is employed by the plaintiff in this case and I am satisfied that in this case too he is an officer of the plaintiff company for the purposes of the Bankers Books Evidence Act. So, I am quite satisfied that this very technical point lacks merit ..."

17. Issues arising under the provisions of the Bankers Books Evidence Act 1879, as amended, have been the subject of a number of Superior Court judgments over the years. In *Moorview Developments Limited v. First Active plc* [2010] IEHC 275, Clarke J. stated as follows:-

"... the main object of the Bankers Books Evidence Acts is to relieve bankers from the necessity for attending at court and producing their books under a subpoena duces tecum. 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 to conform with the Bankers Books Evidence Act. That legislation is irrelevant to a case where the contents of the banks books are proved in the ordinary way by a witness who can give direct evidence of having analysed the books."

18. In *Bank of Scotland plc v. Fergus* [2012] IEHC 131, Finlay Geoghegan J. agreed with the views expressed by Clarke J. in the *Moorview* case, and she stated:-

"I respectfully agree with the above approach as being correct. 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. As pointed out by Clarke J., if a specific element of the records is challenged, the Court would have to decide on the factual dispute and the weight to be attached to the evidence of the relevant bank official would depend upon his personal knowledge of the matter in dispute."

19. In *Walsh v. National Irish Bank* [2013] I.E.S.C. 4 at para. 7.5, Clarke J. reiterated the views he expressed in *Moorview*, when he said:

"...The purpose of the Bankers Books Evidence Acts... is simply to assist in the presentation of routine evidence before the courts and avoids the necessity of requiring an official of a Bank to attend, presumably on foot of a subpoena duces tecum, to give evidence every time a party wished to establish at an ordinary civil trial what in many cases would be routine banking information. The Bankers Books Evidence Acts are not intended primarily as a means of securing the disclosure of information not otherwise available. Rather, those Acts are designed to facilitate the giving, in a convenient way, of evidence which could be secured in any event by requiring the attendance in court of a relevant official of the Bank concerned accompanied by relevant extracts from the Bank's records."

20. In *Bank of Ireland v. Keehan* [2013] (Unreported High Court 16th September 2013), Ryan J. (as he then was) commented as follows:

"The judgments of Clarke J. (Moorview) and Finlay Geoghegan J. (Fergus) reflect an acknowledgement that the courts have to take judicial notice of the obvious and common place facts in circumstances of ordinary life. Companies maintain computer records that are recited and exhibited in summary procedures as evidence of debt. Similarly with banks. The records are prima facie evidence. 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, a prima facie proof is sufficient...(emphasis added).

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 in common, 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 proven its case that the defendant defaulted on a loan..."

21. The decision of O'Malley J. in *Ulster Bank Limited v. Dermody* [2014] IEHC 140 was relied upon by the defendants' in support of their contention that Mr. Holbrook's status did not qualify him to satisfy the requirements of the Bankers Books Evidence Acts, and that his affidavits could not therefore be relied upon to prove the defendants' indebtedness to the plaintiff. In that case, the facts were broadly similar to the facts of the case under appeal. In the *Dermody* case O'Malley J. found herself unable to reconcile the views expressed by Clarke J., Finlay Geoghegan J. and Ryan J. in the *Moorview*, *Fergus* and *Keehan* decisions respectively, with the judgment of Keane C.J. in *Criminal Assets Bureau v. Hunt* [2003] IESC 20, and, more specifically his statement (at p. 189) that:

"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 the authors giving sworn evidence and being subject to cross examination, unless advantage was taken of the provision of the Bankers Books Evidence Acts 1879 to 1959. The documents in question accordingly, should not have been admitted in evidence in the High Court unless, as the plaintiff contends, they were admissible under the provisions to which I have referred."

22. However, in my view, the facts in the three High Court cases to which I have referred and the facts in the *Hunt* case are clearly distinguishable. In the *Hunt* case, the issue was a substantial tax demand raised by CAB, which included a reliance on certain bank records. One of the issues in that case related to whether or not those bank records were sought to be proved by evidence. The case did not involve a bank seeking to prove a debt due from a customer.

23. The decision of Peart J. in *Bank of Scotland plc v. Stapleton* [2012] IEHC 549 was also relied upon by the defendants. However, it is to be distinguished from the facts in this case, insofar as the Stapleton case involved the outsourcing by Bank of Scotland of the management of its loan portfolio to an independent service company, Certus, and an employee of Certus being then presented at a full hearing of the case for the purposes of proving a debt due to Bank of Scotland in the face of the defendant's contesting the claim by Bank of Scotland for an order for possession of property in order to enforce its security in respect of the defendants' borrowings from Bank of Scotland.

24. In *J.B.O'C v. P.C.D.* [1985] I.R. 265, Murphy J. stated that:-

"The purpose of the Bankers' Books Evidence Act was to facilitate the proof of evidence contained in books used by bankers in the day to day conduct of their profession."

25. In this case, in two of the grounding affidavits (relevant to Appeals Nos. 1 and 3) Mr. Holbrook avers as follows:-

"I am a Recoveries Clerk employed by Ulster Bank Limited in its Debt Recovery Department based at Belfast Recoveries Centre, Danesfort, Stranmillis Road, Belfast BT9 5UB, and I have as such access to the computer and other bankers books and records of the plaintiff bank herein relating to the accounts and liabilities to it of the defendant. I now make this affidavit on the plaintiff's behalf and by its authority from my diligent perusal of its said books and records and from facts within my own knowledge save where otherwise appears and where so appearing I believe same to be true and accurate."

26. In his affidavit relevant to Appeal No. 2, Mr. Holbrook avers in identical terms to the other affidavits, save for the fact that he states himself to be "employed by Ulster Bank Limited". In his affidavit relevant to Appeal No. 3, Mr. Holbrook provides his address as Ulster Bank Ireland Limited with a line through "Ireland". There are possible reasons for the varied information in the grounding affidavits. It may be that the difference is simply due to an error on the part of Mr. Holbrook (as was suggested by the learned High Court judge). It may also be the case that Mr. Holbrook was employed by both Ulster Bank Limited and Ulster Bank Ireland Limited at the same time. It may have been the case that Mr. Holbrook was working at different addresses in the course of the period in

question (approximately four months between November 2012 and March 2013), namely in Dublin and in Belfast.

27. Mr. Holbrook makes it quite clear that he has had "access to the computer and other bankers books and records of the plaintiff bank herein, relating to the accounts and liabilities to it of the defendant", and that he makes his affidavit on behalf of "the plaintiff and by its authority from a diligent perusal of its said books and records and from facts within my own knowledge save where otherwise appears and where so otherwise appearing I conscientiously believe the same to be true".

Order 37

28. Order 37 of the Rules of the Superior Courts are also relevant. Order 37, rule 1 states as follows:-

"Every summary summons indorsed with a claim (other than for an account) under Order 2 to which an appearance has been entered shall be set down before the Master by the plaintiff, on motion for liberty to enter final judgement for the amount claimed, together with interest (if any), or for recovery of land, with or without rent or mesne profits (as the case may be) and costs, and, in the case of an action for the recovery of land for non-payment of rent, to ascertain the amount of rent due. Such motion . . . shall be supported by an affidavit sworn by the plaintiff or by any other person who can swear positively to the facts showing that the plaintiff is entitled to the relief claimed (emphasis added) and stating that in the belief of the deponent there is no defence to the action. A copy of any such affidavit shall be served with the notice of motion."

29. Order 37, r. 2 provides for the cross examination of a deponent of an affidavit where such cross examination is sought. No cross examination of Mr. Holbrook was sought by the defendants in these cases.

30. Mr. Holbrook has sworn positively to the facts *showing that the plaintiff is entitled to the relief claimed and stating that in the (his) belief . . . there is no defence to the action*. It is a fact that there is no defence to these claims. The defendants clearly and honestly acknowledge that the debts are due and owing to the plaintiffs, and it follows therefore that they have no defence to the claims.

31. It is noteworthy that in all three cases, in affidavits sworn by Mr. Holbrook on the 25th February, 2015, in response to the defendants' motion seeking a stay pending the hearing of these appeals Mr. Holbrook unequivocally states that he is an employee of the plaintiff, Ulster Bank Ireland Limited, and again avers to the fact that he is informed of the matters deposed to in the affidavit from a "*diligent perusal*" of the plaintiffs books and records, and from facts within his own knowledge, and that he has full access to the computer and other bankers books and records of the plaintiff relating to the accounts and liabilities to it of the defendants, and he further states that the books and records referred to are the ordinary records of the plaintiff, that any entries arising therefrom were made in the usual and ordinary course of the business of the plaintiff. He also avers to the fact that all copy entries referred to in his affidavits have been examined with the original entries and are correct.

Conclusion

32. I am satisfied that Mr. Holbrook has, in his sworn affidavits, demonstrated that he has had access to the computer, bankers books and records of the plaintiff relevant to the amounts being claimed as due and owing to it by the defendants, and that he has perused same for the purposes of establishing the quantum of such amounts, and that he has been appropriately designated by the plaintiff to so do in all three proceedings.

33. I am also satisfied that the requirements of O. 37 r. 1 have been satisfied, in that Mr. Holbrook has sworn "positively to the facts showing that the plaintiff is entitled to the relief claimed and stating that in the belief of the deponent that there is no defence to the action".

34. It is also appropriate to consider O. 37 rr. 8 and 9 in the context of these proceedings. Rule 8 provides that:

Except in actions for the recovery of lands for non payment of rent, if it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted...

35. Rule 9 states:

If it appears to the court that any defendant has a good defence to or ought to be permitted to defend the action and that any other defendant has not such defence ought not to be permitted to defend the former may be permitted to defend, and the plaintiff shall be entitled to enter judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former.

36. I am satisfied that as the defendants have unequivocally acknowledged their indebtedness to the plaintiff (in the amounts claimed in each summary summons) the plaintiff is entitled to judgment, and no purpose can be served by the referral of the three claims (or any one or two of them) to plenary hearing, save for delaying the securing of judgments by the plaintiffs for the amounts in question. In the circumstances of these cases, a referral to plenary hearing cannot therefore properly arise and the only step which can be properly taken by a court in the particular circumstances of these cases is, if appropriate, to grant a stay on the entry or execution of the judgment, or both, for good reason.

37. I would therefore dismiss these appeals.