THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 118

Record Number: 2016/278

Peart J.
Edwards J.
Whelan J.

BETWEEN:

ALLIED IRISH BANKS PLC

PLAINTIFF/RESPONDENT

- AND -

MICHAEL MCPHILLIPS

DEFENDANT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 27TH DAY OF MARCH 2019

1. This is an appeal from that part of the order of the High Court (Barr J.) dated 25th May 2016 by which judgment was granted in favour of the plaintiff bank against the defendant in the amount of €853,920. The balance of the bank's claim for judgment in a sum in excess of €2.5 million was adjourned to a plenary hearing, and that part of the order is not the subject of any cross-appeal by the bank.

2. The bank's summary summons issued on the 22nd July 2014 claimed that a total sum of €3,818,694.72 was due and owing by the appellant on foot of five loan facilities granted to the appellant on dates between the 16th December 1998 and 30th August 2006. Letters of demand were issued by the bank, each dated 13th November 2013, seeking repayment of a total amount of €3,818,694.72. Those demands were not complied with by the appellant.

3. The amount for which judgment was entered against the appellant represents the sums claimed to be due on foot of four out of five loan facilities extended by the bank to the appellant. The claim on foot of the fifth loan is in fact the fourth loan in terms of time, namely 30th August 2006, but for convenience I will refer to it as "the fifth loan". It is the claim of foot of the fifth loan that has been adjourned to a plenary hearing, the Court below being satisfied that a *prima facie* defence and counterclaim by way of an equitable set off in respect of that loan had been raised on affidavit by the appellant.

4. Put briefly, the appellant's argument on this appeal is that if the defence and the proposed counterclaim by way of an equitable set off put forward by him to the fifth claim was considered sufficient for it to be adjourned to a plenary hearing, then it ought to have been considered sufficient in respect of the other claims too, because it is contended that all the loan facilities are inter-linked, having regard to the fact that all are secured by a mortgage on the same property to which the bank could have recourse in respect of any of the loans.

5. In this regard the appellant refers to the fact that the loan on foot of the second loan facility dated 28th February 2001 was secured by a mortgage on the Abbey Gate Street property, and that the loan facility letter stated that "the security [extends] to cover all your present and future obligations to the Bank, including these facilities". Accordingly, it is argued that all the loans are inter-connected because there is this commonality as far as the security is concerned.

6. The appellant also contends that if he is successful in his counterclaim against the bank, which he has been permitted to argue in respect of the fifth loan that has been adjourned to plenary hearing, the potential value of that counterclaim is in the order of €4 million, which would be sufficient by way of set-off to deprive the bank of any entitlement to recover the amount for which judgment has been granted.

7. There is another aspect to this appeal. Prior to the hearing of the bank's motion seeking summary judgment on foot of the summary summons herein, the appellant through his solicitor had been making valiant efforts to obtain certain details and documents from the bank, including under the provisions of the Data Protection Acts 1988-2003. These efforts had not borne fruit by the time the bank's motion was heard in the High Court. The appellant was concerned to know how the proceeds of sale of the Abbey Gate Street premises had been applied following the receiver sale. He did not know against which loans the proceeds of sale had been credited. He maintains that the proceeds ought to have been credited against the amount due on foot of loans other than the fifth, all of which were covered by the security of the Abbey Gate Street premises. He was also anxious to know against what loans an amount held by him in a deposit account with the bank had been credited. He believes that if these amounts had been put against the loans other than the fifth loan, judgment would not have been granted.

8. However, he was not in a position to make that argument in the High Court because his efforts to obtain that information from the bank had been unsuccessful by the time the motion came on for hearing.

9. Following the granting of judgment, the information sought by the appellant was eventually received from the bank as well as an apology for not having provided it in a more timely fashion. The material furnished has shown that the proceeds of sale of the Abbey Gate Street premises and the proceeds of the said deposit account totalling an amount of €848,783 were credited against the amount claimed on foot of the fifth loan, and not the other four facilities for which judgment was granted. There is before this Court a motion by the appellant seeking leave of the Court to adduce that new evidence, and in that regard the appellant submits that the criteria by which this Court would consider such an application as stated in *Murphy v. Minister for Defence* [1991] 2 I.R. 161 are satisfied. I

will return to that motion in due course.

10. The appellant claims therefore that even if the trial judge was correct that no *prima facie* defence was demonstrated by the appellant in respect of the said four loans, the said amount of €848,783 ought to have been credited against those loans, instead of against the fifth loan, and that the failure by the bank to have provided that information deprived him of an opportunity to so argue in the High Court. Alternatively, if the bank was entitled to apply those proceeds and the deposit account funds howsoever it chose, the trial judge ought to have adjourned the entire claim to a plenary hearing so that the counterclaim could be determined, so that in the event of an award in the amount sought on the counterclaim being made in his favour the entire of that award could be set off against the total amount of all five loans, and not just what was owing in respect of the fifth loan.

The defence advanced

11. I do not propose to set out in detail the basis on which the defendant seeks to defend the claims by the bank, and the basis for his counterclaim, as the trial judge has already concluded that the arguments advanced reach the necessary threshold for a plenary hearing, at least as far as the fifth loan is concerned. Suffice to say that the appellant raises a serious issue as to the circumstances in which the bank lent him the amount of €2.5 million on foot of the fifth loan facility, and the manner in which it was permitted by the bank to be drawn down. He alleges that the bank knowingly facilitated a fraud to be perpetrated upon him in the manner set forth at para. 24 of his first replying affidavit sworn on the 6th February 2015. Leaving aside for the moment the issue that he wishes to raise arising from the new information which has come to hand since the date of the High Court's judgment (and which he had 'flagged' in his replying affidavits before he had the information which has since been provided by the bank) the principal issue for determination is whether the trial judge was correct to sever the other four loans, and conclude that there was no prima facie defence disclosed in respect of those loans, and to grant judgment for the sums claimed thereunder.

12. It has been submitted that all five loans were cross-securitised and therefore inter-connected. I have already drawn attention to the security provision contained in the loan facility dated 28th February 2001, and to the fact that the security property at Abbey Gate Street was disposed of by the bank's receiver, though the proceeds thereof were applied to just the fifth facility.

13. The trial judge in his judgment noted that the appellant had been making efforts to obtain documents from the bank, including by way of a complaint to the Data Protection Commissioner under the Data Protection Acts. He noted that some documents had been made available through these efforts, but that the appellant was maintaining that there were further documents that should be provided to him.

14. The trial judge went on to examine the basis put forward for the counterclaim against the bank as disclosed in the appellant's replying affidavits. He did so by reference to the background and purpose of the fifth loan facility which related to investment by the appellant for a 25% stake in a development opportunity on Tuam Road, Galway with two other named persons. The details of what that opportunity comprised does not need further elaboration since the counterclaim has been adjourned to a plenary hearing already. But the appellant agreed to purchase, and expected to receive a 25% beneficial interest in unencumbered land in exchange for his investment of the loan proceeds, and this has turned out not to have been the case. The lands were, unbeknownst to him, already the subject of a charge, and he maintains that the bank was aware of the encumbrance, and complicit in enabling that situation to occur whereby he has sustained a substantial loss. As I have said, the security for the fifth loan to him was, *inter alia*, a legal charge on the Abbey Gate Street property.

15. The trial judge commenced his conclusions at para. 49 of his judgment. He outlined the basis for the counterclaim that the appellant wishes to raise arising from the alleged conduct of the bank and in particular a named individual at the bank with whom the appellant dealt in relation to the fifth loan facility in respect of his investment in the Tuam Road project. He continued at paras. 53 – 55:

> "53. The defendant has put in a Data Protection Act request and has been provided with some documentation. However, he maintains that he will need discovery of documents to enable him to properly mount his defence. In all these circumstances, I am of opinion that the defendant has raised an arguable defence, and has satisfied the tests laid down in the *Aer Rianta* and *Harrisrange* cases.
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> 54. In addition, I am satisfied that the defendant has established an arguable defence in equity arising out of the facts outlined above. This is more than a mere assertion of the type found in the *AIB v. Taylor* case. His counterclaim arises out of the same transaction, which gives rise to the plaintiff's claim in these proceedings. Accordingly, if he is successful in the counterclaim, he will be entitled to an equitable set off as against the sums claimed by the plaintiff.
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> 55. The defendant's defence only relates to the loan for €2.5m. He has not contested the amounts due under the other loans. In these circumstances, I will remit that part of the plaintiff's claim as relates to the loan agreement dated 30th August 2006, to plenary hearing. The plaintiff is entitled to judgement in respect of the remaining loans, which amounted to €139,822.70, €172, 647.01, €88,081.53, and €453,368.83 on the 13th November, 2013."

16. One must appreciate that the trial judge did not have available to him the evidence that the appellant now seeks leave to adduce on this appeal, which he says was withheld from him by the bank until after the date of the High Court's order. The appellant submits that if that material had been available to him he would have been in a position to put forward a *prima facie* defence by way of the counterclaim and equitable set off in respect of the entire of his borrowings with the bank, and not simply the fifth loan facility.

17. In his replying affidavits the appellant had stated that he was unaware as to which loans the proceeds of sale of the Abbey Gate Street property and the proceeds of the deposit account had been applied. I think it is probably a mischaracterisation of the appellant's position in relation to the four other loans to say, as the trial judge stated in his judgment, that the appellant was not contesting his liability under those four loan agreements. The reality is, as he maintained, that he was not in a position to do so until he became aware that those proceeds had been applied only to the fifth loan facility.

18. In relation to the application for leave to adduce the new evidence, I am satisfied that the appellant ought to be permitted to introduce it on this appeal. His application satisfies the test in *Murphy v. Minister for Defence* because:-

> (i) it is material that was in existence at the time of the hearing in the High Court;
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> (ii) the appellant made diligent efforts to obtain same, and it was not forthcoming because of the bank's failure to disclose it when requested by the appellant;
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> (iii) the material would probably have had an important influence on the outcome of the motion; and

(iv) the evidence is clearly credible.

19. In the light of that evidence, which I would admit, I am satisfied that in accordance with the principles stated by Clarke J. (as he then was) in *Moohan v. S & R Motors (Donegal) Ltd* [2008] 3 I.R. 650 the appellant has an arguable counterclaim which he ought to be permitted to advance, and if successful, to be in a position to set off any award of damages on foot of his counterclaim against not just the fifth loan, but the other four loans also. I am satisfied that if the information that has come to hand since judgment was granted had been available prior to the hearing in the High Court, the bank's entire claim would in all probability have been, or ought to have been, adjourned to a plenary hearing.

20. In his judgment in *Moohan*, Clarke J. (as he then was) stated the principles which should guide the Court when considering an alleged set off and counterclaim in a case such as the present one. In that regard he stated at pp. 656-657:-

> "On that basis the overall approach to a case such as this (involving, as it does, a cross-claim) seems to me to be the following:-
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> (a) It is firstly necessary to determine whether the defendant has established a defence as such to the plaintiff's claim. In order for the asserted cross-claim to amount to a defence as such, it must arguably give rise to a set off in equity and must, thus, stem from the same set of circumstances as give rise to the claim but also arise in circumstances where, on the basis of the defendant's case, it would not be inequitable to allow the asserted set off;
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> (b) if and to the extent that a *prima facie* case for such a set off arises, the defendant will be taken to have established a defence to the proceedings and should be given liberty to defend the entire (or an appropriate proportion of) the claim (or have same, in a case such as that with which I am concerned, referred to arbitration);
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> (c) if the cross-claim amounts to an independent claim, then judgement should be entered on the claim but the question of whether execution of such judgments should be stayed must be determined in the discretion of the court by reference to the principles set out by Kingsmill Moore J. in *Prendergast v. Biddle* (Unreported, Supreme Court, 31st July, 1957)."

21. I am satisfied that the cross-claim which the defendant wishes to advance against the bank stems from the same set of circumstances as gives rise to the bank's claim, namely the fifth loan in relation to the Tuam site development. In my view, the cross-claim by the defendant comes within paras. (a) and (b) above. I am also satisfied that the information now available, and which I would favour admitting into evidence on this appeal for the reasons stated, has met the *Aer Rianta/Harrisrange* arguability test, and indicates a sufficient interconnection between the other four loans and the fifth loan by reason of the common security provided for each, namely the Abbey Gate Street property, and the fact that the proceeds of sale of that security, and the proceeds of the appellant's deposit account were applied only to the fifth loan, entitles the appellant to advance his counterclaim and claim for equitable set off in respect of the bank's claim on foot of all five loans, and not simply on what I have described as the fifth loan. It would not, in my view, be inequitable to allow the asserted set off in the circumstances, should the counterclaim be successful.

22. In these circumstances, I would allow the appeal and set aside the order made in the High Court dated 25th May 2016 and direct that the entire of the bank's claim do stand adjourned for plenary hearing as if that claim had been commenced by plenary summons and, as directed by the High Court, I would direct also that the bank deliver a statement of claim within four weeks from the date hereof or within such further time as may be agreed between the parties, and that the defendant be at liberty to deliver a defence and counterclaim within four weeks from the date of delivery of the statement of claim or within such further time as may be agreed between the parties.