THE COURT OF APPEAL

Woulfe J.
Noonan J.
Pilkington J.

Neutral Citation Number: [2021] IECA 127
Court of Appeal Record No. 2018/488
High Court Record No. 2012/3244S

Between

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND
PLAINTIFF/RESPONDENT

-AND-

JAMES OSBORNE
DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Woulfe delivered on the 27th day of April, 2021

Introduction

1. This is the appellant's appeal against the judgment and order of the High Court (Murphy J.) made on the 6th December, 2018. By this order the learned trial judge acceded to the respondent's motion for liberty to enter final judgment against the appellant in the sum of €50,000, and also granted the respondent the costs of the proceedings.

2. The appellant was a litigant in person before the High Court, but instructed solicitor and counsel immediately prior to his appeal.

Background

3. In November, 2007 the appellant was running a business through a corporate entity called "Coregreen Limited" (hereafter "the company"). The business involved buying a medium-sized truck which could be fitted with illuminated mobile advertising signage. The company had opened a current account at the respondent's branch at Gorey, County Wexford, but as of the 12th November, 2007 appear to have had only a small overdraft facility. On that date a cheque in the amount of €72,000.00 was drawn on the company's account by way of payment for the advertising truck, in circumstances where the account had a credit balance of only €41,514.00 approximately, and this clearly needed to be addressed immediately or the cheque would have bounced if not honoured by the respondents. It appears that on the following day, the 13th November, 2007, the appellant telephoned the respondent's Gorey Branch, who agreed to make loan facilities available for the purchase of the advertising truck.

4. Subsequently, on the 13th November, 2007 the appellant attended at the respondent's Gorey branch and met with a bank official, Mr. Michael Field. The appellant executed two documents to complete the various banking formalities in order to obtain the facility from the bank. The first document was a letter of offer dated the 13th November, 2007 whereby the respondent offered to provide the company with an overdraft facility in the amount of €50,000 to assist in funding the working capital requirements of the company, which facility would be repayable on demand at any time. It was a term of the offer letter that the respondent required security, by way of a letter of guarantee from the appellant guaranteeing the borrower's liability. The appellant signed a form of acceptance dated the 13th November, 2007 for and on behalf of the company stating that he had read and agreed to be bound by and to fully accept all of the terms and conditions contained in the offer letter.

5. The second document signed by the appellant was a guarantee and indemnity (hereafter "the guarantee") of the same date, whereby he guaranteed to pay to the bank on demand all sums of money owing or remaining unpaid to the bank from or by the company up to a maximum sum of €50,000 together with interest.

6. There is no dispute between the parties as to the fact that the respondent then provided the company with the overdraft facility in the sum of €50,000, and that the purchase of the advertising truck by the company was done with the assistance of this facility. It appears that the company and the appellant later ran into financial difficulties, in common with many other people in this jurisdiction and elsewhere during the financial recession. As of March, 2012 the company was indebted to the respondent in a sum in excess of €50,000, and the respondent called in the guarantee by letter of demand dated the 21st March, 2012.

The High Court Proceedings

7. These proceedings were commenced by summary summons dated the 27th August, 2012. The matter came before the Master of the High Court pursuant to a notice of motion issued on the 13th March, 2013 seeking liberty to enter final judgment. On the 5th October, 2017 the motion was transferred to the Judge's List by the Master, and was ultimately heard before Murphy J. on the 6th December, 2018.

8. A series of affidavits were exchanged between the parties during the course of the proceedings. In his first affidavit sworn on the 17th July, 2015 the appellant disputed the respondent's claim on the principal ground that on the 13th November, 2007 he had requested a hire purchase arrangement with the respondent by telephone, and he subsequently called in to sign what he believed was the hire purchase agreement, but he ended up having signed the guarantee. He averred that he did not have the opportunity or the time to read or examine this document. He referred to certain dealings with the respondent since November, 2007 but he did not suggest that this claim about an intended hire purchase agreement had ever been raised along the way before he swore this affidavit. In his second affidavit sworn on the 19th November, 2015 the appellant repeats this claim about the document he signed on the 13th November, 2007, states that the company "then" purchased the advertising truck and alleges that the guarantee

"was procured by fraud and deceit", given that he thought he was signing a hire purchase agreement on behalf of the company. In his next affidavit sworn on the 3rd October, 2017, the appellant says again that he understood that he was signing a hire purchase agreement. He says that the company "then" purchased the truck. He says therefore the guarantee is null and void as it was "procured by a mutual mistake" (at para. 7) and further, that there was misrepresentation by the bank. His subsequent affidavits are to the same effect.

9. The appellant's claim about an intended hire purchase agreement was completely rejected in affidavits sworn on behalf of the respondent. In his first affidavit sworn on the 25th May, 2017 Mr. Field averred that he was satisfied that he did explain to the appellant the full nature and consequences of the guarantee which the appellant was willing to execute. He found it difficult to see how the appellant could have confused a current account overdraft repayable on demand and an accompanying guarantee with a hire purchase agreement for a van. If the vehicle was indeed to be financed by way of hire purchase, the respondent would have been the purchaser and owner of the vehicle, whereas it was quite clear from the appellant's own evidence that the respondent advanced the monies to the company which purchased the vehicle in its own name.

10. As stated above, the respondent's motion for liberty to enter final judgment was heard by Murphy J. on the 6th December, 2018. When opening the papers, counsel for the respondent highlighted the entry in the company's current account statements which recorded the company having drawn a cheque in the sum of €72,000.00 on the 12th November, 2007, the day **before** the appellant said he phoned the respondent and requested a hire purchase agreement. In his submissions, counsel for the respondent addressed the appellant's claim of "*non est factum*" and opened authorities which require the signatory of the document in question to establish that there was a lack of negligence, i.e. that the person concerned took all reasonable precautions in the circumstances to find out what the document was. In his replying submissions the appellant appeared to resile from reliance upon the doctrine of *non est factum*. In exchanges with the trial judge the appellant accepted that he paid for the truck on the 12th November, 2007, by writing a cheque for €72,000.00, but he now stated that what was agreed was that money would be put back into the account from the hire purchase agreement which would bring the account back in "within the limits" and into compliance. In further exchanges with the trial judge the appellant accepted that he was not suggesting that the overdraft facility letter was the subject of a *non est factum* claim, and that the overdraft facilities were made available, and he was now saying that his issue was that the overdraft facility was only a temporary arrangement until the hire purchase agreement was put in place, at which point the overdraft would have been gone and the hire purchase agreement would take its place.

11. In her *ex tempore* judgment, Murphy J. held that there was no *bona fide* defence to the respondent's claim. She noted that the appellant had accepted the fact of the guarantee, and the fact of the overdraft debt, when initially engaging with the respondent after the guarantee was called in. There was not one mention of a possible hire purchase

agreement until more than three years after the debt was demanded. It was not until late 2015 that the appellant came up with the claim that the overdraft facility was in fact a short term loan which he had guaranteed, pending the execution of a hire purchase agreement. It seemed to the Court that this was an unsustainable position, having regard to the fact that the appellant never referenced any hire purchase agreement throughout the period from 2012 to late 2015. Then suddenly in November, 2015 he comes up with this issue, that the Bank had acted fraudulently and deceitfully. Murphy J. held that the appellant had moved the goalposts repeatedly in relation to the matter. Initially his claim of *non est factum* related to the guarantee itself. It had now moved to the overdraft facility letter and the suggestion of its replacement by a hire purchase agreement. The Court had regard to the conduct of the appellant throughout this matter. When he was meeting the Bank before the letter of demand was even issued, there was never a suggestion that this was other than an overdraft advanced to his company. The company has had the benefit of the overdraft, and the respondent was entitled to the benefit of the guarantee. The Court was quite satisfied that there was no *bona fide* defence to the respondent's claim and had no option but to give judgment as sought on the summary summons.

Notice of Appeal

12. The appellant filed a notice of appeal to this Court on the 20th December, 2018 and set out eighteen grounds of appeal. Unfortunately, almost all the grounds were extremely vague and very general in nature. At the hearing of the appeal, however, counsel appeared on behalf of the appellant and at the outset helpfully identified five net issues which should, it was said, allow the matter to go to plenary hearing. In addition, during the course of the hearing, in exchanges with Noonan J., counsel for the appellant resiled from any defence of *non est factum*. She did, however, say that the appellant was still claiming that the overdraft facility and guarantee was only a short term arrangement pending the hire purchase agreement, notwithstanding the omission of this issue from the five net issues identified at the outset. I will turn to all of those issues shortly, but it is necessary, firstly, to refer to the legal principles by reference to which a case such as this falls to be determined.

The Legal Principles

13. In *Promontoria (Arrow) Limited v. Burke* [2018] IEHC 773, Barniville J. set out the following very useful summary of the applicable legal principles, which I gratefully adopt:-

> "14. The legal principles governing the exercise of the court's jurisdiction to grant summary judgment are "well settled" (per Clarke J. in the Supreme Court in *IBRC Limited v. McCaughey* [2014] 1 I.R. 749 ("*McCaughey*")). They have been set out, discussed and applied in numerous judgments of the Superior Courts in recent years. I think it is fair to say that there was no real dispute between the parties as to the test to be applied.
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> 15. The essence of the test was succinctly stated by Hardiman J. in the Supreme Court in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 I.R. 607 ("*Aer Rianta*"), as follows:

'…the fundamental questions to be posed on an application such as this remain: "Is it very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?' (per Hardiman J. at 623).

16. Having noted that earlier cases such as *First National Commercial Bank Plc v. Anglin* [1996] 1 I.R. 75 *("Anglin")* focused on the issue of the credibility of the defence raised by the defendant in ascertaining whether there was a "fair or reasonable probability" of the defendants having a "real or *bona fide* defence", Hardiman J. noted that the issue of credibility arose very starkly in the cases referred to in *Anglin* and that ultimately the fundamental questions to be determined on an application for summary judgment were as set out by him. In the Supreme Court in *McCaughey*, Clarke J. reemphasised what is meant by the "credibility" of a defence. He stated:

'(22) A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in *Aer Rianta*…be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the Court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction identified in *McGrath v. O'Driscoll*…[2007] 1 ILRM 203, the Court may come to a final resolution of such issues. That the Court is not obliged to resolve such issues is also clear from *Danske Bank a/s (t/a National Irish Bank) v. Durkan New Homes* [2010] IESC 22… (Per Clarke J. at para. 22, p. 759).'

17. Clarke J. continued:-

'[23] Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions which may not provide an arguable defence are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in *Aer Rianta*… it needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant.' (Per Clarke J. at para. 23, p. 759).

18. This approach, derived from well-established authority, has been regularly and consistently applied by the Superior Courts."

The Five Net Issues on Appeal

14. As mentioned earlier, five net issues were identified by counsel for the appellant at the outset of the hearing of this appeal. I propose dealing with each issue in turn.

15. The first issue put forward is that there was a fundamental mistake in relation to the identity of the appellant. Reference was made to the nature of the borrowing in the facility letter, which letter had allegedly misidentified "the party in question". The background to this issue is as follows. While the letter of offer dated the 13th November, 2007 was directed to the secretary of the company, and was headed up "Re: Coregreen Limited", it was stated in the first paragraph that the respondent would make the overdraft facility available to "Dermot S Cullen Construction Limited". As regards the nature of the facility, it was submitted that such an overdraft facility might be appropriate for a construction company, but the appellant had a pattern in the past of financing by way of hire purchase agreements. In his second affidavit sworn on behalf of the respondent on the 11th April, 2018 Mr. Field avers that the inclusion of a singular reference to Dermot S Cullen Construction Limited in the letter of offer addressed to and clearly for the benefit of the company "was simply a typographical error".

16. I am satisfied that this one erroneous reference to another company in the letter of offer could not possibly give rise to an arguable defence. As stated earlier, the appellant signed a form of acceptance fully accepting all of the terms and conditions in the offer letter "for and on behalf of Coregreen Limited". As the learned trial judge stated in the Court below, there was never a suggestion by the appellant from the 13th November, 2007 until late 2015 that this was other than an overdraft advanced to his company. Insofar as the nature of the borrowing may have differed from the appellant's past practice, that is not material to the appellant's liability under the guarantee.

17. It may be convenient to deal with the second and third issues together as they are connected. The appellant submitted that the discovery suggested that the respondent had made a further mistake regarding the identity of the correct party by producing documents relating to another James Osborne who resides in Galway, and who has nothing to do with the appellant. It was further submitted that the fact that these "clear breaches of bank statements" were referenced in this case meant that the case should have gone to plenary hearing.

18. The background to this issue appears to be as follows. While there was of course no formal discovery process given that these are summary proceedings, it appears that the appellant made a request to the respondent for information under the Data Protection Acts, 1988 and 2003, and that the respondent furnished documentation under cover of letter dated the 21st March, 2017. This letter and the documentation enclosed therewith were exhibited in an affidavit sworn on behalf of the respondent by Mr. Gavin Rothwell on the 4th April, 2018.

19. While the documents furnished were supposed to be documents pertaining to the company's current account with the respondent, No. 45604019, it appears that the respondent erroneously included a number of documents, many of them heavily redacted, referring to a "James Osborne" and also referring to large loan amounts. The appellant submitted that he was not "James Osborne from County Galway", and that the inclusion of these documents in the proceedings were highly prejudicial to him, effectively influencing the High Court's view of him.

20. I am satisfied that this erroneous inclusion of documents relating to a different individual, with the same name as the appellant, could not possibly give rise to an arguable defence. The appellant clearly addressed this issue in his evidence and submissions to the High Court by pointing out that those documents belong to an entirely different man and have nothing whatsoever to do with him. The respondent did not contradict this correction, and it appears to have been accepted by the trial judge. Again, this error was not material to the appellant's liability under the guarantee.

21. The fourth issue relied upon by the appellant relates to the way that this case was conducted by the respondent in the High Court, and it is claimed that this amounted to a breach of High Court Practice Direction 54. While the appellant's submissions in this Court were not very specific as to the nature of this alleged breach, it appears that the issue relates to the fact that the respondent furnished a booklet of authorities to both the Court and the appellant during the course of the hearing in the High Court. The High Court Practice Direction HC54 entitled "Proceedings involving a Litigant in Person" does not address the issue of a party furnishing a booklet of authorities prior to or during the course of a hearing. I note in passing that para. 7 states that failure to comply with any of the requirements of the Direction may expose the party in default to liability for costs, and that no application for costs seeking to rely on this paragraph was made by the appellant in the High Court. In any event, I am again satisfied that this issue could not possibly give rise to an arguable defence.

22. The fifth issue advanced by the appellant is that the trial judge did not take into account an offer by him to resolve the respondent's claim, in circumstances where it is claimed that the sum offered was more than the value of the amount borrowed. It appears that the appellant at some point offered to transfer the advertising truck to the respondent in settlement of the respondent's claim. The respondent, however, exhibited a letter from their solicitors to the appellant dated the 29th October, 2013 referring to this offer. The letter went on to state that:

> "Our client has indicated that they are not in a position to accept a non-monetary offer to settle the account. If you wish to place the vehicle on the market for sale and make our client an offer of the sale proceeds after the sale they will re-consider the matter."

In those circumstances, it does not seem to me that this issue gives rise to any possible defence.

The "Temporary Arrangement" Issue and Credibility

23. As noted earlier, during the appeal hearing counsel for the appellant indicated that the appellant was also maintaining what might be described as the "temporary arrangement" defence, *i.e*. that the overdraft facility and supporting guarantee was only a temporary arrangement until a hire purchase agreement was put in place.

24. In my opinion, the trial judge had ample evidence before her to justify her conclusion that the appellant had failed to put forward any *bona fide* defence to the respondent's claim, for the reasons given by her as set out earlier in this judgment.

25. There are a number of issues about the credibility of this defence of "temporary arrangement", having regard to what was stated by Clarke J. in *McCaughey*, as cited at para. 14 above. In that case, Clarke J. stated that the sort of factual assertions which may not provide an arguable defence "are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in *Aer Rianta*".

26. In the present case the assertions about a temporary arrangement pending a hire purchase agreement appear not only as mere assertions unsupported either by evidence or by any realistic suggestion that evidence might be available, but they are expressly contradicted by and are inconsistent with the actual documentation. By the time the appellant approached the respondent for finance on the 13th November, 2007, the company had already drawn a cheque the previous day to purchase the truck. The appellant professed himself as familiar with hire purchase agreements and, as the respondent pointed out, under such an agreement the bank purchases the vehicle and hires it to the borrower. Here, however, the company had already purchased the truck and therefore it does not appear credible that the appellant could have been seeking a hire purchase agreement after the event.

27. Furthermore, the assertions about a temporary arrangement are also inconsistent with the communications between the parties during the period between the granting of the facilities in November, 2007 and the date of swearing of the appellant's first affidavit herein on the 17th July, 2015, which appears to be the first recorded reference by the appellant to an intended hire purchase agreement.

28. In the light of the above, I am satisfied that the purported defence of "temporary arrangement" is devoid of any credibility, and does not give rise to any real or *bona fide* defence.

Conclusion

29. In my view, the appellant has not established an arguable defence to the respondent's claim. Accordingly, I would dismiss the appeal and affirm the decision of the learned trial judge.

30. With regard to costs, as the appellant has been entirely unsuccessful in this appeal, my provisional view is that the respondent is entitled to its costs of the appeal. The same result would follow if the Court were to apply the traditional approach whereby "costs follow the event", and I see no circumstances present that would justify making any alternative order as to costs. If either party wishes to contend for an alternative order, they have liberty to apply to the Office of the Court of Appeal within fourteen days of delivery of this judgment for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the above proposed terms, the requesting party may be liable for the additional costs of such a further hearing. In default of receipt of such application, an order in the above proposed terms will be made.

31. As this judgment is being delivered electronically, I note that each of Noonan and Pilkington JJ. have indicated their agreement with it and the orders I propose.