Neutral Citation: [2015] IEHC 707

THE HIGH COURT

Record No. 2011/2689S

Between:

Allied Irish Banks p.l.c.

Plaintiff

– and –

Gerard J Smith

Defendant

JUDGMENT of Mr Justice Max Barrett dated 13th November, 2015

PART I: BACKGROUND FACTS

1. AIB seeks summary judgment in the amount of €146,874.35, being the amount that it claims is owed by Mr Smith to it on foot of an overdraft facility on his AIB current account. The overdraft was repayable on demand. By letter dated 9th June, 2011, AIB demanded repayment in full. Mr Smith has made no payment to AIB since demand and the full amount of the overdraft remains due and owing.

2. Mr Smith claims that he should not be obliged to pay the amount demanded of him. He maintains that a substantial amount of the overdraft arose due to his now ex-wife allegedly forging his signature on a direct debit form, at a time when they were still married, so as to ensure monies were taken from his account to settle certain credit card debts that she had incurred. However, an analysis of the facts and figures presenting indicates a somewhat different truth to arise as regards the debt in respect of which claim is made by AIB.

3. The court has considered various bank statements regarding Mr Smith's account that were exhibited in the evidence before it. That analysis shows that from August 2007 until August 2009 the debt incurred on four credit cards was paid from Mr Smith's current account. One of those cards was in the name of Mrs Smith. But from September 2009, the debt arising on only three credit cards was paid out of Mr Smith's current account. All three of those cards were in the name of Mr Smith.

4. Mr Smith claims, as mentioned, that he has been the victim of a fraud on the part of his ex-wife. He also contends that AIB was negligent in facilitating what he claims was the fraudulent conversion of monies from his account. But even taking Mr Smith's case at its height, even assuming that he can prove his allegations against his ex-wife (and at this time they are but allegations), in law this offers no defence to the claim now brought. This is because any debt tainted by his now ex-wife's alleged fraud is not the debt in respect of which AIB now makes demand. This in turn is because of the near two-century old decision in *Clayton's Case* (1816) 35 E.R. 767.

PART II: THE SO-CALLED 'RULE' IN CLAYTON'S CASE

5. Mr Clayton had an account with Devaynes, Dawes, Noble & Co., a London banking partnership. Mr Devaynes died wealthy, but eight months later Devaynes, Dawes, etc. collapsed. A large number of law-suits were commenced against the individual partners and against Mr Devaynes' estate. The first of these cases to be heard, *Sleech's Case*(1816) 35 E.R. 771, had as its result that Mr Devaynes' estate was liable for the debts of the partnership to his death but no further. Mr Clayton, a gentleman of Newcastle, had a cash-deposit of £1,713 with the banking-house at the time of Mr Devaynes' death. He withdrew £1,260, reducing his balance to £453. He came to court seeking this £453 of Mr Devaynes' estate, less his proportion of the bankruptcy share-out. Notably, however, after withdrawing the £1,260, Mr Clayton continued his banking relationship with the firm, making various deposits and withdrawals. He contended that his withdrawals should be netted against the latest lodgements (i.e. on a 'last in, first out') basis. This would have had the effect that the £453 would not have been drawn against. Mr Devaynes' estate argued that the latest withdrawals should have been counted against the earliest lodgements (i.e. 'first in, first out'). This latter approach had the effect that the £453 debt was long settled.

6. Grant M.R., in his judgment, opted for the 'first in, first out' approach, which has since become something of a 'golden thread' of banking practice from then to now, stating, at 608:

> *"[T]his is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of the £500 paid in on Monday, and this other to the account of the £500 paid in on Tuesday. There is a fund of £1000 to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place. Presumably, it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the account, that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has, or has not, been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards, and strike the balance at the head, instead of the foot, of it. A man's banker breaks, owing him, on the whole account, a balance of £1000. It would surprise one to hear the customer say "I have been fortunate enough to draw out all that I have paid in the last four years; but there is £1000, which I paid in five years ago, that I told myself never to have drawn out; and therefore if I can find anybody who was answerable for the debts of the banking house, such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the £1000 I paid in last week.' That is exactly the nature of the present claim. Mr Clayton travels back into the account, till he finds a balance, for which Mr Devaynes was responsible; and then he says, – 'That is a sum which I have never drawn for. Though standing in the centre of the account, it is to be considered as set apart, and left un-touched. Sums above it, and below it, have been drawn out; but none of my drafts ever reached or affected this remnant of the balance due to me at Mr Devaynes' death.' What boundary would there be to this method of re-moulding an account? If the interest of the creditor required it, he might just as well go further back, and arbitrarily single out any balance, as it stood at any time, and say, it is the identical balance of that day which still remains due to him….*
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> *If appropriation be required, here is appropriation in the only way that the nature of the thing admits. Here are payments, so placed in opposition to debts, that, on the ordinary principles on which accounts are settled, this debt is extinguished.*
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> *If the usual course of dealing was, for any reason, to be inverted, it was surely incumbent on the creditor to signify that such was his intention. He should either have said to the bankers, –*
>
> *'Leave this balance altogether out of the running account between us,' – or – 'Always enter your payments as made on*

the credit of your latest receipts ,' so as that the oldest balance may be the last paid.' Instead of this, he receives the account drawn out, as one unbroken running account. He makes no objection to it, – and the report states that the silence of the customer after the receipt of his banking account is regarded as an admission of its being correct. Both debtor and creditor must, therefore, be considered as having concurred in the appropriation."

7. It is important to note that the so-called legal 'rule' in *Clayton's Case* is in fact nothing of the sort. It is a legal presumption that may be rebutted by express or implied agreement, or indeed by statute. However, there is nothing to suggest –it was not even contended – that there was any such agreement, or that there is any statute, which would affect the application to the facts now presenting of a similar presumption to that applied in *Clayton's Case. Clayton's Case* was decided in what, so far as banking was concerned, were possibly simpler times when one did not perhaps encounter transactions of the same level of sophistication as those which occasionally present today. Some modern transactions, by their very complexity, could undoubtedly merit the application of some alternative method of appropriation that would meet the individual justice of a particular case. But the within proceedings are not such a case. This is a simple 'overdraft debt incurred, overdraft debt repaid' arrangement that is not very far removed from the simple 'in-out' transactions that were at issue in *Clayton's Case*, each form of arrangement being done on a running account, yielding a final balance on any one day and thus readily subject to the operation of a simple 'first in, first out'-type principle.

8. The presumption in *Clayton's Case* appears entirely and rightly applicable to an overdraft facility so that the first monies paid in must be taken to repay the first liability incurred and each payment in repays the next liability incurred *seriatim*. It does not appear to the court to affect matters, either in principle or in practice, that in *Clayton's Case* the debt settled was one owed by the bank to a customer and settled by payment out by the bank, whereas here the overdraft debt was owed to the bank and settled or capable of being settled on a rolling basis by payment in by the customer.

9. The total sum paid out of Mr Smith's account up to August 2009 to meet his then wife's credit card bill was €109,741.86. From then on, the only credit cards extant were his own. From September 2009 to the date the account was stopped and the overdraft facility withdrawn, Mr Smith paid a total of €188,691.83 into his current account, thereby repaying the entirety of the overdraft utilised to meet the credit card bills of Mr Smith's then wife and an array of other bills. Mr Smith then proceeded to overdraw the account afresh to the amount at which it stands today, being €146,874.35. That is an amount which is untainted in any way by any fraud that Mr Smith may have suffered at his now ex-wife's hands in respect of the earlier payments made out. If he wishes to report his ex-wife to the Gardaí, if he wishes to sue her for any loss he claims to have suffered by her allegedly forging his signature to a direct debit arrangement of which he now belatedly complains, if he wishes to sue AIB for its alleged negligence, those are all options that are open to him. But they are not matters that affect the overdraft debt incurred since September 2009, and regrettably for him they are not matters which afford him a defence against the summary judgment now sought. The court has been referred by counsel for Mr Smith to the Cheques Act 1959 and the Bills of Exchange Act 1882, and to certain case-law concerning forged signatures and bank liability, but finds nothing in those measures or cases that would lead it to depart from the conclusion just reached or the reasoning that it has outlined above.

PART III: THE TEST APPLICABLE TO SUMMARY JUDGMENTS

10. The court has recently considered the test applicable to summary judgment proceedings in its decision of 22nd October in *LSREF III Achill Investments Ltd v. Corbett and Anor* [2015] IEHC 652 and would respectfully refer the parties to its analysis in Part I of that judgment. Even applying the very low threshold for the referral of cases to plenary hearing that was recognised by the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, the court considers that, for the reasons identified above, it is very clear that Mr Smith has no defence, never mind an arguable defence, to the application now brought by AIB.

PART IV: CONCLUSION

11. The court has sympathy for the financial predicament in which Mr Smith presently finds himself; no doubt it is deeply unpleasant. However, this is an instance in which the court is coerced by our present law, and centuries-old principle, into granting the summary judgment now sought.