THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 271

[2016 No. 428]

Birmingham P.
Irvine J.
Hogan J.

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF/

RESPONDENT

AND

NOEL DUNNE

DEFENDANT/

APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 25th day of July 2018

1. This is the appeal of Mr. Noel Dunne against the judgment and order of the High Court, White J., of the 12th May 2016.

2. By his order the High Court judge granted judgment in favour of the Governor and Company of the Bank of Ireland ("the bank") for the total sum of €384,699.66. That was the sum allegedly due by Mr. Dunne on the 25th November 2015 for principal and interest, on foot of guarantees in writing dated the 11th November 2005 and the 30th May 2006. The bank did not make any claim for further interest.

3. It is not disputed that the guarantees had been provided by Mr. Dunne to support certain loan facilities advanced by the bank to Leinster Broadband Limited ("the company") of which company Mr. Dunne was then a director. The first of the guarantees, limited to the principal sum of €300,000 plus interest, was a joint and several guarantee executed by Mr. Dunne and his co director, Mr. Declan Gilligan. The latter, which secured the company's liabilities to the extent of €50,000 plus interest, was executed solely by Mr. Dunne.

4. By letter dated the 22nd February 2008 the bank made demand of Mr. Dunne for repayment of the sum of €306,532.36 after which it commenced the within proceedings by summary summons issued on the 8th July 2008. The bank's notice of motion seeking summary judgment issued on the 1st April 2009 and this spawned no less than eight affidavits which were exchanged over what can only be described as a rather leisurely six year time frame, an issue to which I will later return.

5. The principal argument advanced by Mr. Dunne in support of his applications that the proceedings be referred to plenary hearing, concerned the circumstances in which, on the 30th August 2006, two withdrawals were made from the company's account which he maintains were not validly sanctioned. The first was a withdrawal of €50,000 and the second for €30,855. These sums had been transferred by the bank into accounts in the name of his co director, Mr. Gilligan. The bank maintained that he, Mr. Dunne, had telephoned the bank and had authorised the transactions. It further contended that it had carried out the transactions in accordance with a telephone/telex/facsimile authority and indemnity (the "telephone mandate") from the company dated the 16th November 2005 which authorised it to operate its account on foot of telephone instructions furnished by Mr. Dunne until notified of any change to that instruction.

6. Mr. Dunne maintained that he did not make any telephone call to the bank on the 30th August 2006 sanctioning the withdrawal of the aforementioned sums. He also claimed that at the time the bank withdrew the funds from the company's account it had no valid telephone mandate to carry out that transaction. In support of his position Mr. Dunne exhibited three documents each of which was authored by an employee of the bank. They are so brief it is convenient to quote their contents in full.

E-mail from Mary Tuohy of the 9th December 2008:

> "Hi Noel,
>
> Just to confirm the transfers on the 30th August 2006 relate to a telephone instruction from yourself to transfer €50K and €30,855 to the accounts of Declan Gilligan.
>
> Regards"

E-mail from Orla Fagan dated 12th May 2011:

> "Noel,
>
> Per our telephone conversation, I confirm that the bank mandate, Form 1/21 dated the 1st December 2005 is the instruction the bank rely on regarding signing instructions on Leinster Broadband limited. We do not hold a

"fax/telephone indemnity" form.

I trust this is the information you require"

E-mail from Libby Kelly on the 24th September 2012:

"To whom it may concern,

Please accept this as confirmation that according to the mandate held by Bank of Ireland Newbridge Mr. Noel Dunne is authorised to sign cheques on this account as a sole authorised signatory.

At present there is no telephone / fax indemnity in place which would allow the bank to accept payment instructions via phone/fax.

I trust you will find this in order."

7. In its response, the bank contended that the e-mails relied upon by Mr. Dunne did not represent the true situation. Mr. Gerry Laheen, in his affidavit of the 28th May 2014, maintained that the transactions dated the 30th August 2006 had been authorised by Mr. Dunne as per the e-mail of the 9th December 2008 earlier referred to. Further, contrary to what had been asserted by Mr. Dunne, he claimed that the bank did indeed hold a telephone mandate from Mr. Dunne which he had signed on the 16th November 2005. Thus, according to Mr. Laheen, the e-mails that Mr. Dunne had exhibited were incorrect insofar as they stated that no telephone mandate existed.

8. In his further affidavits, Mr. Dunne, for a second time, explicitly denied sanctioning the withdrawal of funds from the company's account by telephone instruction on the 30th August 2006. He also maintained that the telephone mandate relied upon by the bank had been countermanded by a resolution of the company dated the 1st December 2005 ("the December 2005 authority) which required both directors to sign in respect of any transaction on the company's bank account.

9. While Mr. Dunne maintained that he was unaware that the impugned transfer had been made or to what use the funds had been applied, he nonetheless contended that the transfer of the funds had precipitated the downfall of the company as they had been earmarked to support the expansion of the business at a critical time. Further, the diversion of the funds had, according to Mr. Dunne, complicated the potential sale of the company to another broadband company as the proposed purchaser did not want to assume liability for the repayment of funds which had disappeared without explanation. So prejudicial to his interests had been the transfer of these funds that Mr. Dunne maintained that the bank's negligence called into question its entitlement to rely upon the guarantee to recover any of the sum claimed.

10. Insofar as the bank maintained that the telephone mandate remained valid, notwithstanding the December 2005 authority, which required the consent of both directors, Mr. Dunne relied upon the fact that the second page of the company's resolution had not been produced by the bank notwithstanding the fact that he had sought sight of the same during the currency of the proceedings. Thus, it could not be said that the December 2005 authority had not varied the earlier telephone mandate of 16th November 2005.

11. Ms. Mary Tuohy, on behalf of the bank, in her affidavit stated that she was well familiar with Mr. Dunne and that she knew his voice. She was not in a position to say that she remembered any telephone call concerning the transaction in question, but she was able to say that she would not have transferred the funds unless she had received a call from him authorising the transfer.

12. Mr. Laheen, in one of his later affidavits expressed surprise that Mr. Dunne had taken no action against Mr. Gilligan concerning what he maintained was an unauthorised misappropriation of company monies. He further observed that the paperwork authorising the transactions had been signed by himself and Ms. Mary Touhy. Mr. Laheen referred to the affidavit sworn by Ms. Tuohy and stated that, like her, he knew Mr Dunne's voice and he was certain he would not have authorised the transaction unless satisfied that the instruction had come from the person authorised to give it.

Judgment of the High Court Judge

13. In his judgment the High Court judge set out in great detail the facts and arguments relied upon by Mr. Dunne to support his entitlement to a plenary hearing. He also set out the facts and arguments relied upon by the bank in support of its contention that Mr. Dunne's affidavits failed to disclose a defence which was *bona fide* and credible. Having done so, the trial judge referred to the principles to be applied on an application for summary judgment. In particular, he referred, *inter alia*, to the decisions of Hardiman J. in *Aer Rianta v. Ryanair Limited* [2001] 4 I.R., Finlay Geoghegan J. in *Bank of Ireland v. Walsh* [2009] IEHC 220, Murphy J. in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75, Clarke J. in *McGrath v. O'Driscoll* [2007] ILRM 203 and McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R.1.

14. The High Court judge then went on to conclude as a matter of fact and law that the company's resolution of the 1st December 2005 did not nullify the earlier telephone authority of the 16th November 2005. He then observed that it was not until the 2nd April 2014 that Mr. Dunne had first complained of the transfers to Mr. Gilligan which he stated were "obvious". He also expressed himself satisfied that Mr. Laheen, in his affidavit of the 25th November 2015, had explained any prior inaccuracies concerning credits giving to the company and the monies that had been levied in terms of interest on the company's current account.

15. Critical, in my view, to this appeal is what the trial judge stated in the final paragraph of his judgment. I will set out the paragraph in full.

> "The court has to examine the matter in the round and approach it determined on the approach of a judge applying the law to facts determined as a matter of probability. The glaring issue for any judge on the facts is the credibility of the defendant on the conflict that arose between himself and Ms. Tuohy. The court is quite satisfied that it has to be particularly careful in determining credibility but combined with that lack of credibility the legal defence advanced by the defendant is tenuous. I accept that if there were not glaring issues of credibility, which effectively alleges serious criminal behaviour on behalf of a director of the company where illegally a very substantial sum of money was drawn down by that director, and which no action was taken whatsoever by the defendant in these proceedings either to bring that to the notice of the bank in any reasonable time or to bring it to the notice of any form of officialdom is a situation where, combined with the tenuous defence on the legal documents where the court is clearly of the opinion that the telephone instruction mandate still stood, leaves the court in the situation that he cannot see how the defendant would have a *bona fide* defence. In the circumstances I am going to enter judgment accordingly against the defendant."

I will consider this statement later.

The Appeal

16. The principal grounds of appeal advanced on behalf of Mr. Dunne in his notice of appeal may be summarised as follows:-

(i) The High Court judge impermissibly resolved a conflict in the evidence by taking a view as to the credibility of Mr. Dunne's evidence. In effect, he concluded that he was not telling the truth and made that determination in circumstances where he did not see Mr Dunne give evidence and where Mr. Dunne had been denied the opportunity of testing the evidence of the bank.

(ii) The trial judge failed to have regard to the prejudice to Mr. Dunne due to the bank's failure to deliver its affidavits in a timely fashion. Reliance is placed on a number of adjournments sought by the bank to finalise its affidavits. Accordingly, the bank's claim should have been limited to the principal sum claimed.

(iii) The trial judge erred in holding that the December 2005 authority, which authorised the bank to operate the company account on foot of the signature of one or other director, did not nullify the telephone mandate of the 16th November 2005.

New Evidence

17. Subsequent to the delivery of the notice of appeal, the defendant, by notice of motion dated the 1st September 2016, sought to admit three further documents into evidence on the hearing of the appeal. The first was a bank statement dated September 2009, the second a letter from the plaintiff's solicitors dated the 14th January 2015 and the third an e-mail from the bank to Mr. Dunne dated the 6th December 2005.

18. On the 12th December 2016, the Court made a consent order to the effect that the documents set out in the order would be admitted on the hearing of the appeal. In stark contrast to the relief that had been sought in the notice of motion, some 64 documents are listed in the order. When taken together with the affidavits filed on the motion, an additional book of evidence was presented on the appeal running to one hundred and sixty pages in total. In my view, had the court had the opportunity to properly scrutinise the documents referred to in the said order, it would have refused to admit those documents on the appeal.

19. Order 86A, r. 4(1)(C) permits new evidence to be admitted on special grounds only. Further, the prevailing jurisprudence requires the applicant, *inter alia*, to demonstrate that the documentation sought to be introduced on the appeal could not have been obtained with reasonable diligence prior to the High Court hearing. In this case, all of the allegedly "new" evidence was readily available prior to the High Court hearing, comprising, as it does, bank statements and interparty correspondence and e-mails. All of that documentation was readily available to Mr Dunne had he wished to introduce it in the court below.

20. The unsuccessful party to High Court litigation has no entitlement, even with the consent of their opponent, to visit upon an appellate court, a swathe of additional documentation in an effort to make a better case than they did at first instance. The effect of doing so is to undermine the role of the appellate court which, save in exceptional circumstances that do not arise in this case, is to review the decision of the High Court judge by reference to the materials that were before them, rather than conduct a rehearing on new evidence. (See by way of example the decision of O'Donnell J. in *Lough Swilly Shellfish Growers Co-Operative Society Ltd v. Bradley and Others* [2013] 1 IR 227).

21. Whilst my observations in relation to the application to admit new evidence are not particularly germane to my conclusions on this appeal, I nonetheless consider it important to emphasise the limited circumstances in which an appellate court will admit new evidence and to restate the relatively limited nature of the appellate court's jurisdiction. Its role is to provide for a review of the first instance decision. It does not provide the parties with a rehearing.

Appellant's Submissions

22. The principal submissions advanced on behalf of Mr. Dunne on the hearing of the appeal can be summarised as follows:

(i) Based upon the new evidence admitted pursuant to the order of this court dated the 12th December 2016, counsel submits that the bank had not established its entitlement to claim the sum of €48,882.77 in respect of surcharge interest and in respect of which judgment had been granted.

(ii) The delay on the part of the bank in bringing its application for summary judgment to a full hearing was such that the court ought not to have granted judgment in respect of the sum of €78,167.30 claimed in respect of interest from the date of demand.

(iii) Based upon the decision of this Court in *Ulster Bank Limited v. Grimes* [2015] IECA 346, the evidence of the bank concerning the sums claimed did not reach the standard required such that judgment should not have been granted in favour of the bank.

(iv) The court erred in law in determining an issue of credibility arising from the affidavits. This was only permissible in discreet circumstances such as those outlined by Clarke J. (as he then was) in *Irish Bank Resolution Corporation v. McCaughey* [2014] IESC 44. The trial judge was bound to remit the proceedings to plenary hearing so that the court might determine on an oral hearing whether or not Mr. Dunne did or did not make the telephone call authorising the transactions.

(v) The High Court judge impermissibly found as a fact that the company December 2005 mandate did not countermand the earlier telephone mandate of November 2005. He did so in circumstances where he did not have a complete copy of the resolution passed by the company on the 1st December 2005 and where Mr. Dunne had maintained he was not in possession of a complete copy.

Respondent's Submissions

23. The respondent's submissions are as follows:

> (i) The appellant's submission in relation to surcharge interest was not raised in the court below and, accordingly, should not be entertained on appeal. The interest rates charged were all, in any event, clearly evidenced in the statements of account.
>
> (ii) The trial judge had not impermissibly resolved a credibility issue. There was an abundance of evidence in the bank's affidavit's sufficient to permit the trial judge conclude that Mr. Dunne's assertion that he had not authorised the transfer of the funds over the telephone was not credible. Further, he had not responded to the affidavits of Ms. Tuohy and Mr. Laheen on this point.
>
> (iii) It was clear from the face of the December 2005 mandate that it did not countermand the previous telephone mandate. Further, the wording of the telephone mandate stated that it remained in place until changed by the company and there was no evidence of any such change.
>
> (iv) Not all of the delay on the proceedings was caused by the bank. This was not a case of inactivity, as was clear from the volume of correspondence exchanged between the parties. There was no basis for the contention that the bank's entitlement to interest ought to have been reduced by reason of any delay in the progress of the proceedings. Further, no claim for further interest was made beyond May 2015.

Legal Principles

24. The principles to be applied by a High Court judge when hearing an application for summary judgment are well established and are not in contest in this case. The most straightforward guidance on the proper approach to the judge's task is to be found in the decision of Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 where he stated at p. 623:-

> "In my view, the fundamental question 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?"

25. More detailed guidance as to the approach to be adopted by the court is to be found in the judgment of McKechnie J. in *Harrisrange Limited v. Duncan* [2002] IEHC 14, [2003] 4 I.R. 1 where he identified the following principles as those to be applied on an application for summary judgment, namely at para. 9: -

> "(i) the power to grant summary judgment should be exercised with discernible caution;
>
> (ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;
>
> (iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;
>
> (iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;
>
> (v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;
>
> (vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;
>
> (vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or *bona fide* defence; or as it is sometimes put, "is what the defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;
>
> (viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;
>
> (ix) leave to defend should be granted unless it is very clear that there is no defence;
>
> (x) leave to defend should not be refused only because the court has reason to doubt the *bona fides* of the defendant or has reason to doubt whether he has a genuine cause of action;
>
> (xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and, finally;
>
> (xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be.

26. Of significant importance in the context of this appeal is the decision of Clarke J. in *Irish Bank Resolution Corporation (in special liquidation) v. McCaughey* [2014] 1 IR749, in which he discussed the circumstances in which a judge hearing an application for summary judgment might engage upon a consideration of the credibility of the evidence. The following is what he said, commencing at para 5.2 of his judgment:

> "5.2. It is also important, as Finlay Geoghegan J. pointed out in *Bank of Ireland v. Walsh* [2009] IEHC 220, (Unreported, High Court, Finlay Geoghegan J., 8th May, 2009) to keep clearly in mind that the use of the term "credible" in relation to a defence has, for the reasons also addressed by Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607, a very narrow meaning. The issues of credibility, which had formed the basis of a conclusion that a defendant had not put

forward an arguable defence, in cases such as *National Westminster Bank Plc. v. Daniel* [1993] 1 W.L.R. 1453, *Banque de Paris v. de Naray* [1984] 1 Lloyds Rep. 21 and *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75, arose, as Hardiman J. put it, 'rather starkly'. In *Daniel,* the defence affidavits were mutually contradictory. In *de Naray*, there was clear evidence, not challenged, from a private detective, which flatly contradicted the plaintiff's case. In *Anglin*, the chronology asserted was entirely inconsistent with commercial documentation which was not, in itself, disputed.

5.3. Denham J., speaking for this court in *Danske Bank v. Durkan New Homes* [2010] IESC 22, also approved a passage from a judgment which I delivered in the High Court in *McGrath v. O'Driscoll* [2007] 1 I.L.R.M. 203, where, at p. 210, I said the following:-

> 'So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment'.

5.4. It is important, therefore, to re-emphasise what is meant by the credibility of a defence. 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*, 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 v. Durkan New Homes*.

5.5. 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."

27. It is with these principles in mind that I propose to deal with the appeal advanced on behalf of Mr. Dunne against the order of Mr. Justice White perfected on the 19th August 2016.

Decision

28. Having regard to the nature of the appellate jurisdiction of this Court, I would reject that aspect of the defendant's appeal which seeks to raise, as a potential defence, the amount claimed by the bank in respect of interest or interest surcharges. These proceedings were before the High Court for a full period of six years before they were heard. It was for Mr. Dunne to put before the High Court any defence he wished to advance based upon the rate/rates of interest charged by the bank. Having failed to do so, and having been unsuccessful in his application for plenary hearing, he cannot now, on appeal, raise for the first time an issue which he might have raised at first instance. The role of this Court is not to afford him a rehearing of his application for summary judgment; its role is to carry out a review of the judgment of the High Court judge based upon the evidence and arguments made at first instance.

29. I would also reject the appellant's submission that due to the delay on the part of the bank in prosecuting its claim, that the High Court judge somehow erred in law or in fact in failing to confine the judgment granted to the principal sum of €306,532.36 rather than the total claimed as of the 25th November 2015 which included an additional sum for interest of €78,167.30.

30. I would first observe that the High Court judge had a discretion as to how he might reflect any culpable delay on the part of the bank in the manner of his approach to the sum claimed. That is a discretion which this Court would be slow to interfere with.

31. Whilst it is undoubtedly the case that the sum claimed in respect of interest is substantial, it was clear from the special indorsement of claim on the summary summons that further interest would be sought on the principal sum until payment or judgment. The grounding affidavit to the bank's motion makes clear that interest would continue to accrue until such time as Mr. Dunne's liability to the bank was discharged. In those circumstances, it was for Mr. Dunne to ensure that the proceedings were dealt with expeditiously.

32. What is also clear from the chronology is that both parties were responsible for the leisurely pace at which the proceedings were progressed. Further, there is nothing in the correspondence to demonstrate that Mr. Dunne felt prejudiced by the manner of the bank's approach to this litigation. Indeed, it might be said that he acquiesced in the delay. Neither does it appear that he was prejudiced by that delay, in the sense of finding himself less well able to meet the bank's claim. The prejudice claimed relates solely to interest charges claimed by the bank and in respect of which he made no complaint. Accordingly, I see no basis upon which this Court could conclude that the High Court judge erred in law in failing to reduce the bank's entitlement to the sum claimed to the figure for principal due in January 2008.

33. I also reject that aspect of the defendant's appeal which seeks to rely upon the decision in this court in *Ulster Bank Ireland Limited v. Grimes*. The facts of this case are clearly distinguishable from those in *Grimes* where the bank had made a litany of errors in terms of the sums claimed. There were errors not only in the summons but also in the notice of motion seeking liberty to enter final judgment and in a number of the affidavits. In the present case, it is true that there was an error in the manner in which interest had been calculated post the 22nd February 2008 on the sum of €306, 532.36. However, the sum of €306, 532.36 itself was correct and that was the sum claimed for principal in both the summary summons and the notice of motion seeking liberty to enter final judgment.

34. Mr. Laheen, in his affidavit, had incorrectly stated that Mr. Dunne's continuing liability for interest was to be calculated on the basis of the sum that remained outstanding on Account No. 17134443, an account which, in fact, had at that point had been closed. However, he corrected this error and proceeded to clarify how the sum of €311,135.04 was lawfully due by Mr Dunne as of August 2012 and he confirmed that interest continued to accrue at a rate of 3.78%. Other than this one error of minor significance, there was no lack of clarity in respect of the sums claimed. It is noteworthy that the sums particularised by Mr. Laheen at paragraph 4 of his affidavit of the 11th June 2013 are repeated in paragraph 3 of his final affidavit of the 25th November 2015. Likewise, the figures

particularised at paragraph 7 of his affidavit of the 11th June 2013 are repeated at paragraph 4 of his later affidavit in the course of which confirmed the balance outstanding as of the 25th November 2015 was €384,699.60, that being the sum in respect of which the High Court judge granted judgment.

35. Accordingly, unlike the situation that pertained in *Grimes*, this is not a case in which it can be argued the bank did not identify with clarity how the sums the subject matter of the application had been calculated. Indeed, it is noteworthy that it is not asserted that the final amount claimed by Mr. Laheen on behalf of the bank in his affidavit of the 25th November 2015 is in any way inaccurate. I would, accordingly, reject this ground of appeal.

36. The only blemish in an otherwise unimpeachable judgment is to be found in the final paragraph of the High Court judge's decision. The fact that he was about to fall into error is perhaps signalled by his opening sentence in which he indicates his intended approach to the application, namely, to "examine the matter in the round" by applying the law to the facts determined as "a matter of probability". Whilst that might be a proper approach for a judge to take following a plenary hearing, it is not the correct legal approach to adopt on an application for summary judgment. A judge cannot favour what he considers to be the strong case made by a plaintiff and reject what he considers to be, by way of contrast, a weak defence advanced by a defendant.

37. It must be very clear, as was stated by Hardiman J. in *Aer Rianta v. Ryanair*, that the defendant has no defence before a plenary hearing is refused. Much like the approach of the court on an application by a defendant to dismiss a plaintiff's claim as bound to fail, where a judge must not strike out a weak or novel claim, it is not for the judge hearing a summary judgment application to reject what they perceive to be a weak case or one which they consider likely to be lost on the balance of probabilities, having regard to the evidence then available.

38. It seems to me that the High Court judge weighed the apparent solidity of the bank's claim on foot of the guarantees against the problematic and weak nature of the individual lines of defence proposed by Mr. Dunne, and on the basis that all such proposed lines of defence were weak, concluded that he did not have a *bona fide* defence. It is to be inferred from his judgment that he likely attached weight to the respective arguments of the parties and then, "in the round", decided as a matter of probability that Mr. Dunne's defence was not credible. Whilst that is a tempting approach to take for a judge who considers it highly likely that the defendant will ultimately fail in their defence of the proceedings, it is an approach that is impermissible. On an application for summary judgment a defendant is entitled to have the Court assess each of their proposed grounds of defence and, provided they are not inconsistent with each other, have them rejected as incapable of providing a defence before judgment will be granted against them. That is not to say that the inherent limitations on the summary judgment jurisdiction preclude the possibility that the court might not, in the course of such a hearing, resolve a straightforward issue of law or construction of the nature identified in *McGrath v. O'Driscoll.*

39. Having acknowledged that he had to be particularly careful in his approach to credibility on an application for summary judgment, the High Court judge nonetheless fell into error by determining such an issue, i.e., whether or not Mr. Dunne had made the telephone call to authorise the transactions. As was stated by Clarke J. in *McCaughey*, there are very limited circumstances in which a judge hearing an application for summary judgment may resolve a credibility issue and the circumstances in this case were not, in my view, such as would have entitled the High Court judge to determine this issue.

40. It must be remembered that, for the purposes of a summary judgment application, the court must accept the facts of which the defendant gives evidence. Of course, mere unsupported assertions may be rejected, but only where it can be shown that they ought to have been capable of being supported by other evidence. I would observe that it is difficult for a person who contends that they did not make a particular telephone call to do more than make a bald assertion that they did not make it.

41. Neither is this a case in which Mr. Dunne had made any contradictory statements regarding the telephone call relied upon by the bank to support the transfer of funds to Mr. Gilligan's accounts. He was consistent from the outset in his denial that he had made the call. Whilst the bank produced a document signed by both Ms. Tuohy and Mr. Laheen, which they maintained supported the bank's case that Mr. Dunne had indeed make the call authorising the transfer of the funds, this is not the type of uncontested documentation that would allow a judge on an application for summary judgment resolve what was both a factual dispute on the affidavits and also a grave credibility issue. Mr. Dunne, after all, contests the aforementioned document insofar as he maintains that he did not make any telephone call to authorise the transaction. The fact that Ms. Tuohy and Mr. Laheen had signed the document authorising the transaction was not conclusive evidence that Mr. Dunne made the phone call. Accordingly, in the absence of some document signed by Mr. Dunne authorising the transaction or acknowledging that he made the telephone call concerned, the High Court judge was not entitled to reject his evidence in favour of that of Ms. Tuohy and Mr. Laheen without him being afforded the opportunity to give his own oral evidence on the matter and to challenge, by way of cross-examination, such evidence as might be called by the bank at a plenary hearing to support its conduct in transferring the funds.

42. A similar impermissible approach was taken by the trial judge when he decided, as a matter of fact, that the December 2005 authority had not replaced the telephone mandate of 16th November 2005. It is undoubtedly the case that Mr. Dunne's proposed defence based on these facts would seem to be a slender one. However, as Mr. Dunne correctly pointed out, the court did not have the second page of the authority of 1st December 2005. Further, in support of the credibility of this line of defence, Mr. Dunne was in a position to rely upon the email from Orla Fagan of 12th May 2011 which confirmed that the bank was operating on the basis of the December 2005 authority and that it did not hold a telephone mandate. Whilst that email does not state that the state of affairs therein identified was that which pertained on 30th August 2006, it does at least demonstrate that at some stage post-1st December 2005, the telephone mandate of 16th November 2005 had been withdrawn.

43. In circumstances where I am satisfied that the High Court judge should not have rejected Mr. Dunne's evidence to the effect that he did not make the telephone call authorising the transactions in the course of the summary judgment application, and that he should not have determined that the December 2005 authority did not alter the validity of the telephone mandate of November 2005, I would remit that aspect of the bank's claim to a plenary hearing.

44. In circumstances where Mr. Dunne has demonstrated a potential defence (or counterclaim/set off) in respect of the sum transferred to the accounts of Mr. Gilligan, I would propose that the judgment granted by the High Court judge would be varied to the sum of €284,699.66 and the balance of the claim remitted to plenary hearing. What will then be in dispute between the parties is the sum of €80,855 transferred to Mr. Gilligan's accounts on 30th August 2006 together with interest thereon. Depending on the outcome of the plenary hearing the sum of €284,699.66 can be adjusted in order to reflect the true liability of the parties.

Conclusion

45. For the reasons already stated, I would reject a significant number of the grounds of appeal advanced on behalf of the defendant. I am, nonetheless, satisfied that the High Court judge erred in law in two respects. He should not have resolved the factual dispute and the credibility issue concerning whether or not Mr. Dunne likely made the telephone call authorising the transfer of funds to Mr.

Gilligan's account on the 30th August 2006. That was a matter that could only be resolved at a plenary hearing, given that Mr. Dunne's evidence on the issue was not contradictory and was not inconsistent with other uncontested documents. Neither should the trial judge have concluded that the December 2005 authority did not interfere with the validity of the telephone mandate of the 16th November 2005 having regard to the incomplete nature of the December 2005 mandate, as exhibited, and bank's e-mail of the 12th May 2011.

46. I would remit these two issues to a plenary hearing. Whilst perhaps it is obvious, for the purposes of clarity I should nonetheless perhaps state that the bank is clearly entitled in relation to these issues to pray in aid of it claim the terms of the guarantees on foot of which the proceedings have been brought. To facilitate that hearing, I would propose that the High Court order be varied in the manner provided for at paragraph 44 above.