Neutral Citation: [2013] IEHC 631

THE HIGH COURT

[2012 No. 1950 S.]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

PAUL KEEHAN

DEFENDANT

JUDGMENT delivered by Mr Justice Ryan on the 16th September, 2013

1. This is a motion pursuant to O. 63, r. 9 of the Rules of the Superior Courts seeking to set aside the order of the Master of the 26th April, 2013, in which he refused the plaintiffs motion for liberty to enter final judgment against the defendant, dismissed the plaintiffs claim and awarded costs to the defendant. The plaintiff seeks liberty to enter final judgment in the sum of €317,043.38 and interest pursuant to contract or statute. The special endorsement of claim gives particulars of two accounts that it claims are due and owing and that amount to the sum claimed.

2. The claim is grounded in affidavits of Michael Murphy of Bank of Ireland Business Banking, O'Connell Street, Limerick, who avers that he is a business manger in the bank, is duly authorised to make the affidavit and that he does so "from facts within my own knowledge and from a perusal of the plaintiffs books and records, save as where otherwise appears and where so otherwise appearing I believe the same to be true and accurate".

3. Mr. Murphy sets out details of the accounts that give rise to the liability. First there was a credit agreement of the 5th October, 2005, in the amount of €275,000 that the bank advanced to the defendant. He exhibits a copy of the credit agreement, a copy of the terms and conditions on which it was advanced and a copy of the acceptance of the facility and the terms and conditions by the defendant.

4. That original credit agreement was replaced by another agreement dated the 15th February, 2011, which is the account in respect of which the great bulk of the liability arises. The credit agreement was for €299,724.32 (plus interest accrued) which was a continuation and replacement of the previous facility. The deponent exhibits a copy of the credit agreement, the loan terms and conditions and the acceptance by the defendant. This last document is signed by the defendant, dated the 1st April, 2011, and is witnessed by David Ryan, solicitor, of Hartstonge Street, Limerick.

5. The deponent says that the defendant also has a current account which is overdrawn in the amount of €1,633.33, which account is payable on demand in accordance with the bank's terms and conditions.

6. On the 18th May, 2010, the plaintiff wrote to the defendant citing events of default in that the loan facility was overdue and interest payments were not provided and the bank made a formal demand accordingly.

7. Mr. Murphy exhibits the loan account statement dated the 4th September, 2012, showing the amount due and owing by Mr. Keehan and the transaction details in the account from the 16th December, 2011, to the 20th August, 2012. Similarly, with the current account statement of the same date, which records transactions from the 30th December, 2011, to the 22nd June, 2012.

8. The bank brought proceedings by way of summary summons setting out the details of the two accounts as then due and owing by the defendant. By notice of motion dated the 9th October, 2012, it notified its intention to apply to the Master for judgment.

9. Following a hearing before the Master, the matter was adjourned and Mr. Murphy swore a supplemental affidavit on the 16th April, 2013. In this he detailed a number of demand letters in addition to those that were exhibited in his original grounding affidavit. He exhibited those letters, one of which refers specifically to the overdraft facility that is the second account in respect of which the claim is made for a small sum in the summons.

10. The defendant has not filed a replying affidavit. The case made on his behalf is not of any substantive matter of defence in point of fact but rather that the bank has not proved its case. The argument is that the bank has not complied with the Bankers Books Evidence Act, 1879 as amended and that that the claim must therefore fail. The Master accepted that submission and ruled accordingly. In addition to this principal ground, the defendant also submits that there are some technical defects in the bank's proofs.

11. I have had the benefit of written submissions and oral argument of counsel for the bank and for the defendant. It is now apparent that at the hearing before the Master counsel were not aware of the amendments of the 1879 Act that were effected by section 131 of the Central Bank Act and did not draw his attention thereto. This was a significant omission because the legislation had not previously provided for records held electronically in non-legible form, i.e. computer records.

12. It is not in dispute that the plaintiff must establish a prima facie case. The plaintiff submits that it has done so and that the grounding affidavit does in fact comply with the Bankers' Books Evidence Act, 1879.

13. The function of the 1879 Act and its application to the question of how a bank may prove a debt owing from a customer have been considered in a number of recent cases in this court. Before referring to the cases, I will set out the relevant provisions of the Act. This is not a precis of the legislation but merely a summary of the parts as they may be applicable in this case.

14. Section 3 provides that subject to certain conditions a copy of any entry in a banker's book is receivable in all legal proceedings as prima facie evidence of its contents. In the first place, certain things must be proved by an officer of the bank. (Demonstrating its

age, the Act provides that a partner of the bank may also provide the evidence.) The proofs are that the book was at the time of the making of the entry one of the ordinary books of the bank, that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. These requirements are in s.4 and concern the status of the book containing the information that is copied. S.5 deals with verification of the copy that is adduced as evidence in court. A witness is required to confirm that he or she has compared the copy with the original and that it is correct. Such person does not have to be an officer or partner.

15. By an amendment Act of 1959, the definition of bankers' books in s.9 of the original Act was replaced by a new provision which was in turn superseded by Section 131 of the Central Bank Act, 1989. As a result of the latest amendment, bankers' books now include computer records as well as traditional paper and card and microfilm entries. S.131 refers to records used in the ordinary business of a bank that are kept in any non-legible form (by the use of electronics or otherwise) which is capable of being reproduced in a permanent legible form.

16. Section 131 also inserted a replacement s.5 in the 1879 legislation. Where the copy to be received in evidence is reproduced in a legible form by mechanical or electronic means from a banker's book maintained in a non-legible form, there must be evidence from some person who has been in charge of the reproduction concerned that it has been so reproduced. And if the exhibit is a copy of such downloaded document, a witness must verify the copy.

17. These provisions contemplate the production in court of a document that will speak for itself as prima facie certification of the state of a bank account or of a transaction. The evidence specified in sections 4 and 5 is required for verification of the provenance of the document as having been copied or taken accurately from records kept in the ordinary course of the bank's business. The Act was primarily intended for cases in which the bank whose records are required as evidence was not a party. The recent cases decided by this court make it clear that that situation is quite different from a case like this in which the bank witness bases his or her testimony on an examination of the books.

18. In *Moorview Developments Ltd & ors -v- First Active Plc & ors*, [2010] IEHC 275, Clarke J considered the mode of proving bank records and made certain observations about the Bankers' Books Evidence Act that are pertinent in this case. I have added the emphasis in each of the following excerpts.

> 4.8 A point was made on behalf of the Cunningham Group and Mr. Cunningham that some of the documents produced by Mr. Collison were not documents which could be proved under the provisions of the Bankers Books Evidence Acts 1879 and 1959. However, that submission seems to me to misunderstand the object of that legislation. As pointed out in Volume 1 of the 1st Edition of *Halsbury's Laws of England* at para. 1301, the main object of the Bankers Books Evidence Acts is to relieve bankers from the necessity for attending at court and producing their books under a subpoena *duces tecum.* The purpose of the Acts is not, therefore, to facilitate banks in proving matters. The purpose is to enable evidence to be given of the contents of other parties' bank accounts without the necessity for the attendance of a representative of the bank concerned and the production of the relevant books. However, in this case a representative of the bank did attend and gave evidence that the records which he produced to the court were taken from First Active's electronic books and faithfully recorded what was present in them. In those circumstances there is no need for the relevant records to conform with the Bankers' Books Evidence Acts. ***That legislation is irrelevant to a case where the contents of the banks books are proved in the ordinary way by a witness who can give direct evidence of having analysed the books***.
>
> 6.3 To the extent that it was complained that Mr. Collison could not give evidence about aspects of the First Active's dealings with the Cunningham Group where he was not directly and personally involved, it seems to me that the point made was misconceived. What Mr. Collison gave evidence of was an analysis carried out by him of documents kept by the bank in the ordinary way as part of the bank's records. Business records of that type are prima facie evidence of a course of dealing between parties, although, of course, any party is free to challenge the accuracy of any such records. However, the idea that a bank wishing to prove its case in debt against a customer has to produce a separate bank official who was personally involved in each individual transaction which gives rise to the customer's current debt is, in my view, fanciful. ***A witness from a bank is entitled to give evidence of the bank's records showing the amount due by a customer of that bank. That evidence and those records provide prima facie evidence of the liability***. If a specific element or elements of those records are challenged, then the bank might well have a problem if it could not produce a witness who could give personal evidence of the contested matter. The reason for that problem is not that the bank did not have evidence of the matter concerned. Rather it is the weight to be attached to that evidence. If credible evidence is given that the bank's records are wrong, then the weight to be attached to a witness who could do no more than speak to the bank's records might well be insufficient to displace the credible evidence suggesting the inaccuracy of the same records. In those circumstances the court might well conclude, on the balance of probabilities, that the records were inaccurate. In order to counter the credible evidence of the inaccuracy, the bank might well have to produce a witness who could do more than speak to the bank's records but could give evidence of direct involvement. Even in those circumstances, however, the court would have to consider the weight to be attached to the bank's records and form a judgment on all the evidence as to whether it could properly be concluded that those records were wrong.

19. The second of these passages was approved and adopted by Finlay Geoghegan J in *Bank of Scotland v Fergus* [2012] IEHC 131, a case in which no evidence was adduced to contest the bank's records. At paragraph 14, the learned judge said:

> I respectfully agree with the above approach as being correct. In this case, Mr. Moroney, as a former official of the Bank, is entitled to give evidence of the Bank's records in relation to the indebtedness of the Company to the Bank. Those records include the electronic records of the Bank. That evidence is admissible evidence and is *prima facie* evidence of the liability of the Company to the Bank. As pointed out by Clarke J., if a specific element of the records is challenged, the Court would have to decide on the factual dispute and the weight to be attached to the evidence of the relevant bank official would depend upon his personal knowledge of the matter in dispute.

20. The defendant's submissions do not suggest that these authorities were wrongly decided or are not applicable. They are applicable to this case and I adopt and apply the reasoning of Clarke J and Finlay Geoghegan J.

21. Both parties cited *Bank of Scotland plc -v- Stapleton* [2012] IEHC 549, an appeal from the Circuit Court, in which Peart J addressed an issue that arose from the fact that the claiming creditor, Bank of Scotland, had no physical presence in the State and had outsourced recovery to an independent service company. The learned judge concluded:

> Where a bank needs to prove by sworn testimony the amount it is due by a defendant customer, that evidence must be

> provided by an officer or partner of the bank - in other words an employee of the bank itself, and not some person employed by some other company to whom the task of a or collecting the debt has been outsourced for whatever reason. To allow otherwise would be akin to a foreign bank engaging a solicitor here to collect the debt, and that solicitor coming to court and giving evidence as to the amount due to the bank, having been authorised to do so by the bank. The evidence is necessarily hearsay and inadmissible. It offends first principles, and in my view there is no basis in law for permitting it.

The court found that the facts of the case were wholly distinguishable from *Moorview Developments Ltd & ors -v- First Active plc* & ors such that it was not of assistance to the plaintiff. Peart J did not, however, express any dissent from the reasoning of Clarke J and cited the decision with apparent approval.

22. The court in *Bank of Scotland plc -v- Stapleton* was not referred to s.131 of the CBA, 1989 and the significant amendment it made of the Bankers' Books Evidence Act to include computer records but Peart J was nevertheless open to a liberal construction of the legislation as it had been amenderd by the 1959 Act. The plaintiff submits that his comment about comparing a copy entry is relevant to the present case:

> The Act therefore facilitated the admission into evidence of a copy of any entry. In those days of course that would have been a copy made by hand. Hence it was necessary that among other matters to be proved before the copy would be admitted was that it had been compared with the original and was correct. Nowadays, the printing off of a page or pages of entries produces a facsimile copy and there is no need, for any practical purpose, to compare the facsimile copy with the original stored electronically.

23. It is implicit in the defendant's submissions that the only way that the bank can prove its case is by reliance on the Bankers' Books Evidence Act, 1879 but that is not consistent with the decisions cited above, which held that that a witness could give evidence by reference to the books and records of the company in order to demonstrate prima facie liability, subject to any rebutting evidence. This is in accordance with normal practice in summary judgment applications where it is routine for the deponent to refer to the books and records of the plaintiff company.

24. The judgments of Clarke J and Finlay Geoghegan J reflect an acknowledgment that courts have to take judicial notice of the obvious and commonplace facts and circumstances of ordinary life. Companies maintain computer records that are cited and exhibited in summary proceedings as evidence of debt. Similarly with banks. The records are prima facie evidence that the defendant owes the money to the plaintiff. If the defendant contests the liability in whole or in part, the evidence required to prove the case depends on the issues raised. If a matter is not disputed, there is no need of proof. Where a party chooses to stay silent in face of a claim, prima facie proof is sufficient.

25. The fact that the evidence is given in this case on affidavit is not a material distinction. The deponent refers to the bank's books and records and his perusal thereof as the basis of his evidence. That is the factual situation that obtained in the cited authorities.

26. The authorities and the textbooks make clear that the purpose of the 1879 Act was not to facilitate banks in making their claims on foot of unpaid accounts or loans but rather to provide a practical and efficient manner of gaining access to the information in bankers' books, particularly when sought by third parties. Obviously, a bank can invoke the Act to prove specific entries in its books. As Peart J describes in Stapleton, this relieved the bank from bringing to court their heavy tomes in which the transactions were recorded and producing the witnesses who had made the entries.

27. Although the evidence of the contents of the bank's records does not conform to the formal specifications in the 1879 Act as amended in a number of respects, it is nevertheless apparent as a matter of legitimate inference that the evidence of the defendant's liability emanates from the bank's books and records and that the statements are printed from its computer records. The point, however, is that the case is not about the 1879 Act and a copy of a bank book but about a liability arising on a contract entered into by the defendant by written agreement signed by him and witnessed by his solicitor and an overdrawn current account. The bank is proving its case that the defendant defaulted on a loan and has not discharged his overdrawn account. It has to establish a sufficient prima facie case that will result in judgment being given unless the defendant raises some basis of defence.

28. The plaintiff has made out a prima facie case. The affidavits and exhibits constitute prima facie proof of the bank's claim. It has proved the loan agreements entered into by the defendant on foot of signed acceptances. The period of the later loan has expired and bank statement number 14, exhibited and identified by the deponent, shows an outstanding liability that is in excess of the sum borrowed. Another statement similarly identified shows the overdrawn account. The bank issued demand letters for payment of the loan account and of the defendant's small overdraft which are also exhibited. The defendant did not respond substantively to the claim and confined himself to submissions made by counsel on his behalf.

29. The defendant makes in addition to the argument on the 1879 Act a number of criticisms of the contents of the grounding affidavit but it appears to me that none of them amounts to a ground on which the proceedings could reasonably be dismissed. Some of the points are admittedly only pedantry. Neither is the complaint of uncertainty valid. The case of O'Gorman v Long [1959] 93 ILTR 3 is cited as authority. However, that decision was based on a particular and unusual and wholly different set of facts and is not of assistance in this case. The test is whether there is sufficient information to enable the defendant to know whether he should discharge the debt. The defendant has not asserted any confusion or uncertainty about his liability.

30. In the circumstances, the plaintiff is entitled to judgment.