



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 14

**Peart J.
Irvine J.
Mahon J.**

Supreme Court No. 2011/40

Court of Appeal No. 2014/248

Templecrone Co-Operative Agricultural Society Limited

Plaintiff/ Respondent

and

Frank (Orse Frankie) McLoughlin

Defendant/Appellant

Judgment of the Court delivered on the 29th of January 2015 by Ms Justice Mary Irvine

1. This is an appeal against an Order made in the High Court by Hedigan J on 13th January 2011, whereby he granted summary judgment to the plaintiff in the sum of €68,595.78.

Background

2. By summary summons issued on 18th February 2009, the plaintiff claimed repayment of the sum of €68,670.18 in respect of building supplies allegedly provided to the defendant, a builder, on foot of an agreement entered into between them on 9th February 2001. The same sum was also claimed on foot of what is described as a "debt repayment plan" entered into between the parties on 27th August 2008.

3. By Notice of Motion dated 15th October 2009 the plaintiff sought liberty to enter the final judgment and the parties each swore a number of affidavits in support of their respective positions.

4. The grounding affidavit of Mr. McGill sworn on the plaintiff's behalf referred to the fact that by August 2007 the defendant had run up a debt of €76,000 and he exhibited invoices referable to that debt, with the exception of one invoice for a sum of €74.40 which had been misplaced.

5. Mr. McGill maintained that on 27th August 2008 the defendant personally agreed to repay the outstanding arrears of €76,000 in monthly instalments of €7,000 per month commencing August 2008. That agreement, he says, was reduced to writing and its terms and conditions contained in an undated letter addressed to the defendant which he then duly signed.

6. The plaintiff only received one payment under the agreement last mentioned and that was made by way of a cheque drawn on the account of McLoughlin Developments Limited which Mr. McGill maintains was accepted against the defendant's personal liability in respect of his account with the plaintiff and also under the debt repayment plan.

7. Due to the defendant's default, a letter of demand was sent to him in November 2008 seeking payment of the outstanding arrears. No response having been received to that letter, proceedings were issued on 18th February 2009.

8. Mr. McLoughlin, the defendant, claims that the liability the subject matter of these proceedings is that of his company, McLoughlin Developments Limited, and that he gave no assurance or indemnity to the plaintiff in respect of that company's debts or liabilities.

9. Mr. McLoughlin accepts that he had a personal account with the plaintiff which was opened in February 2001. However, he maintains that that agreement was altered in January 2007 when he formed a limited liability company and commenced trading under the name of McLoughlin Developments Limited, a company now in voluntary liquidation.

10. Mr. McLoughlin asserted that in January 2007 he asked the plaintiff to open a new account in his company's name and that the plaintiff agreed to this proposal. Thereafter he says that all invoices were issued to McLoughlin Developments Limited. He later rode back somewhat on that statement when he advised the court that the invoices were in fact made out to McLoughlin Developments without the addition of the word Limited. He maintains that at all material times that the goods provided by the plaintiff post January 2007 were delivered pursuant to orders made by his company's employees to sites under the company's control and were signed for by the company's employees.

11. In support of his assertion that since 2007, the trading agreement was conducted between the plaintiff and McLoughlin Developments Limited, Mr. McLoughlin said that all payments were made thereafter out of the company account and he exhibits a number of cheques drawn on the company account over the period May 2007 to August 2008 to demonstrate the truth of that assertion. He also deposed to the fact that he paid off all monies due on foot of his personal account with the plaintiff in February 2007 by the payment of a cheque in the sum of €2,715 and in respect of which he produced a supporting Statement of Account.

12. In August 2007 Mr. McLoughlin maintains that the plaintiff left his company with no option, because of mounting liabilities, to enter into a debt repayment plan which it did on 27th August 2007. He maintains that when he signed that agreement he did so as agent on behalf of the company and that in doing so he was not acknowledging that he personally was indebted to the plaintiff in the sum of €76,000, as might otherwise be assumed from the content thereof. He supported his assertion that he was not personally liable for the sums then outstanding by reference to the fact that on 30th August 2008 the company made a payment by cheque from its bank account in the sum of €7,500 which the plaintiff duly accepted in reduction of the company's liabilities.

13. In response, Mr. McGill denied that he was instructed to issue a new trading account in the name of McLoughlin Developments Limited in 2007 and he relied upon the fact that at all times the plaintiff traded with the defendant by reference to an account numbered M535 which never changed from inception. Further, an account was sent to the defendant personally each month showing the sums then outstanding on foot of his account.

14. Mr. McGill further claimed that the position adopted by Mr. McLoughlin vis-à-vis the circumstances in which he signed the agreement of August 2008 were simply incredulous. He contends that the agreement of August 2007 clearly demonstrates that the defendant had a personal liability of €76,000 at that time and that he acknowledged this liability when he signed the debt repayment plan in his own name. According to Mr. McGill, the court ought not to draw any inferences from the fact that cheques were accepted from McLoughlin Developments Limited in aid of the reduction of the defendant's personal liabilities as it was not concerned about where the monies came from once the outstanding liabilities were discharged.

Judgment of the High Court

15. The learned High Court judge, Hedigan J, granted judgment in favour of the plaintiff on 13th January 2011. In his judgement he stated that he was satisfied that the defendant had failed to establish the existence of a *bona fide* defence on the grounds that the liability was in fact that of his company rather than his own personal liability. He concluded that all of the written evidence supported the plaintiff's position stating that "the only concrete evidence supporting the defendants claim was the name of the customer on the invoice which he described as tenuous in that they were addressed to "McLoughlin Developments" and not "McLoughlin Developments Limited". "Limited" was not on the invoice". In coming to this conclusion he also expressed himself satisfied that the debt repayment plan had been signed by the defendant in a personal capacity and that it was a commercial transaction.

Submissions

16. It is not necessary in the course of this judgement to rehearse in any great detail the submissions of the parties on this appeal.

17. Mr. Mohan, S.C., on behalf of the defendant, having outlined the relevant legal principles, submitted that the defendant had established that he had a fair or reasonable probability of having a real or *bona fide* defence to this claim. In particular, he relied upon the following facts:-

1. That the McLoughlin Developments cheques were the only ones exhibited in the proceedings thus lending credibility to his assertion that at all times the plaintiff's contract was with McLoughlin Developments Limited.
2. That the invoices exhibited almost all referred to "McLoughlin Developments". Consistent with his assertion that the plaintiff's account was with the company rather than with the defendant.
3. That subsequent to the debt repayment plan McLoughlin Developments Limited had written a cheque for €7,500 which the plaintiff duly cashed. Again, evidence to support the alleged contractual relationship between the plaintiff and McLoughlin Developments Limited.
4. That at all stages the materials, the subject matter of the outstanding debt, were delivered to sites under the control of McLoughlin Developments Limited where they were signed for by the company's employees.

18. All of the aforementioned evidence, Mr. Mohan submitted, was sufficient to establish that his client had established the possibility that he had a credible and *bona fide* defence to the claim.

19. On the plaintiff's behalf it was submitted that the defendant's affidavits amounted to no more than mere assertions and that the defendant's credibility was wanting having regard to the very significant documentary evidence put forward by the plaintiff.

Principles

20. In *Aer Rianta v. Ryanair Limited* [2001] 4IR607 at p. 623, Hardiman J in the Supreme Court enunciated that the test to be applied by the court in deciding whether or not it should enter summary judgment. It should ask itself the following fundamental questions:-

"Is it very clear that the defendant does not have a defence? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendants affidavits fail to disclose even an arguable defence?"

21. As was stated by McKechnie J in the High Court in *Harrisrange Limited v. Duncan* [2003] 4IR at p. 7:-

1. "The power of the court to exercise summary judgment should be exercised with discernable caution".

He further stated:-

(vii) "The test to be applied as now formulated is whether the defendant has satisfied that court that he has a fair or reasonable probability of having a real or *bona fide* defence; or as is it sometimes put, "Is what the defendant says credible?", which later 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 not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it been 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 reasons 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."

22. The court has had the benefit of reviewing all of the evidence which was before the learned High Court judge and has also considered the written and oral submissions of the parties on this appeal. Having considered these against the backdrop of the principles which must be applied when deciding whether or not to grant summary judgment, this court is satisfied that it must allow the appeal. It is satisfied that the defendant has demonstrated on affidavit a fair or reasonable probability of having a real or *bona fide* defence to this claim.

23. For the purposes of clarity the court will now briefly visit the basis upon which it has reached this decision.

24. Firstly, the defendant maintains that he is not liable for the sum claimed on the grounds that in January 2007, having personally traded with the plaintiff up to that time, it was agreed that thereafter the plaintiff would trade with his newly formed company, McLoughlin Developments Limited. In support of this assertion he produced evidence of his discharge of the amounts outstanding on that personal account by cheque dated 13th February 2007 and the clearance of that liability lends some weight to his assertion that all subsequent liabilities are those of the company.

25. In further support of his intended defence, the defendant has exhibited a vast ray of invoices which post-dated January 2007, the vast majority was which are addressed to McLoughlin Developments. These invoices were not addressed to the plaintiff personally and, once again, provide further credible evidence in support of his contention that the liability, the subject matter of these proceedings, as a matter of fact and law are those of McLoughlin Developments Limited.

26. The defendant has also exhibited a number of cheques in respect of goods supplied by the plaintiff subsequent to the agreement of January 2007. All of these are drawn on the company's bank account. Again, the payment of these sums by cheques drawn on the company bank account lend evidential weight to his claim that he was not contractually bound to the plaintiff in respect of any such liabilities.

27. Insofar as the plaintiff relies upon the debt repayment plan which was signed by him following a meeting on 27th August 2008 as proof of the fact that the trading relationship at the time was between himself and the company, the defendant supports his assertion that he signed that document as agent of the company and in respect of the company's liabilities by drawing the courts attention to a cheque post dating that agreement for the sum of €7,500 drawn on the company account and cashed by the plaintiff which he says is consistent with his assertion that the liabilities were those of the company.

28. The court is very mindful of the fact that there is a very significant amount of evidence to support the plaintiff's claim. Much of this was ventilated in the course of the hearing of this appeal and it is not necessary to identify the strength of that evidence in the course of this judgment. The court on this application is doing no more than seeking to establish whether or not the defendant has produced sufficient credible evidence to reach the threshold of proof to allow him defend this case as advised by Hardiman J in *Aer Rianta*. The court is quite satisfied that the defendant has done so, and mindful of the fact that the court must proceed with caution before dismissing a claim on summary judgment it is perhaps worth noting that this is a case in which discovery of documents may assist the parties in resolving the disputed facts. It would accordingly be unjust and premature in the absence of such discovery to grant judgment to the plaintiff where the true relationship between the parties may well be advanced, clarified or resolved through that process.

29. For all of the aforementioned reasons the court will allow the appeal.