



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 12

Record No. 2017/282

**Ryan P.
Irvine J.
Whelan J.**

BETWEEN/

IRISH LIFE AND PERMANENT PLC TRADING AS PERMANENT TSB

PLAINTIFF /

RESPONDENT

- AND -

JOHN HANRAHAN AND SELINA HANRAHAN

DEFENDANTS/

APPELLANTS

JUDGMENT of Ms. Justice Irvine delivered on the 5th day of February 2018

1. This is the application of Mr. John Hanrahan, the first named appellant, to extend the time to permit him appeal an order of the High Court, Noonan J., made on the 25th April 2017. On that date the High Court judge granted judgment against him for a sum of €292,727. He further directed Mr. Hanrahan to pay the plaintiff's costs when taxed in default of agreement. That order was perfected on the 16th May 2017.

2. In his proposed notice of expedited appeal Mr. Hanrahan maintains that in the High Court he demonstrated sufficient potential grounds of defence to warrant the proceedings being remitted for a plenary hearing. Second, he asserts that the trial judge paid insufficient regard to what he claims was admitted fraudulent conduct on the part of Ms. Susan Harte, a branch manager with Irish Life And Permanent PLC ('the bank'), which caused himself and his wife, the second named defendant, irreparable loss and damage.

Background facts

3. The bank commenced proceedings against Mr. and Mrs. Hanrahan on the 1st September 2011. Its claim was on foot of an overdraft facility for the sum of €300,000 which it maintained it agreed with the defendants on the 10th November 2010 and which had expired on the 31st January 2011. It is not disputed that Mr. Hanrahan later requested the bank to renew that facility and that it declined to do so. Accordingly, by letter of demand dated the 1st June 2011 the bank made demand of Mr. Hanrahan for payment of all sums due in respect of the expired facility. As of the 1st June 2011 the balance outstanding was €232,189.25, comprising principal of €221,627.92 and interest of €10,561.33.

4. By notice of motion dated the 20th June 2013 the bank sought liberty to enter final judgment solely against Mr. Hanrahan for the sum of €292,727. That sum comprised a claim of €240,957.20 for principal and €51,769.80 for interest. That application was ultimately heard by Noonan J. in the High Court in April 2017 at which stage he had before him a number of affidavits and exhibits.

5. The principal affidavit relied upon by the bank in support of its application for judgment was that of Susan Harte sworn on the 18th June 2013 which set out what she described as the facility offered to the defendants on the 10th November 2010 and the terms and conditions attached thereto which included a solicitor's undertaking that the net proceeds of any awards of damages made in favour of Mr. Hanrahan in High Court proceedings bearing record no. 2006 no. 1811p (*John Hanrahan v. The Minister for Agriculture and Food*) would be credited to the aforementioned account.

6. Ms. Harte, in her affidavit, detailed the circumstances in which Mr. Hanrahan on the 26th November 2010 had obtained an award of damages against The Minister for Agriculture and Food in the aforementioned High Court proceedings in a sum of €304,320 and how McMahon J. had refused to grant the Minister a stay on the full award he had made in favour of Mr Hanrahan pending appeal. He refused a stay in respect of the sum of €180,000 which he directed be paid by the Minister to Mr. Hanrahan with immediate effect. Ms. Harte explained that subsequent to the said judgment another creditor of Mr. Hanrahan, who had earlier obtained judgment against him, successfully garnishees €90,000 from the sum of €180,000 which McMahon J. had directed be paid by the Minister to Mr. Hanrahan. On the 2nd February, 2011, the remaining €90,000 was paid by the Office of the Chief State Solicitor into Mr. Hanrahan's bank account by way of electronic transfer and was thus credited to the overdrawn balance on the account.

7. Mr. Hanrahan, in an affidavit sworn by him on the 19th February 2014 set out the reasons while he maintained judgment should not be granted against him. He claimed that the affidavit of Susan Harte was an effort on the part of the bank to mislead the court. His wife had had no hand, act or part in the opening of the bank account the subject matter of the proceedings and neither had she been party to any agreement concerning overdraft facilities. According to Mr. Hanrahan her name was only on the account so that she would be in a position to withdraw cash to pay farm wages etc.. His second complaint was the failure of Ms. Harte to disclose to the court a copy of a letter which he had written to the chief executive of the bank, Mr. David Guinane, dated the 10th June 2011 concerning what he stated were the unexplained actions of Susan Harte in the running of his account which had caused him serious loss and damage. That letter was later exhibited in an affidavit sworn by the bank's solicitor, Mr. Jason Kelly, on the 21st October 2013. I will return to this letter later in this judgment.

8. It should also be stated that the bank's application for judgment was adjourned to await the outcome of an application made by Mr. Hanrahan for discovery which he maintained was necessary to establish why Ms. Harte had set out to mislead the court in her affidavit. That application was refused by Moriarty J. as being premature in the context of summary summons proceedings, a decision upheld by this court in an ex tempe judgment delivered by Kelly J. on the 10th June 2015.

9. As this is an application for an extension of time to appeal the decision of Noonan J. rather than the appeal against that order this court does not have a copy of his ruling as to the reason/s why he granted judgment against Mr Hanrahan. It can, however, be inferred from the fact that judgment was granted in favour of the bank on the 25th April 2017 that Noonan J. was not satisfied that he had demonstrated as a probability any bona fide credible defence to the within proceedings.

Extension of time to appeal

10. The order which Mr. Hanrahan now wishes to appeal was perfected on the 16th May 2017. Given that his appeal is what is classified as an expedited appeal he was obliged under the rules of court to have his appeal filed within ten days. In circumstances where he missed the ten day deadline, by notice of motion dated the 13th June 2017, he now asks this court to exercise its discretion and extend the time to permit him pursue his appeal.

11. The principles to be applied by the court on an application such as the present one are those which are identified in the judgment of Lavery J. in *Eire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] I.R. 170. The following were identified as "proper matters" for the consideration of the court when asked to determine whether time should be extended, namely:-

(1) Has the applicant demonstrated that he had bona fide formed the intention to appeal within the permitted time?

(2) Has the applicant identified the existence of something like a mistake, which has had the result that the deadline for the filing of his appeal was missed?

(3) Has the applicant established a good arguable ground of appeal?

12. The bank does not dispute Mr. Hanrahan's contention that he formed the intention to appeal within the permitted time limit and accordingly this first leg of the *Eire Continental* test does not need to be further considered. However, the bank does not accept that Mr. Hanrahan has established that his failure to discover that the order of the High Court was perfected on the 16th May 2017 was the result of any "mistake". The bank maintains that the scant detail in Mr. Hanrahan's affidavit is unsatisfactory and that the only reasonable conclusion for it to draw is that he failed to make proper enquiries and searches concerning the order in the period immediately following upon the 25th April 2017.

13. Notwithstanding the bank's submission that Mr. Hanrahan should not be considered to have discharged the proof suggested in the second leg of the test in *Eire Continental*, I am satisfied that it would be unjust to deny Mr Hanrahan the extension of time he seeks by reason only of his less than satisfactory explanation as to why he did not become aware of the court order on the date it was perfected or in the days that immediately followed. In my view justice and fairness would suggest that on the facts of this case and having regard to the fact that Mr Hanrahan is a lay litigant, I should reach my conclusion on the current application based upon on the final leg of the test, namely, whether or not he has established the existence of a *bona fide* and credible defence to the bank's claim, absent which time cannot be extended.

14. For the purposes of assessing whether or not Mr. Hanrahan can be stated to have demonstrated a *bona fide* and credible defence to the banks claim and hence an arguable ground of appeal against the decision of Noonan J. it is necessary to look at the evidence he has put before the court on affidavit.

Mr Hanrahan's proposed defence

15. There is no doubt whatsoever that Mr. Hanrahan is deeply aggrieved and upset by the fact that his wife was named as a co defendant to the proceedings in circumstances where, on his account of events, her name was only added to the account concerned so that she might have access to cash to pay wages and discharge other expenses of the business. His sense of grievance is palpable from his affidavit and the fact that he requested that the application for summary judgment be postponed to enable him obtain discovery of documents which he hoped would clarify why it was Ms. Harte had set out to mislead the court about his wife's involvement with the account, clearly demonstrates that this is so.

16. Mr. Hanrahan, however, fails to recognise the significance of the fact that the bank has not sought judgment against his wife. It issued its motion for judgment solely against him on the basis of the overdraft facility. For this reason it is also not important that Ms. Harte, as is apparent from her supplemental affidavit sworn on the 8th April 2014, does not accept Mr Hanrahan's contention concerning his wife's joint liability in respect of the overdraft facility and maintains that the account which had originally been in Mr Hanrahan's sole name had been converted into a joint account on the 6th November 2008 with Mrs. Hanrahan's agreement.

17. Regardless of the aforementioned dispute between Mr. Hanrahan and Ms Harte, in circumstances where Mr. Hanrahan does not contest the facility afforded to him on the 10th November 2010 and its expiry on the 31st January 2011 and the bank only proceeded to seek judgment against him, the bank's dealings with his wife in respect of this facility are simply irrelevant and cannot afford him any arguable defence to the bank's claim.

18. Mr. Hanrahan also seeks to rely, by way of proposed defence, upon the circumstances surrounding the judgment which he obtained against the Minister for Agriculture and Food on the 21st December 2010 and in particular the order of McMahon J. that, as a term and condition of the stay granted, the Minister immediately pay him a sum of €180,000. In this regard Mr. Hanrahan seeks to rely upon the affidavit of his solicitor, Mr. David McAvin, sworn in those proceedings on the 23rd May 2011. Whilst it was not particularly clear from Mr. Hanrahan's oral submission to this court precisely why he believes the content of this affidavit might assist him on his present application, it would appear that he seeks to contend that his position vis-a-vis the bank was adversely affected by the matters therein deposed to. That being so it is necessary to briefly consider the content of Mr. McAvin's affidavit.

19. Concerning the order of McMahon J. requiring the payment of €180,000 to Mr. Hanrahan, Mr. McAvin advises that he furnished the details of his firm's bank account to an official in the Department of Agriculture and Food on the 23rd December 2010 and to the Chief State Solicitor the following day. He states that he was aware that in the aftermath of the judgment of the 21st December 2010 a successful application for garnishee in the sum of €90,000 had been made by another creditor of Mr. Hanrahan and that this would impact on the order made by McMahon J. Nonetheless, having regard to his discussions with the Chief State Solicitor's office he understood that the balance of the €180,000 would be transferred to his account shortly after the 7th January 2011 and this did not happen. Rather, the Chief State Solicitor's office transferred the balance of €90,000 directly to Mr. Hanrahan's bank account, a transfer which he considered to be irregular having regard to the exchanges which had taken place between the parties. Mr. McAvin's

complaint was that as a result of what he considered to be a breach by the Chief State Solicitor's office of the universally accepted practice of ensuring that any payment to be made to a party would be made to the solicitor on record for that party that this had resulted in a breach by Mr. Hanrahan of his contractual arrangements for the payment of his professional fees.

20. As is readily apparent the matters deposed to in Mr. McAvin's affidavit could never provide any basis upon which Mr. Hanrahan might defend the within proceedings against the bank. First, the complaint of wrongdoing advanced by Mr. McAvin was as against the Chief State Solicitor's office, rather than the bank. Second, the payment of the €90,000 to the bank rather than to Mr. McAvin had the result that Mr. Hanrahan's liability to the bank was reduced from that which would have been the case had the €90,000 been paid to Mr. McAvin who, as Mr Hanrahan's solicitor, would have been entitled to deduct his legal fees prior to lodging the balance with the bank. Third, lest Mr. Hanrahan be labouring under the mistaken impression that he can rely upon Mr. McAvin's affidavit to suggest that he might have been entitled to retain the balance of the monies allegedly wrongly paid to the bank by the Chief State Solicitor's office, after the discharge of his legal costs, that is clearly is not the case. As we know, Mr. McAvin was bound to pay the net proceeds of any monies received by him on foot of Mr. Hanrahan's proceedings against the Minister for Agriculture and Food to the bank on foot of the undertaking which was provided as security for the facility. Finally, it is clear that Mr. McAvin accepted that the sum of €180,000 which McMahon J. directed to be paid to Mr. Hanrahan had to be reduced to reflect the garnishee obtained by a creditor subsequent to that order.

21. Given that Mr. Hanrahan in the High Court, in his replying affidavit of the 19th February 2014, stated that he wished to rely upon complaints which he had made to Mr. David Guinane by letter dated the 10th June 2011 by way of defence to the proceedings. It is necessary to refer briefly to the main points he made in that letter.

22. The first complaint made by Mr. Hanrahan was the fact that Ms. Harte had allegedly deducted a sum of in excess of €9,000 from a creamery cheque of approximately €12,300 at a time when the creamery cheque was, accordingly to Mr. Hanrahan, at its lowest and which he claimed had had a catastrophic effect on the business. However, as is apparent from the copy of the bank statement exhibited to Ms Harte's affidavit, the creamery cheque to which Mr Hanrahan refers was lodged on the 18th January 2011. The sum of €9,090.62 was not deducted from that cheque. Rather that sum was debited to the account on the 20th January 2011 in respect of the previous quarterly interest payment and that deduction, as counsel for the bank made clear by reference to the full statement of account, was fully in accordance with the prior conduct of the bank and the overdraft facility. It is also to be noted that Mr. Hanrahan does not maintain that Ms. Harte's actions were contrary to the terms of the overdraft facility agreed between the parties and no detail whatsoever is furnished as to the catastrophic effect this deduction is alleged to have had on his business.

23. Perhaps the overriding sense of grievance expressed by Mr. Hanrahan in his letter to Mr. Guinane concerned the bank's decision to send him a solicitor's letter demanding repayment of the facility without the good grace of a prior telephone call particularly in circumstances where he considered the bank was fully secured by reason of his solicitor's undertaking.

24. In relation to this complaint the first relevant factor is that Mr. Hanrahan does not dispute the bank's claim to the effect that the facility which it afforded him on the 10th November 2010 expired on the 31st January 2011 without the requirement of any prior notice. Further, as a matter of law, the bank cannot be faulted for writing the letter which it did seeking repayment of the monies on foot of the overdraft facility. That is the standard approach of most creditors who feel they may need to resort to litigation to recover monies due to them. There was no obligation on the part of the bank to telephone Mr. Hanrahan, even if it be the case that he expected the courtesy of such a call. The absence of such a telephone call is immaterial from a legal perspective and affords him no potential ground of defence.

25. Another matter upon which Mr. Hanrahan sought rely in his letter to Mr. Guinane was his assertion that the bank's conduct was reprehensible given that it was fully secured by virtue of his solicitor's letter of undertaking concerning the net proceeds of any award of damages he might recover in his proceedings against the Minister for Agriculture and Food. In my opinion, it matters not whether Mr. Hanrahan was correct in this assertion as the fact that the bank was secured could never as a matter of law provide him with a defence to the bank's claim for summary judgement. That fact notwithstanding, I have to say I find it difficult to understand how Mr. Hanrahan could contend that the bank was fully secured. Whilst he obtained an award of damages against the Minister for €304,320 that judgment was appealed by the Minister. Further the result of the Minister's application for a stay on that judgment and the consequences of the order of garnishee obtained by Kelly's Farm Machinery in December 2010 was that the only sum that the bank was bound to recover on foot of its security was the €90,000 which was credited to his account on the 2nd February 2011 by electronic transfer from the office of the Chief State Solicitor. Further, the sum claimed by the bank in its application for summary judgment was one which gave credit to Mr. Hanrahan for that €90,000. Accordingly, it is difficult to see how Mr. Hanrahan could maintain to Mr. Guinane that the bank was, at the time of his letter, fully secured in respect of the overdraft facility.

Conclusion

26. To conclude, while Mr. Hanrahan contends that he has a bona fide ground of appeal against the decision of Noonan J. and considers that he has put evidence before this court sufficient to establish a credible defence to the banks claim, for the reasons earlier stated I cannot accept that this is so. The terms of the overdraft facility, insofar as it relates to Mr Hanrahan, are not disputed. The facility has expired and the sums claimed as due and owing to the bank by Mr. Hanrahan have not been contested. Any error or controversy concerning the transfer of the account the subject matter of the facility into the joint names of himself and his wife do not avail him by way of potential defence given that the bank has not pursued Mrs. Hanrahan for the sums outstanding.

27. For the reasons already stated I am also satisfied that Mr. Hanrahan has not demonstrated the existence of any *bona fide* credible defence based on the payment into his account of the sum of €90,000 on the 2nd February 2010 by the Chief State Solicitor or the charge to his account of the sum of €9,090.62 in respect of quarterly interest on the 20th January 2011.

28. Whilst it is true to say that in the course of his submissions Mr. Hanrahan has asserted that he has suffered catastrophic loss and damage by reason of some wrongdoing on the part of the bank, that is nothing more than a bald assertion which is unsupported by any credible evidence. He has not explained the nature of any such breach and how it has caused him the loss and damage to which he has referred. Neither has he demonstrated how such conduct could afford him a defence to the bank's claim for summary judgment or support a counterclaim of the type that would warrant granting the extension of time sought.

29. For the aforementioned reasons I would refuse the extension of time sought.