THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 62

Record Numbers: 2017/41

2017/88

2017/481

Peart J.
Edwards J.
McGovern J.

BETWEEN:

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF/RESPONDENT

- AND -

JOHN ROARTY AND PAULA ROARTY

DEFENDANTS/APPELLANTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 22ND DAY OF FEBRUARY 2019

1. There are three appeals for determination – one by the first named appellant ("Mr Roarty") and two by the second named defendant ("Mrs Roarty"). All in one way of another arise from the fact that on the 13th January 2016 the respondent bank ("the bank") obtained judgment in default of appearance against the defendants on foot of a summary summons.

2. The most significant of these appeals is that against the order of the High Court (Ní Raifeartaigh J.) dated 12th October 2017 refusing the application of the second named appellant (Mrs Roarty) to set aside the judgment obtained against her and Mr Roarty on the 13th January 2016 on the grounds (a) that they were taken by surprise, and (b) their contention that they had in fact entered a valid appearance by having sent to the Central Office of the High Court a document entitled "Memorandum of Conditional Appearance" by letter dated 27th November 2015. I will address that appeal before the remaining two.

3. The bank's solicitors were unaware that the defendants had sent this form of conditional appearance to the Central Office as provided for in O. 12, r. 4 RSC. Equally they were not aware of the reply by the Central Office to the defendants by letter dated 2nd December 2015 informing the defendants that there was no basis under the Rules of the Superior Courts for the entry of a conditional appearance except where the defendants wished to contest jurisdiction under the terms of Article 24 of the Regulation (EC) No. 44/2001.

4. The conditional appearance form which the defendants had sent to the Central Office stated, *inter alia*, that the bank's claim was "vigorously contested" and that "consent and jurisdiction are withheld until the herein below conditions are met in full, the said conditions are set out herein as follows: …". There followed a list of 13 conditions comprising in the main requirements that the bank provide them with various documents, and proof of certain matters as set forth.

5. The defendants replied to the Central Office by letter dated 14th December 2015 in which they stated, *inter alia*, that

> "2. You state that 'there is no basis under the Rules of the Superior Courts for the filing of a conditional appearance' however it is my clear understanding that such conditional appearances have been accepted into the High Court namely cases: a) 2015/591S, b) 2015/592S, c) 2014/96S.
>
> 3. Therefore I would conclude that as these conditional appearance (sic) listed above have been accepted, our conditional appearance should also be accepted.
>
> 4. *We will await your reply*, before resubmitted (sic) the documentation." [Emphasis provided]

6. There was no further communication from the Central Office by way of response to that letter.

7. Having served the proceedings on the defendants, and having received no entry of appearance from them or from any solicitor on their behalf, the bank proceeded to lodge papers in the High Court so as to obtain a judgment against the defendants in default of appearance in the sum claimed namely €898,981.13 and default costs in the amount of €508, as provided for by O. 13, r. 3 RSC.

8. Having obtained judgment in default of appearance the bank's solicitors wrote to the defendants so informing them by letter dated 10th February 2016. Upon receiving this notification, the defendants, representing themselves, filed a notice of motion on the 24th February 2016, grounded upon an affidavit sworn by Mrs Roarty, seeking to set aside the judgment obtained against them in default of appearance. That grounding affidavit referred to the form of conditional appearance which they had sent to the Central Office to which I have already referred, and to the reply from the Central Office dated 2nd December 2015, and their letter in response dated 14th December 2015. Mrs Roarty also averred that such a conditional appearance had been accepted by the Central Office in three previous summary summons proceedings (not against the defendants), and she provided the record numbers of those cases. She averred that she was taken by surprise by the letter from the bank's solicitors informing her that judgment had been obtained against them in default of appearance, as she was expecting to have heard further from the Central Office following her reply letter dated

14th December 2015 (which had concluded with the sentence "We will await your reply, before resubmitted [sic] the documentation".

9. Mrs Roarty went on to aver that the affidavit relied upon by the bank for its default judgment does not satisfy the requirements of the Bankers Books Evidence Acts 1879-1989 and ought not to have been accepted by the High Court, and that its contents were not true. She stated also that in so far as the larger part of the judgment sum was claimed as due on foot of three personal guarantees executed by her and her husband in respect of borrowings of a company, John Roarty Quarries Limited, the bank had failed in their duty to them as guarantors by sending a letter of demand to the company just one day before sending letters of demand to them as guarantors, given that the primary entity responsible for the debt was the company.

10. A further ground of defence, and one which was to the forefront of their arguments before this Court on appeal, is set forth at para. 17 of Mrs Roarty's grounding affidavit wherein she states:-

> "I say that it is our contention that we were fraudulently induced to sign the alleged personal guarantees on the 01/09/2006 as we were notified via emails on the 18/07/2006 and on the 21/08/2006 by Seamus Ferry, Business Bank Manager in the Letterkenny Branch, that the security taken would be in the form of Directors Guarantees".

11. Those emails are exhibited by her. They refer to "directors guarantees" and, of some relevance to the argument advanced in the High Court and on this appeal, is that the second email states in relation to security: "Debenture and guarantees of directors Paula and John Roarty counter-covered by first legal charge over quarry land totalling circa 9.5 acres at Woodtown …". She made further averments in relation to these guarantees in her second affidavit sworn on the 16th February 2017. She seeks to argue that "directors' guarantees" are not personal guarantees, and that the bank in error presented forms of personal guarantee for signature by her and her husband. By this she means that she and her husband believed from what they were informed by Seamus Feeley of the bank that recourse under the guarantees executed qua directors would be limited to the 9.5 acres of quarry land referred to in the emails referred to above, which said lands were in the ownership of John Roarty Quarries Limited. In so far as they were presented with personal guarantees which made no mention of recourse being restricted to the company's 9.5 acres of quarry lands, it is argued that this amounts to a misrepresentation on the part of the bank. They say that they relied upon the representation by the bank that recourse was limited to those lands, and that they have suffered loss as a result whereby instead of only the quarry lands being realised to repay the company's loan, all their personal assets including their home is at risk. Accordingly, they say that they have a *bona fide* defence to the proceedings which they ought to be permitted to advance at a plenary hearing, and seek to set aside the judgment accordingly.

12. The affidavits of Mrs Roarty also allege that the bank exerted undue influence in having the guarantees executed by her and her husband. Mrs Roarty avers that they would never have signed these guarantees if they had been informed that they were personal guarantees whereby all their personal assets were being out at risk. In so far as the guarantees state clearly thereon in capital letters that "YOU ARE STRONGLY RECOMMENDED TO TAKE INDEPENDENT LEGAL ADVICE ABOUT ITS TERMS AND EFFECTS", she avers that they were each handed a pre-printed card TO SIGN stating: "I understand the nature of the liability incurred and I have no wish to be independently advised by a solicitor". She goes on to aver that in fact while they signed the guarantees on the 26th September 2007, it was not until the 5th October 2007 (some 6 days later) that they signed the waiver in respect of legal advice. In argument she has submitted that it is not possible to waive that right to legal advice on a date after having signed the guarantees.

The judgment of the trial judge

13. In her written judgment ([2017] IEHC 789) the trial judge outlined the background to the application to set aside the default judgment and the arguments sought to be put forward by way of a bona defence, in very much the same way as I have done above. There is no need to repeat same. Having done so, the trial judge then considered what was the correct test for setting aside a default judgment where it was contended that the defendant was taken by surprise, since the parties were not in agreement as to the principles to be applied. She referred to the judgment of Costello P. in *Fox v. Taher* (unreported, High Court, 24th January 1996) which referred to the court's task as being "to do justice", and to the court's wide discretion in that regard, and that in circumstances where the defendant was mistaken in his view that judgment in default could not be granted against him on foot of the statement of claim which had been delivered by the plaintiff and that leave of the court would be required, the defendant should be permitted to defend the claim, as it had intended, namely by contesting jurisdiction, albeit on certain terms. There was no consideration of the merits of the challenge to jurisdiction.

14. The trial judge next considered the judgment of Lynch J. in *O'Callaghan v. O'Donovan* (unreported, Supreme Court, 13 May 1997). In that case the defendant had brought an application to set aside a summary judgment obtained against him in default of appearance. That application was refused in the High Court, but allowed on appeal. I n his judgment in the Supreme Court, Lynch J. had referred to the correct test being that stated in the case of "The Saudi Eagle", namely *Alpine Bulk Transport Co Inc. v. Saudi Eagle Shipping Co. Inc.* [1986] 2 Lloyds Reports, 221, that is to say that on an application to set aside judgment it is necessary to go beyond identifying "an arguable case" as one word when seeking leave to defend a liquidated claim prior to judgement having been granted, so that on an application to set aside a judgement such a defendant "should show that he has a defence which has a real prospect of success".

15. The trial judge then referred to the judgment of Hogan J. in *Stafford v. J.V. Cummins (Supermarkets) Limited* [2014] IEHC 10. That was an unusual case. The Master of the High Court had adjourned the case to plenary hearing, and directed a statement of claim and defence to be delivered. Following the delivery of the statement of claim, the defendant failed to deliver a defence. A motion seeking judgment in default of defence was issued on the 11th September 2012 returnable for the 3rd December 2012. On that return date an order was made on consent extending the time for delivery of the defence by four weeks. However, unbeknownst to the defendant, the plaintiff's solicitor on the 12th November 2012 had already obtained a default judgment in the Central Office. It was in those circumstances that Hogan J. concluded that the parties had been "at cross-purposes" and that the defendant's error was "pardonable" where his focus was principally on the motion that had been issued. In his judgment in that case, Hogan J. referred to the judgment of Costello P. in *Fox v. Taher* and set aside the judgment in default, but did not consider the extent to which the defendant had a defence or the nature of the applicable test.

16. The trial judge then referred to the judgment of my own given in the High Court in *Allied Irish Banks Plc v. Lyons & anor* [2004] IEHC 129. In that case I had drawn a distinction between a judgment obtained *irregularly* in default of appearance, where for example there had been some defect in service on the defendant, and one where the judgment was obtained *regularly*. I stated that in the former case it was not necessary for the defendant to make out a good defence in order to seek to have the default judgement set aside, but that in the latter type of case where judgment was obtained regularly, and where the defendant was simply taken by surprise on the basis of some mistake on his/her part "the Court [must] be satisfied, before it will order that the judgement be set aside, that there is at least a possible defence to the claim which has a reasonable prospect of success". I went on to state that "in my view the Court does not need to be satisfied that the defendant will succeed, but that there is a point which has a reasonable prospect of success", I went on to adopt the *Saudi Eagle* test.

17. In her judgment, the trial judge went on to consider the defences which the defendants wished to have an opportunity to advance at a plenary hearing. She referred to the "conditional appearance" to which I have referred and having noted that there was no provision in the Rules for a conditional appearance in the circumstances of this case, the trial judge stated that "it could not be said that there was any irregularity in the process by which the judgement was entered", and accordingly that "the key issue is the extent to which she has a real chance of success in her defence of the bank's claim".

18. The trial Judge then considered the arguments put forward in relation to the guarantees which were signed in respect of the company's loans to which I have already referred. In relation to the purported distinction sought to be drawn by the defendants between a "director's guarantee" and a "personal guarantee" the trial judge stated "I am of the view that this is a distinction without a difference", and immediately went on to say:

> "… when a director signs a guarantee in respect of company debts, it is in any event a guarantee that if the company defaults, the director will make good the default from his or her own resources".

19. The trial judge went on to state that she was "not persuaded that there was any merit at all in the suggestion that there was something improper with regards to the officials giving her pre-prepared forms to sign, particularly when the pre-prepared forms specifically advised that the proposed guarantor should seek legal advice before signing, and which forms specifically provide for the person signing the declaration that she is waiving her right to legal advice if that is what she chooses to do". She then considered the three different guarantees and to the point being made by the defendants as to waiver being signed on a different date than the guarantee itself. Having looked at the documents, she stated "both signatures are on the same page of the document, and even if the signatures were affixed on different dates, I am satisfied they relate to the same transaction and that as of 5th October 2010 at the latest, Mrs Roarty was indicating that she did not wish to seek independent legal advice in relation to this guarantee. The trial judge concluded:

> "On none of these grounds put forward is there in my view any level of defence, no matter how the test is formulated, whether in terms of Saudi Eagle or otherwise".

20. In her second affidavit Mrs Roarty had sought also to rely upon the Unfair Terms in Consumer Contracts Regulations 1999/ Directive, and to urge, as provided by those Regulations, that "a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes significant imbalance in the parties' rights and obligations arising from the contract, to the detriment of the consumer". She relied also on a clause in the said Regulations which provides that "a term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term".

21. In her consideration of this issue put forward by way of purported defence to the claim under the guarantees, the trial judge noted the judgment of Barrett J. in *Allied Irish Bank Plc v. Counihan & anor* [2016] IEHC 752 in which he considered *inter alia* the decision of the CJEU in *Aziz v. Caixa d'Estalvis de Catalunya, Tarragona I Manresa* (Case C-415/11) as to the obligations upon the court when considering whether an arguable defence has been shown by a defendant in order to obtain a plenary hearing, to consider the document on foot of which the proceedings rely and identify any terms which are potentially unfair to the consumer, and if necessary invite submissions. In this regard the trial judge stated:

> "22. Having regard to the above, I should perhaps state for the record that I am not aware, nor has my attention been drawn to, any particular unfair term in the contracts between the parties. Mrs Roarty's argument appeared to be that the provision of a pre-prepared waiver of legal advice for signing constituted an 'unfair term' for the purposes of the Regulations/Directive. However, I do not think that a waiver of legal advice before signing the contract could possibly be considered a term of the contract itself for the purposes of the Regulations or the Directive. Rather, it is a declaration that the consumer, having been offered the opportunity to seek legal advice in relation to the terms of the contract, has declined to do so. It relates to the contract but is not a term of the contract [italics in original]. Further, I would have doubts in any event as to whether Mrs Roarty in signing these guarantees could be considered a 'consumer' for the purpose of the contracts with the Bank when the loans in question were in respect of business loans to business of which she was a director. Article 2 (b) of the Directive defines a 'consumer' as 'any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession', while the Regulations define 'consumer' as 'a natural person who is acting for purposes which are outside his business'."

22. It was for those reasons that the trial judge dismissed the application by Mrs Roarty to set aside the judgment obtained against her in default of appearance.

23. I pause for the moment to refer to the fact that while the notice of motion seeking to have the default judgment set aside was issued by both defendants, Mr Roarty and Mrs Roarty. Mr Roarty had failed to appear before the High Court on the 23 January 2017 when the matter came before Mr Justice Twomey, who struck out the motion as against Mr Roarty because of his non-attendance. It appears that on that date a counsel appeared on behalf of Mrs Roarty only, and the motion to set aside the default judgment was adjourned as against her only. The striking out of Mr Roarty's set-aside application is the subject of one of the appeals before this court, namely appeal number 41/2017. I will return to that in due course. But I should add that as far as Mrs Roarty is concerned she is speaking not only for herself but for her husband, even though his application was struck out by Twomey J. The issues are common to both in any event.

24. In her notice of appeal, Mrs Roarty set out her grounds of appeal somewhat briefly as follows:

> "1. A conditional appearance was submitted in the High Court [on] second of December 2015 and not accepted by mistake, and the conditions pertained [sic] therein had not been met.
>
> 2. Judgment should not have been given on foot of guarantees as the guarantees have never been factually or legally established and they are being vigorously contested.
>
> 3. There were valid ground[s] for setting aside the judgement which were not taken into account."

25. These grounds of appeal are so brief as to not make clear in what manner it is contended that the trial judge erred. However, Mrs Roarty has submitted a helpful and quite lengthy written submission to this Court, and of course made her oral submissions by reference to those written submissions. Generally speaking, however, her submissions to this Court repeat the submissions made to the High Court and which I have already summarised. She maintains that judgment was obtained against her and her husband because she was waiting to hear back from the Central Office following her letter dated 14th December 2015 which ended by stating

that they would await hearing further before re-submitting the conditional appearance forms. They heard nothing further until they received the letter dated 10th February 2016 from the bank's solicitors informing them that judgment had been obtained in default of appearance. She maintains that the fault rests with the Central Office because it never replied to them further. She submits that they should not be penalised by that failure by the Central Office.

26. I would accept that the defendants were certainly taken by surprise by having judgment marked against them in default of appearance. I accept that they were awaiting further correspondence from the Central Office. But I do not accept that the judgment was obtained irregularly by the plaintiff bank in the sense stated by me in my judgment in *Allied Irish Banks Plc v. Lyons & anor* to which I referred at para. 14 above. The solicitors acting for the plaintiff bank was unaware of the correspondence about the conditional appearance that the defendants had sent to the Central Office. They were entitled to believe that no appearance had been entered as it had not been served with any entry of appearance. It would have been a wise precaution for the defendants to have at least written to the solicitors acting for the bank to inform them of their wish to enter a conditional appearance and to defend the bank's claim, and of the difficulties which they were encountering with the Central Office in that regard. The bank's solicitors cannot be faulted for having proceeded to apply for judgment in default of appearance, and accordingly I would consider the default judgment to have been regularly obtained in accordance with O. 13, r. 3 RSC.

27. Accordingly, in my view, and as I stated in *Allied Irish Banks Plc v. Lyons & anor*, the defendants must satisfy the court on an application to set aside a regularly obtained judgment, not only that they were taken by surprise, but that they have not simply an arguable defence, but one that has a reasonable prospect of success. That is a somewhat more stringent test than that which applies when a defendant to a summary summons seeks to have a summary summons adjourned to a plenary hearing, though falling short of having to demonstrate that the defence will succeed at trial.

28. The trial judge examined the grounds of defence put forward and reached her conclusions as described. In my view she applied the correct test when at para. 19 she stated that there had been no irregularity in the manner in which judgement had been obtained, and "in those circumstances, the key issue is the extent to which she has a real chance of success in her defence to the bank's claim". Applying that test to the grounds of defence put forward, the trial judge concluded that none of those grounds satisfied the test "no matter how the test is formulated, whether in terms of *Saudi Eagle*, or otherwise". In my view she was correct in her conclusions in this regard. The principal ground of defence put forward by Mrs Roarty is that the guarantees presented to her and her husband by the bank's Seamus Ferry, seriously misrepresented the extent of the guarantee by assuring them that the extent of the bank's recourse under the guarantees was the 9.5 acres of quarry lands owned by John Roarty Quarries Limited. She has stated that Mr Ferry was a trusted friend, and that when he gave them that assurance they believed him and relied upon it, and that in the absence of such assurance they would never have signed the guarantees. In that regard Mrs Roarty has pointed to the fact that in the emails to which reference has been made, these guarantees are referred to as "director guarantees" and not personal guarantees.

29. I agree with the trial judge when she stated that this was a "distinction without a difference". The whole purpose of a bank requiring a guarantee by an individual or individuals, be they directors or not, of a company's borrowings, is to provide against the possibility that otherwise the limited liability of the company would prevent the bank being able to recover its debt from the company either in part or at all. If there is to be any limitation to the nature of the right course against any such guarantor, that would have to be stated in the document itself. The particular guarantees executed by the defendants makes no reference to any limitation of recourse to the 9.5 acres of quarry lands owned by the company. Indeed, it is obvious that in circumstances where those lands were being provided by the company as security for the loans in question, the provision of a personal guarantee by the directors which was limited to the bank having recourse to the lands in question would add nothing to the bank's security. If the lands were sold and realised sufficient to discharge the amount outstanding on the borrowings by the company, then no recourse to the guarantees would be necessary. On the other hand, if the lands in question either were not or could not be sold for any particular reason, or if there was a shortfall upon any such realisation of the lands, then records could be had by the bank to the guarantees provided by the directors.

30. Where the defendants put forward a defence based upon a misrepresentation by the bank as to the nature of the guarantee and the recourse thereunder, the Court, when considering whether that defence meets the threshold of having a reasonable prospect of success, can have regard to the fact that the asserted defence is contradicted by the executed guarantee. The court can also have regard to the fact that the defendants were clearly in a position to obtain legal advice as to the meaning of the guarantees, and the extent of any recourse by the bank which was possible thereunder, and that for whatever reason they chose not to seek such advice, and indeed signed a certificate indicating t the nature of the liability under the guarantee and stating that they had no wish to be independently advised by a solicitor. I would not accept that the fact that a waiver was signed, if it be the case, after the document was executed, nullifies the waiver. It is nevertheless indicative of a desire on the defendants' part that they did not wish to seek independent advice in relation to effect of the guarantees.

31. In this case there is no objective or independent evidence to support the claim of misrepresentation on the part of the bank in relation to the nature of the guarantees.

32. In my view the trial judge was correct to conclude that the defendants had failed to meet the test identified in relation to the claim of misrepresentation. The fact that there are unsubstantiated claims of misrepresentation does not meet the test.

33. Even though there has been no ground of appeal raised in relation to the conclusion by the trial judge in relation to the submissions made by reference to the EC Regulations on Unfair Terms in Consumer Contracts, I wish to add that I am satisfied that this proposed ground of defence has not been made out. The onus is upon the defendants to establish that they were 'consumers' for the purpose of the Regulations. They have not done so. The company John Roarty Quarries Limited was the principal borrower from the bank. It clearly was not a 'consumer' for the purpose of the Regulation not being a natural person, and as submitted by the bank, the guarantor of that borrowing is therefore not a 'consumer' for the purpose of the Regulation. In that regard this Court was referred in written submissions to the judgment of Ryan J. (as he then was) in *AIB v. Smith* [2012] IEHC 381.

34. I am satisfied that there is no error identified in the judgment of the trial judge, and I would therefore dismiss the appeal (Appeal number 481/2017) against the refusal of Mrs Roarty's application to set aside the judgment obtained against the defendants in default of appearance.

35. Given this decision, it is unnecessary to address Mr Roarty's appeal against the order of Twomey J. dated 23rd January 2016 when he struck out his application to set aside the default judgment (appeal number: 41/2017). The same grounds of defence were being offered by Mr Roarty as were put forward by Mrs Roarty, so even if that order dated 13th January 2016 was set aside, nothing would be achieved, given the result of Mrs Roarty's appeal against the order of Ms. Justice Ní Raifeartaigh.

36. Finally, I would dismiss the remaining appeal (Appeal number 88/2017). That appeal is against another order made by Twomey J., namely that made on the 22nd February 2017 when a "notice of motion for clarity" issued by the defendants was struck out. In their motion the defendants asked the Court for "clarity" in relation to certain matters relating to their attempt to enter a conditional appearance, the basis for the striking out of Mr Roarty's set aside application for his non-appearance, why the bank had proceeded on foot of its summary summons "in full knowledge that the defendants have a valid and *bona fide* defence to the spurious claims of the plaintiff", and finally in relation to why there was delay in the provision of discovery which had been sought from the bank.

37. The trial judge struck out this "motion for clarity" stating that he could not see any grounds for the motion. He was entirely correct in this regard. There is no provision under the Rules, or on any other basis, for a party to is "seek clarity" from the court in the way in which the defendants sought to do when they issued such a motion on 27th January 2017. There is no such procedure. I would dismiss that appeal also.