

THE HIGH COURT

[2014 No. 2730 S.]

BETWEEN

ALLIED IRISH BANK PLC

PLAINTIFF

AND

OLIVER ROONEY

DEFENDANT

JUDGMENT of Mr. Justice Eagar delivered on the 28th day of March, 2017

1. This is a judgment on an application by the defendant to set aside the judgment entered in default of appearance by the defendant.
2. On the 19th May, 2015, the plaintiff entered judgment against the defendant in the Central Office of the High Court arising from the defendants default in entering an appearance to these proceedings. The plaintiff's claim against the defendant was for the sum of €453,292.74 arising from a letter of guarantee dated the 4th September, 2009, whereby the defendant agreed to pay to the bank on demand all sums of money due to the bank by DBR Construction Ltd. to a limit of €692,000.00.
3. The affidavit of the defendant Oliver Rooney grounded the notice of motion to set aside the judgment. He states that he believes that he can defend the proceedings and that he has been advised that he has a defence to the plaintiff's claim which is a reasonable prospect of success.
4. The first claim of Oliver Rooney is that the letter of guarantee dated the 4th September, 2009, whereby he agreed to pay to the plaintiff on demand all sums due to the plaintiff by DBR Construction Ltd. up to a limit of €692,000.00. Mr. Rooney claims in his affidavit that the letter of guarantee dated the 4th September, 2009, whereby he agreed to pay to the plaintiff on demand all sums due to the plaintiff by DBR construction Ltd. up to a limit of €692,000.00. Mr. Rooney claimed that he did not recall entering into the guarantee dated the 4th September, 2009, whereby he agreed to pay to the plaintiff on demand all sums of money due to the plaintiff by DBR Construction Ltd. up to a limit of €692,000.00. He said he did not have a copy of the guarantee and had not been furnished with evidence of same by the plaintiff in the lead up to the issuing of the summary summons and he says that part of his defence would be to argue that contract upon which the claim is based does not exist and the claim must be dismissed.
5. He also states that he believes that the guarantee (if it existed) amounted to an unconscionable bargain and is void and unenforceable for that reason. He said that he had never had any involvement in the company nor did he benefit in any way from the company's activities. The company was owned by his brother David Rooney as was a vehicle to which he carried out property developments. He said that he was advised that the Court had jurisdiction to interfere to relieve the consequences of an unconscionable transaction such as this where there is no consideration for his guarantee.
6. He further says that he was informed by his brother David Rooney that the level of debt claimed as due and owing by the companies is disputed. He is informed that the plaintiff had failed to take into account a reduction of the debt in the region of €95,000.00 in late 2010 being the proceeds of the sale of a house in two sites in Louth village in respect of which the loan was advanced to the company.
7. He further states that the plaintiff is prevented from pursuing any remaining debt owed by the company on the grounds of estoppel. The said estoppel arises from a representation made by Robert Amerlynck of the plaintiff around June, 2010 to his brother David to the effect that if the company sold the house and two sites on the Louth site, the plaintiff would not pursue the balance of the debt. He said that the company relied on this representation to its detriment in selling the two houses and two sites for the drastically reduced sums. He further states that his brother has been served with a summary summons on the same grounds.
8. On behalf of the plaintiff Mark Hughes says that on the 19th May, 2015, the plaintiff had obtained judgment against the defendant herein in the sum of €444,018.14. He said that the judgment was obtained regularly and in accordance with the Rules of the Superior Court and that the defendant had acknowledged that he had failed to enter an appearance by in averments. He said that the guarantee, the subject matter of the proceedings, does in fact exist and he exhibits a copy of part of the guarantee which clearly shows the signature of a person reporting to be Oliver Rooney and under the terms of the guarantee he agreed to pay and satisfy on demand all sums due by DBR Construction Ltd. up to a limit of €692,000.00. The guarantee was given in consideration, the bank agreeing to continue to give credit and banking facilities to the company and the bank relied upon the guarantee given by the defendant as security against which it could extend various banking facilities to the company. He also states that the guarantee is not an unconscionable transaction and that there was no factual basis set out by the defendant to support such an allegation. He said in or about the 12th August, 2015, there was a sum due and owing to the company by the company to the bank in the sum of €389,193.46 together with interest in the amount of €78,219.99 given a total of €467,413.45. In this regard he refers to copies of the statement of the accounts.
9. He further states that the company had failed to repay the sums to the bank despite having been called upon to do so on many occasions to date. He said by letter dated 8th April, 2011, the bank made a demand of the defendant pursuant to his guarantee to pay the sum then due and owing by the company and he said the company was dissolved on the 16th July, 2014. He further states that the defendant failed to discharge the sum demanded of him and failed to enter an appearance to the summons and judgment which was duly entered against him on the 19th May, 2015.
10. He says that in relation to the allegations made by the defendant in paras. 9 and 10 of his affidavit he says the proceeds of sale of the houses that are referred to were applied to the company's loan account in reduction of its overall liability and he denies there was any representation made on behalf of the bank to the effect that it would not pursue the debt owed by this company as entitled to now look to the guarantors of the company in circumstances which the company has failed to discharge the liability.
11. He further states the defendant has failed to set out the basis of any defence that has a reasonable prospect of success.
12. The affidavit of Oliver Rooney sworn on the 1st February, 2016, the following points:-

13. (1) Mr. Hughes purported to exhibit a copy of the judgment made against him in default of appearance. It in fact appears to be in order of *fieri facias*. He also says that a copy of the guarantee is illegible and appears to be incomplete and he believes that there exists a defence with a reasonable prospect of success. He also avers to the purported representation of Robert Amerlynck of the plaintiff to his brother David Rooney that if the company sold the house and two sites on the Louth site the plaintiff would not pursue the balance of the debt. He also says that Mr. Hughes does not address that allegation but rather avers generally there was never any representations made to that effect on behalf of the plaintiff. He believes that this is not a sufficient answer to the specific claim he made and within the circumstances there is in this regard a defence with a reasonable prospect of success.

14. Mr. Declan Darby of the Bank Centre, Ballsbridge, Dublin 4 swore an affidavit on behalf of the plaintiff on the 20th June, 2016. He states that he is advised that judgment was entered against the plaintiff on the 19th May, 2015, and states that he is advised that a copy of the judgment has been served on the defendant's solicitors. The bank has a guarantee provided by the defendant to the company of which his brother David Rooney was a director, secretary and a 99% shareholder. He further states that the defendant and Mr. Rooney work in the same industry and have a business relationship in addition to their sibling relationship.

15. He states that the plaintiff had failed to take account of a reduction in the debt of his brother's company in the region of €95,000.00 in or around late 2010. On the 8th June, 2010, and the 2nd July, 2010, a total sum of €237,000.00 was lodged to the company's account in reduction of the company's total debt to the plaintiff. The said sum of €237,000.00 represent the proceeds of sale of Nos. 1 and 2 St. Mochta's Corner, Louth Village, Louth which properties were mortgaged to the plaintiff as security for the loan facility extended to the company in September, 2009. He further states that he had doubt with David Rooney's accounts interchangeably with Mr. Amerlynck and Ms. Deirdre Forde who has since retired. He said that at no stage was it ever agreed that the balance of the company and/or debt to the plaintiff would not be pursued if the security properties were sold. What was agreed with the defendants was that once the security properties were sold the plaintiff would review the balance of the debt once the guarantors both sent in statements of their net worth and he refers to copies of letters sent to the defendant and David Rooney and their solicitor regarding the balance of the debt due by them to the plaintiff after the sale of the properties.

16. Exhibited to the affidavit of Declan Darby is a letter addressed to the defendant signed by Robert Amerlynck in which he states as follows:-

"Attached is an asset/liability and income/expenditure statement and I would be obliged if you complete same as fully as possible and would return to me with your proposal regarding what you feel you could afford regarding your liability under your guarantee for the above debt."

A similar letter was sent to David Rooney by Robert Amerlynck. Further letters were sent by Declan Darby to David Rooney which is dated the 19th September, 2012, which stated:-

"With reference to your liability under your letter of guarantee for the above customer, we note from an earlier conversation you had with my colleague Robert Amerlynck that you were to get your accountant to confirm that the company is no longer trading, has not been liquidated and has no assets. We also require an update as to what you propose to do with the company going forward. Please arrange to have your accountant forward the information for my attention."

And a further letter to the defendant Oliver Rooney dated the 13th November, 2012, in which Mr. Darby says:-

"With reference to your liability under your letter of guarantee for the above account and your request that AIB Bank write off the residual debt, we wish to advise that the bank is agreeable to writing off the residual debt on condition that you consent to the bank obtaining a judgment to be attached to your private dwelling house. Please confirm to the undersigned in writing that you will consent to this judgment against your house."

And a further letter from Deirdre Forde dated the 9th August, 2013, in which she sent to the defendant:-

"I refer to the above and to telephone conversation 9th August, 2013. I have discussed and enclosed statement of means and net worth statement to be accurately completed, signed and witnessed. Please return to the office for my attention."

17. Finally there is a letter from Deirdre Forde to the defendant dated the 10th December, 2013, in which she says:-

"I refer to the above and to our telephone conversation on the 10th December, 2013, as discussed please find the terms, statement of means and net worth statement in declaration enclosed. Please include loans taken out, amounts outstanding and name of institution. Also any other assets you may hold. When I have received forms I will revert to you."

18. This affidavit was that of Oliver Rooney sworn on the 7th October, 2016, in which he takes issue with a number of matters including the judgment. He states that he avers that the plaintiff had failed to exhibit eligible and complete copy of the guarantee and that Mr. Darby's affidavit did not correct this omission. He also states that the plaintiff had also failed to produce documentation in relation to the loan of the company in respect of which the guarantee provided security and he avers that the plaintiff was estopped from pursuing the debt against the company in circumstances where Mr. Robert Amerlynck an agent of the plaintiff had represented to his brother David Rooney in or around June, 2010 that if the company sold the corner house and two sites in Louth Village the plaintiff would not pursue the balance of the debt. Mr. Darby denies this representation was made, but the plaintiff had not adduced evidence from Mr. Robert Amerlynck himself to that effect.

19. He said that he recalled receiving the correspondence exhibited to Mr. Darby's affidavit and he said that he discussed it with his brother who had reacted with incredulity that the plaintiff had reneged on Robert Amerlynck's representation and was proceeding to pursue the balance of the debt. However, there is no correspondence from either David Rooney or the defendant in respect of this.

20. The Court is satisfied that on the 19th May, 2015, the plaintiff entered judgment against the defendant in the Central Office of the High Court arising from the defendant's default in entering an appearance to these proceedings.

21. In *Allied Irish Banks plc v. Robert Lyons and Josephine Lyons* [2004] IEHC 129 Peart J. refers to Order 13, rule 11 of the Superior Court Rules as follows:-

"Where final judgment is entered pursuant to any of the preceding rules of this order, it shall be lawful for the court to

set aside or vary such judgment upon such terms as may be just."

Peart J. then stated:-

"A wide discretion is given to the court in its task of achieving justice between the parties, but the interests of both parties must be taken into account in the weighing exercise undertaken by the court in considering the interest of each party, and not simply the hardship and distress pleaded on behalf of the applicant in this case."

In the present case where it is simply being asserted that the judgment was obtained by surprise or perhaps more correctly, by mistake on the part of the applicant's solicitor, it is necessary that the court be satisfied, before it will order that the judgment be set aside, that there is at the least a possible defence to the claim which has a reasonable prospect of success (this Court's emphasis). 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 real prospect of success."

He adopted that standard set out by that *Saudi Eagle* case [1986] 2 Lloyd's Rep 221.

22. In dealing with the issues raised by the defendant as to possible grounds of defence which have a real possibility of succeeding, the Court is satisfied that on the 19th May, 2015, the plaintiff entered judgment against the defendant in the Central Office of the High Court arising from his default in entering an appearance in these proceedings. While the defendant queries the documents and not receiving a copy of the judgment he does aver to this fact in his first affidavit sworn on the 13th July, 2015, and he further says that it was due to inadvertence on his part. He overlooked the service of the summary summons and failed to enter an appearance within the time allowed for this purpose.

23. The Court is satisfied that the guarantee had been signed by the defendant and that he never thought to raise this issue of not having signed the guarantee when correspondence came from the plaintiff.

24. Whilst the company was owned almost wholly by David Rooney the defendant signed the guarantee also knowing this fact and in these circumstances the Court does not believe that a defence exists in relation to this matter which has a reasonable prospect of success.

25. Finally, in relation to the debt the Court notes the DBR loan account details which show sums of money being credited to the DBR loan account in the sum of €118,500.00 in relation to 2 St. Mochta's Corner and €118,500.00 credited to the account on the 2nd July, 2010, in relation to 1 St. Mochta's Corner. The Court is satisfied that the proceeds of the sale of the house and sites was credited to the company account.

26. Having regard to the test which is laid down by *Allied Irish Banks plc v. Robert Lyons and Josephine Lyons* [2004] IEHC 129, this Court is satisfied that the court should not set aside the judgment because there is no possible defence to the claim which has a reasonable prospect of success.