COURT OF APPEAL

Neutral Citation Number: [2015] IECA 132

Appeal No. 2014/1280

Ryan P.
Peart J.
Irvine J.

Close Invoice Finance Limited

Plaintiff/Respondent

- and -

Gabriel Matthews and Ronald Matthews

Defendants/Appellants

JUDGMENT of the Court delivered on the 24th day of June 2015

1. This is the defendant's appeal against the order of the High Court (Birmingham J.) made on 20th May, 2014, following the plaintiff's application for summary judgment.

2. The High Court judge granted judgment against the first named defendant in the sum of €369,644.43. He adjourned the balance of the plaintiff's claim as against the first named defendant, namely the sum of €100,000, to plenary hearing. The High Court judge also granted the plaintiff judgment against the second named defendant in the sum of €150,000. He ordered that the defendants pay the costs of the proceedings and refused the defendants' application for a stay on the entry and execution of the respective judgments pending appeal. That refusal was appealed to the Supreme Court, which granted a stay on the execution of the judgments pending the outcome of this appeal.

Background
3. Summary summons proceedings were commenced against the defendants on 10th December, 2012. The plaintiff's claim against the first named defendant was brought on foot of a guarantee dated 6th December, 2010, and, as against the second named defendant, on foot of a guarantee dated 17th April, 2008. The latter guarantee limited the liability of the second named defendant to a sum of €150,000. Suffice to state that the guarantees were given by the defendants to support facilities granted by the plaintiff to a company by the name of Garlester Limited ("Garlester"), of which both defendants were directors. Prior to the issue of the proceedings, letters of demand dated the 17th July, 2012, and 14th November, 2012, were sent to the defendants.

4. For the purposes of the application for summary judgment, three affidavits were sworn on behalf of the plaintiff and four on behalf of the defendants. In basic terms, the matters advanced by way of potential defence to the claims can categorised as follows:-

> (a) A claim that the receiver, who had been appointed by the plaintiff as debenture holder, sold the assets of Garlester in an overly prompt asset sale promoted by the plaintiff at a gross under value, thus increasing the defendant's liability to the plaintiff on foot of the guarantees.
>
> (b) The receiver confined the negotiations to one potential purchaser.
>
> (c) That the sums claimed on foot of the guarantees were excessive insofar as certain sums identified in the replying affidavits, which had allegedly been paid to Garlester, had not been credited to its account.
>
> (d) That the plaintiffs were estopped, by reason of representations made at a meeting on 5th December, 2012, from pursuing the defendants on foot of the personal guarantees.

The judgment of the High Court
5. The High Court judge in his judgment correctly set out the principles which are to be applied by the court on a consideration of an application for summary judgment, and it is not necessary to revisit the same in any detail in the course of this judgment as they are not in dispute between the parties. The High Court judge referred to the oft cited judgment of Hardiman J. in *Aer Rianta cpt v. Ryanair Ltd* (No.1) [2001] 4 I.R. 607 where he held, at p.623, that the test to be applied on an application for summary judgment involved the court asking itself the answer to one simple question which he framed in the following terms:-

> "It is very clear that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

6. The High Court judge also referred to the decision of McKechnie J. in *Harrisrange v. Duncan* [2003] 4 I.R. 1 at pp. 7-8 where he set out a list of matters to which the court should have regard when dealing with an application for summary judgment. He also dealt with the extent of the duty of care owed by a receiver and did so by reference to the judgment of Denning M.R. in *Standard Chartered Bank Limited v. Walker* [1982] 1 W.L.R. 1410. He noted that part of the judgment, pp.1416-1417, which advises that:-

> "The receiver is the agent of the company, not of the debenture holder, the bank. He owes a duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to the company, of which he is the agent, to clear off as much of its indebtedness to the bank as possible, but he also owes a duty to the guarantor, because the guarantor is liable only to the same extent as the company. The more the overdraft is reduced, the better for the guarantor. It may be that the receiver can choose the time of sale within a considerable margin, but he should, I think, exercise a reasonable degree of care about it. The debenture holder, the bank, is not responsible for what the receiver does except insofar as it gives him directions or interferes with his conduct of the realisation. If it does so, then it too is under a duty to use reasonable care towards the company and the guarantor."

7. The High Court judge concluded that, even if it was arguable that the receivers sold the assets of Garlester at an undervalue, at its height it might provide a basis for a claim directed against the receiver. However, he was satisfied that any such cross-claim could not be said to stem from the same set of facts as gave rise to the claim and that, accordingly, the existence of such a potential future claim did not provide any basis upon which judgment could be resisted. Further, because such potential claim was so vague and lacking in specificity, he refused to stay the entry of the judgments to allow that cross-claim to be pursued.

8. Insofar as the defendants had canvassed the possibility of a *bona fide* defence based upon arguments concerning the accuracy of the accounts of the principal debtor, the High Court judge was satisfied that all of the specific transactions which had been highlighted by the defendants in their replying affidavits had been dealt with satisfactorily, such that he was satisfied that they did not demonstrate any *bona fide* potential ground of defence. However, in circumstances where the first named defendant continued to protest that the transactions which he had highlighted were only examples of irregularities that he had identified in the accounts and because the plaintiff had accepted having made a number of errors in the sums earlier calculated as due and owing in the proceedings, the High Court judge left open the possibility that the first named defendant might be in a position to establish some, as yet, unidentified irregularities in the accounts of the principal debtor which might somewhat reduce his liability to the plaintiff. For this reason, he withheld judgment against the first named defendant in respect of the sum of €100,000 and referred the plaintiff's claim for that sum to plenary hearing. In doing so, he concluded that the further examination of the sums due and owing by the principal debtor did not warrant shutting out the plaintiff's claim in respect of the entire sum claimed.

9. Insofar as a potential defence based on the doctrine of estoppel was concerned, the High Court judge was satisfied that no evidence had been advanced on affidavit as might support the conclusion that a binding agreement on the part of the plaintiff not to sue on foot of the personal guarantees had been made. Further, insofar as any representations may have been made by the plaintiff to either defendant, there was no evidence that either of them had placed any reliance upon these or had, as is required by law, thereby acted to their detriment.

The Appeal

10. In the course of this appeal it was argued on the defendant's behalf that the High Court judge erred in law and in fact in failing to find that there was a fair and reasonable probability of them having a real or *bona fide* defence to the claim based on the plaintiff's interference and involvement in the alleged sale of the assets of Garlester at a gross under value.

11. Having considered the evidence that was before the High Court and the written and oral submissions of the parties, this Court is not satisfied that the appellants have put forward sufficient evidence to meet the, albeit modest, threshold that would have required the High Court judge to have referred these proceedings to plenary hearing.

12. It is worth restating that the mere assertion in an affidavit of a given situation which is to form the basis of an intended defence does not of itself constitute a ground for granting leave to defend. As was stated by Murphy J. in *First National Commercial Bank plc. v. Anglin* [1996] 1 I.R. 75 at p. 79, whether or not there is a fair and reasonable probability of the defendant having a real or *bona fide* defence has to be ascertained by looking at the situation as a whole.

13. While the receiver was at all stages acting as the agent of the company and not as the agent of the plaintiff, the debenture holder, it is of course correct as a matter of law that he nonetheless owed a duty of care not only to Garlester but to the defendants, as guarantors of its indebtedness, as to the manner in which he conducted the receivership. However, the receiver is not a party to these proceedings and neither is the company. Hence, any complaint to be advanced by the defendants by way of potential defence or cross-claim can only be based upon the assertion that it was the plaintiff's wrongful engagement with the receiver that led to the sale of the assets of Garlester at a gross undervalue.

14. The assertions made by the defendants in this regard amount to no more than a bald assertion which is unsupported by any meaningful evidence such that the Court could conclude that there is a fair or reasonable probability that the defendants have a *bona fide* defence based upon such assertion. That this is so is clear from the first replying affidavit of Mr. Gabriel Matthews sworn on 22nd July, 2013, where the only reference made to the role of the debenture holder is at paragraph 5. There, he states that the plaintiff was involved in the asset sale transaction and that it promoted the quick transfer of those assets to another of its credit customers. In his two later affidavits, Mr. Matthews makes no further mention of the plaintiff's interference with the sale process or the facts supporting that assertion. In these circumstances, the defendant could not resist judgment based upon a bald assertion of this nature.

15. While it is not the function of this court or of the High Court to attempt to resolve conflicts of fact or evidence disclosed in affidavits, it is relevant to point out a lack of cogency and logic in the suggested defence. It did not make sense for the plaintiff to dispose of the company's assets at an undervalue. It was in the interest of the debenture holder that the maximum amount possible be recovered on the sale of Garlester's assets given that it could not have been assured of recovering from the guarantors the sums that would remain outstanding following that sale. Secondly, no steps were taken against the receiver, who it is alleged failed in his legal obligations to them as guarantors and thereby left them exposed to liabilities that would not have existed had he discharged his duties in a proper fashion.

16. This court sees no reason to interfere with the conclusion of the High Court that the claim canvassed by the defendants that the assets of Garlester had been sold at an undervalue was vague and lacking in specificity.

17. As to the submission made that the High Court judge erred in law and in fact in failing to refer the entirety of the claim to plenary hearing on account of alleged discrepancies in the accounts of Garlester, this Court is satisfied that the conclusion of the High Court judge cannot be faulted. He clearly considered the evidence concerning the alleged irregularities in the accounts and, in particular, those payments that had been specifically identified at para. 9 of the affidavit of Mr. Gabriel Matthews of the 20th January, 2014. Having considered the matters deposed to by Mr. Brian O'Keeffe in his affidavit of 17th February, 2014, the High Court judge concluded, correctly in the view of this Court, that each of the relevant amounts had in all probability been properly credited to Garlester's account.

18. The High Court judge, however, was clearly sympathetic to the defendant's concerns as to the accuracy and validity of the sums claimed as outstanding and for which they are being held accountable. Suspicion and uncertainty was undoubtedly generated by the fact that the plaintiff had failed to furnish them with a full set of accounts and, in particular, those referable to the months of June, July and August 2012. Even on the day of the hearing of the application for summary judgment, the plaintiff was forced to accept that one page of the accounts for this period had been omitted from an exhibit to the affidavit of Mr. O'Keeffe of the 17th February, 2014. This drip feeding of information to the defendants clearly engendered genuine concerns that they may not have received the benefit of a large number of reasonably substantial payments which had been made over this period. However, the High Court judge was ultimately satisfied that these particular payments had in fact been credited to the Garlester account.

19. This Court is satisfied that it would have been unjust had the High Court judge refused to grant judgment to the plaintiff on the basis that, if the claim were referred to plenary hearing and discovery obtained, some discrepancies might be identified such as would reduce the liability of the principal debtor to the plaintiff and thus the plaintiff's claim as against the defendants.

20. The High Court judge was correct in acknowledging that this was a possibility, having regard to the fact that a number of errors had been made by the plaintiff in the sums claimed in these proceedings. He referred in this regard to the fact that a number of incorrect figures had been advanced and had to be corrected, including that which had been contained in the initial letter of demand. Further, there had been a failure to recognise that the second named defendant's liability on foot of his guarantee was one limited to a maximum claim of €150,000.

21. It is of course true to say that, where judgement is entered in favour of a plaintiff for part only of an amount claimed, this normally arises in a claim which has within it separate and identifiable heads of claim, and where the defendant has only been able to identify a *bona fide* defence in respect of one, or some, but not all heads of claim. Take for example the sale by a plaintiff of three vehicles on foot of three separate invoices. The defendant asserts that the vehicle the subject matter of the third invoice was not fit for purpose. However, he can advance no *bona fide* defence in respect of the claim made for the price of the other two vehicles. In such circumstances, judgement would probably be granted to the plaintiff for the sums outstanding on the first two invoices and the sum claim on the third invoice referred to plenary hearing.

22. Such circumstances do not arise in the present case as the defendants have not been able to identify, with specificity, the items which they maintain were not credited to Garlester's account. The twelve items which they brought to the Court's attention were dealt with to the satisfaction of the High Court judge by Mr. O'Keeffe in his affidavit. However, at all stages the defendants maintained that these twelve payments had been put forward by way of example only, and the High Court judge was clearly satisfied, on account of both this fact and the fact that the plaintiff had made other errors in the calculation of the sums due, that the defendant might have a *bona fide* defence to some portion of the plaintiff's claim based upon other, as yet, unidentified inaccuracies in the Garlester account.

23. It was in these circumstances that the High Court judge refrained from entering judgement against the first named defendant, whose liability on foot of his guarantee was unlimited, for the final €100,000 of the claim made against him, and he referred that aspect of the claim to plenary hearing. In doing so, he adopted a similar approach to that of Clarke J. in *ADM Londis Plc. v. Arman Retail Ltd* [2006] IEHC 309. As in the present case, the defendants in that case were the guarantors of the liability of the principal debtor. They filed a replying affidavit raising some evidence as to a potential counterclaim. While it was not possible to quantify the value of that counterclaim from the evidence on affidavit, Clarke J. concluded that the justice of the case would be met by making an approximate estimation of the quantum of the counterclaim. This he assessed at 50% of the plaintiff's claim. In the present case, it was clearly impossible for the High Court judge, on the evidence before him, to reach any objective conclusion as to the extent to which the Court might find in the defendant's favour at an oral hearing. Indeed, it might be said that, in circumstances where the replying affidavits did not identify an obvious method whereby the amount of any potential reduction in the plaintiff's claim might be assessed that no element of the claim should have been referred for a plenary hearing. However, given that the plaintiff has not cross-appealed this aspect of the High Court order, it is not necessary to consider the matter further given that, in taking the course he did, the High Court judge made more than adequate provision for any potential reduction in the plaintiff's claim having regard to the evidence that was before the Court.

24. Insofar as the appellant's maintain that the High Court should have concluded that the defendants had established a fair and reasonable probability of a *bona fide* defence based upon an alleged representation made by Mr. Harry Parkinson, managing director of the plaintiff company, on 5th December, 2012, to the effect that the defendants would be released from the liabilities under their guarantees, the Court is quite satisfied that the decision of the High Court judge on this issue was, on the facts, correct as a matter of law.

25. Firstly, it should be noted that the notice of appeal makes no complaint as to the findings of the High Court judge on this issue. Secondly, while the written submissions on the appellant's behalf allege that the High Court judge failed to find that the plaintiff was estopped from pursuing the appellants due to the undertaking of Mr. Parkinson, no basis for that criticism is set out in the submissions.

26. However, leaving aside these two technical impediments and looking at the merit of this purported ground of appeal, this Court can see no basis upon which the rejection by the High Court judge of a potential defence based upon the law of estoppel can be challenged.

27. At paragraph 24 of his judgement, the High Court judge makes clear that, even if he accepted all that had been said by Mr. Gabriel Matthews in respect of what occurred at the meeting with Mr. Parkinson on 5th December, 2014, there was no evidence to show, as is required by law, that the defendants placed reliance upon what he had said and had otherwise acted to their detriment. Such evidence, as was submitted by the plaintiff on this appeal, is an essential proof for a defence based on estoppel as was advised in *Greenwood v. Martin's Bank Limited* [1933] A.C. 51 where the relevant factors were summarised as follows:

> (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made;
>
> (2) An act or omission by the person to whom the representation is made resulting from such representation or conduct; and,
>
> (3) Detriment to such person as a consequence of the act or omission.

28. While it was not necessary for the High Court judge to consider the credibility of the defendant's assertions as to the undertaking allegedly given by Mr. Parkinson, evidence which he accepted for the purposes of determining whether a defence was open to the defendants based on this representation, it is nonetheless noteworthy in terms of the overall credibility of the lines of defence advanced on the defendants behalf. In particular, it is noteworthy that, while these proceedings were issued on 10th December, 2012, the first time that the facts underlying this plea were raised was in the affidavit of Mr. Gabriel Matthews of 20th January, 2014, that being the second affidavit sworn by him in the within proceedings. Further, no such averment was raised by Mr. Ronald Matthews in his affidavit of 22nd July, 2013, even though his affidavit was filed in response to that of Mr. Parkinson himself which was sworn on 24th April, 2013.

29. For all of these reasons, the Court would dismiss the appeal.