



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 121

**Peart J.
Irvine J.
Hogan J.**

Between/

Danske Bank A/S Trading As Danske Bank

**Plaintiff/
Respondent**

- And -

Fintan Fox

**Defendant/
Appellant**

Record No. 2016/202

- And -

THE COURT OF APPEAL

Between/

Fintan Fox

**Plaintiff/
Appellant**

- And -

Declan McDonald and Danske Bank A.S. Trading As Danske Bank

**Defendants/
Respondents**

Record No. 2016/410

JUDGMENT of Ms. Justice Irvine delivered on the 26th day of April 2017

1. This judgment deals with two appeals brought by Mr Fintan Fox, a party to both of the above entitled proceedings, in relation to orders of the High Court made against him in such proceedings.

2. The first order under appeal is that of Noonan J. of the 4th April 2016 whereby he granted summary judgment in favour of Danske Bank A.S. trading as Danske Bank ("Danske") in the sum of €1,472,996.95. That order was made in summary summons proceedings which were commenced by Danske on the 9th June 2014 [High Court Record No. 2014/1480 S].

3. The second order under appeal is that of O'Regan J. dated the 15th July 2016 in Plenary proceedings commenced by Mr. Fox [High Court Record No. 2014 47584P]. On foot of that order Mr. Fox's claim against Danske and Mr. Declan McDonald ("the receiver"), who was appointed receiver over a number of Mr. Fox's properties, was dismissed.

Lending History

4. Relevant to both appeals is the lending history between National Irish Bank Limited ("NIB") and its successor, Danske, and Mr. Fox.

5. As far back as 2007 NIB agreed to provide Mr. Fox with a loan facility in the sum of €1.425m. That loan was to be repaid over a period of fifteen years on the terms specified in a facility letter of the 27th March 2007. Whilst initially disputed by Mr. Fox in the High Court, it is now clear that the repayments due on foot of that loan were not met for several months in 2011 and that he faced further difficulties as a result of exceeding an overdraft facility of €30,000 which had been afforded him in March 2010.

Summary Summons Proceedings

6. In the summary summons proceedings Danske maintained that in late 2012 it reached an agreement with Mr. Fox to restructure his outstanding loans. It did so first by facility letter of the 14th July 2011 and later by a further facility letter signed on the 15th November 2012. It is Mr. Fox's alleged failure to comply with his obligations pursuant to the latter facility that forms the basis for Danske's claim in those proceedings. Thus it is not necessary to record the full extent of the banking arrangements between the parties in the period predating the 15th November 2012.

7. The terms of the loan facility dated the 15th November 2012 required Mr. Fox to repay the sum of €1,524,000 loaned to him on foot of that facility within a period of twelve months.

8. It is not disputed that Mr. Fox had not repaid the aforementioned loan at the time that Danske, by letter dated the 27th February 2014, sought payment of the sum of €1,478,527.42 which it claimed was the amount then outstanding.

9. Material also to the lending history between the parties is that Mr. Fox was required to give security for the various loans which he obtained from the bank over the years. He does not dispute that he executed two mortgages in favour of the lender. These are dated the 8th May 2007 and the 6th March 2012 respectively. The first mortgage is in respect of four properties. The first property comprises four units in an industrial estate in Naas, Co. Kildare, the second, O'Briens Sandwich Bar in Glasnevin, Dublin, the third a unit in the Shopping Centre at Scholarstown Road, Dublin and the fourth a takeaway at Lusk, Co. Dublin. The second mortgage captures only the units at Naas Industrial Estate. However, relevant to both sets of proceedings is the fact that the terms of the loan facility of the 15th November 2012 provides at clause 6.1 thereof that "any security already provided by the borrower to the bank shall be security for the borrower's liabilities under this agreement, unless such security expressly provides otherwise."

10. Notwithstanding the sworn affidavits of Mr. Fox dated the 19th October 2014 and the 26th March 2015 in the Summary Summons proceedings, Noonan J. granted judgment against Mr. Fox on the 4th April 2016 expressing himself satisfied that there was nothing in his affidavits sufficient to demonstrate the existence of a bona fide defence to the proceedings. He rejected the assertion that the sum claimed by Danske was incorrect, in circumstances where he was satisfied that it had an entitlement to set off against the sum outstanding monies lodged from other accounts held by Mr. Fox.

11. It is from the said judgment and consequential order that Mr. Fox maintains the first of his appeals.

Appeal against Order for Summary Judgment

12. In his submission to this court Mr. Fox maintains that his affidavits filed in the High Court did disclose a *bona fide* defence and that being so the proceedings should have been referred for plenary hearing. In particular he submits that he was not in default of his obligations to Danske and seeks to rely upon the fact that at all times he continued to pay the monthly repayments as required of him on foot of the loan offer of the 8th May 2007. He also relies upon an assertion that Danske restructured his loans without his consent or agreement in November 2012 knowing well that he would not be in a position to repay the sum the subject matter of that agreement within the twelve months period therein provided. He also maintains that a sum of €21,291 was incorrectly debited from one of his accounts with Danske with the result that the sum claimed was excessive.

The legal principles to be applied on an application for summary judgment

13. In his decision in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 I.R. 607 Hardiman J. identified the question which he considered a judge presiding over a contested application for summary judgment should ask himself or herself. The question to be answered is "whether it is very clear that the defendant has no case"? Given the issues for consideration on this appeal it is not necessary to dwell further on the extensive jurisprudence which governs this area of law which oftentimes has to be considered given that it may be germane having regard to the specific circumstances of an individual case.

14. To succeed on his appeal before this court it is accordingly necessary for Mr. Fox to demonstrate that the High Court judge was in error when he concluded on the evidence before him that he had not demonstrated a bona fide defence to Danske's claim.

Discussion and Decision

15. The first matter that is critical in the context of this appeal is that Danske brings the within proceedings based upon the loan facility afforded to Mr. Fox on the 15th November 2012. That agreement required the borrower to repay the entire sum thereby made available to him within twelve months. The evidence before the High Court established that as of the 27th February 2014, more than twelve months after Mr. Fox executed that agreement, a sum of €1,478,527.42 remained outstanding. That being so the fact that Mr. Fox had made regular and significant repayments pursuant the earlier facility of the 8th May 2007 cannot afford him any defence to Danske's claim. When he signed the loan facility on the 15th November 2012 he committed himself to repaying the entire sum within 12 months, an agreement he should not have executed if he knew he would be unable to meet the terms thereby imposed. Further, while Mr. Fox makes a bald assertion that the bank restructured his loans without his consent or agreement in November 2012 that is a bald assertion unsupported by any credible evidence and is untenable in circumstances where he accepts that he knowingly executed that loan facility which contractually committed him to repay the loan within twelve months.

16. Insofar as Mr. Fox maintains that he has a *bona fide* defence to the proceedings because Danske without his consent removed funds to the extent of €21,291.10 from his loan account, that is also a bald assertion that was unsupported by any credible evidence. He did not produce any banking documentation to support this assertion as would be expected of a party seeking to rely on such alleged wrongdoing. Further, in response to this assertion by Mr. Fox, Mr. Paddy Kennedy on behalf of Danske, in an affidavit sworn on the 12th February 2015, exhibits a copy of Mr. Fox's loan account Number 951991 50010391 for the period commencing February 2014 to demonstrate that €21,297.10 was not removed from that account as alleged by Mr. Fox and goes on in that affidavit to explain how the sum of € 1,472,996.95 was then due and owing having regard to sums credited to Mr. Fox's loan account both prior to and following the commencement of the proceedings.

17. For the aforementioned reasons, I am satisfied that High Court judge was correct in his conclusion that Mr. Fox had not demonstrated the existence of a *bona fide* defence to the proceedings and did not err in law or in fact when he granted judgment in favour of Danske in the sum of €1,472,996.95. Accordingly I would dismiss the first of Mr. Fox's appeals.

18. It is perhaps worth stating that even if Mr. Fox had been able to establish an arguable defence based on the alleged withdrawal from his loan account without his consent of the sum €21,291.10, that would not have resulted in the entire claim being sent forward to a plenary hearing. The High Court judge would have been obliged to grant judgment against Mr. Fox for that part of the claim to which he was satisfied no arguable defence had been advanced and would likely have remitted Danske's claim for the contested €21,291.10 for further hearing in the Circuit Court.

Mr. Fox's claim against Danske (High Court Record Number 2014/7584)

19. Mr. Fox commenced the abovementioned proceedings in August 2014. He maintains those proceedings against the receiver and Danske.

20. In his statement of claim Mr. Fox claims, *inter alia*, damages for breach of contract, negligence, breach of duty and breach of statutory duty on the part of the defendants. He maintains that Mr. McDonnell's appointment as receiver was unlawful and he also claims an entitlement to an injunction restraining the defendants from offering the properties over which Mr. McDonnell was appointed as receiver for sale.

21. The principal claims advanced by Mr. Fox in his statement of claim delivered on the 15th December 2014 are as follows:-

(i) That Danske mismanaged and misapplied his monies in administering his bank accounts.

(ii) That Danske impermissibly altered his loan facility of May 2007 and converted the same into a structured term loan on the 15th November 2012.

(iii) That neither of the mortgages executed by him gave Danske the right to appoint Mr. McDonald as receiver over his properties and accordingly his appointment is unlawful.

(iv) That Mr. McDonald's appointment was unlawful because it was not under seal in accordance with s. 64 of the Land and Conveyancing Law Reform Act 2009.

22. In his defence the receiver maintains that the statement of claim discloses no cause of action against him while Danske, in its defence, denies all wrongdoing and maintains that Mr. McDonald was lawfully appointed.

23. Mr. Fox's proceedings came on for full hearing on the 14th July 2016 when the High Court judge dismissed his claim and made an order rendering him liable for the defendant's costs when taxed in default of agreement. It is from that decision that this appeal is brought.

Mr. Fox's appeal against the dismissal of his claim.

24. Having regards to his grounds of appeal against the receiver, the onus of proof rests upon Mr. Fox to demonstrate that the High Court erred in law or in fact when she concluded:-

(i) that he was validly appointed;

(ii) that he had the power to appoint an auctioneer;

and

(iii) that he enjoyed a power of sale.

25. For my part I am not satisfied that Mr. Fox has discharged the aforementioned burden. It is in disputable that the 2007 mortgage by virtue of Clause 6 (2) gives power to the mortgagee to appoint a receiver and under Clause 6(3) the receiver so appointed is given a power of sale. I do not consider it necessary to set out the clauses in full. Clause 6 (2) provides "that the powers of sale and of appointing a receiver conferred on mortgagees by the Conveyancing and Law of Property Act 1881 apply to these presents"... and "are exercisable by the Bank at any time after demand made by the Bank". Clause 6.3 (ii) provides, inter alia, that the receiver shall have the power "to sell the mortgaged property in such manner and generally upon such terms as he thinks fit".

26. Likewise, under Clause 7.12 of the 2012 mortgage the bank has an entitlement to appoint a receiver and Clause (7.17) affords the receiver a power of sale.

27. The question that next must be considered is whether there was evidence to support the trial judge's conclusion that the receiver was validly appointed.

28. The respective deeds of appointment were authorised on the bank's behalf by Michael Leonard and Victoria Byrne. Mr Leonard gave oral evidence before the High Court to the effect that they were both authorised officers of the bank for the purpose of executing the deeds of appointment.

29. In the present case the 2007 mortgage provides that the powers of sale and of appointing a receiver conferred on mortgagees under the Conveyancing and Law of Property Act 1881 shall be exercisable by the Bank and s. 24(1) of that Act entitles the mortgagee under its hand to appoint such a person as they consider fit to be a receiver. Thus, in the present case there was no mandatory requirement that the receiver be appointed by deed made under the seal of Danske Bank.

30. As for the 2012 deed of mortgage, clause 7.12 specifically permits the Bank to appoint a receiver "under the hand of any officer, manager or other nominated person of the bank".

31. The Deeds of Appointment were both signed on behalf of Danske Bank by Michael Leonard and Victoria Byrne as "authorised officers pursuant to power of attorney" and a certified copy of the power of attorney was proved in evidence by Mr Leonard as is sufficient to comply with s.21 of the Powers of Attorney Act 1996. That being so there can be no challenge to the validity of the Deeds of Appointment based upon the manner of their execution. I should add that Mr. Fox in a written submission sought to argue also that the appointment of the receivers was invalid because the power of attorney under which the deed of appointment was signed was not filed or deposited in the Central Office of the High Court as is provided for in O. 78 of the Rules of the Superior Courts. However, Mr. Fox is mistaken in thinking that a power of attorney is required to be so filed or deposited before it can be acted upon, or proven in court. Section 21(1) of the Powers of Attorney Act, 1996 provides:

"21(1) A power of attorney may be proved by the production of the original instrument or of a copy which:-

(a) is certified by the donor of the power or by a solicitor or member firm (within the meaning of the Stock Exchange Act, 1995), or in such manner as the court approves, to be a true copy of the original, or

(b) where the instrument has been deposited in the Central Office of the High Court pursuant to section 22 is attested in accordance with that section."

32. It is clear from this section that a power of attorney may be so deposited, but it is not required to be deposited in the Central Office. Paragraphs (a) and (b) above provide alternative methods whereby a power of attorney may be proved. In this case the powers of attorney were proven in accordance with (a). Accordingly there is no invalidity in the appointment of the receiver as contended for by Mr. Fox under this argument.

33. In the aforementioned circumstances, having regard to the relevant statutory provisions and the evidence adduced by Mr. Leonard, it cannot be stated that the High Court judge erred in law or in fact when she concluded that the receiver was validly appointed and that his appointment did not need to be made by deed under the seal of the bank.

34. As already stated, once the High Court judge was satisfied that the receiver was validly appointed, she cannot, having regard to the provisions of Clause 6 and 7 of the respective mortgages, be faulted for concluding that the receiver enjoyed the power of sale.

35. As to the receiver's entitlement to appoint an auctioneer that entitlement is to be found in clause 6.3(ii) of the 2007 mortgage as it provides that the receiver is permitted "to sell the mortgaged property in such manner and generally upon such terms and conditions as he thinks fit". That clause is one which clearly gives the receiver authority to appoint an auctioneer to market and sell the property. Further, even if there was any doubt as to the receiver's entitlement to appoint an auctioneer by reference to this particular clause it has to be remembered that the receiver is under a duty to act in good faith. That being so, in my view, the appointment of an auctioneer for the purposes of proper marketing and sale in order to secure a fair market value, is well within his competence and entitlement. Indeed, if the receiver failed to take professional advice concerning the sale of a mortgagor's property of the type concerned in these proceedings, it might be argued that he was in breach of his statutory obligation to the borrower to obtain the "best price reasonably obtainable" when exercising a power of sale on behalf of a mortgagee: see s. 103(1) of the Land and Conveyancing Law Reform Act 2009.

36. Similarly, clause 7(17) of the 2012 mortgage permits the receiver extensive latitude in terms of the appointment of third parties to assist him in his role and is one which supports his entitlement to appoint an auctioneer for the purposes of assisting with the marketing and sale of the premises.

37. As to Mr. Fox's claim in these plenary proceedings that Danske mismanaged and misapplied his monies in administering his bank accounts and impermissibly altered his loan facility of May 2007 and converted the same into a structured term loan on the 15th November 2012, those are issues which were raised by him in his efforts to defend the Summary Summons claim and were determined against him by Noonan J when he granted judgment on the 4th April 2016. In circumstances where Mr. Fox's appeal against that judgment has been unsuccessful those claims cannot avail him in these proceedings.

38. For all of the aforementioned reasons I would dismiss this the second of Mr. Fox's appeals.