THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 98

Court of Appeal Record No. 2014 583

Supreme Court Record No. 408/2012

(Article 64 Transfer)

Peart J.
Irvine J.
Mahon J.
Between

Irish Life & Permanent Plc Trading as Permanent TSB

Plaintiff/Respondent

- and -

John O'Mahony

Defendant/Respondent

Judgment f Mr. Justice Michael Peart delivered on the 8th day of May 2015

1. By Order of the High Court (Ryan J. as he then was) the plaintiff/respondent ("the Bank") obtained summary judgment against the defendant/appellant ("Mr. O'Mahony") for the sum of €927,463.08 together with an order for costs, those to be taxed in default of agreement.

2. Mr. O'Mahony, having been duly served with the Bank's Summary Summons, entered a personal appearance to the proceedings on the 11th January 2011, and has represented himself before the High Court, and again on this Appeal.

3. In response to the Bank's Notice of Motion dated 6th May 2011 seeking liberty to enter final judgment against him for the amount due on foot of certain borrowings, Mr. O'Mahony filed a number of replying affidavits in which he first of all contended that the Bank was not entitled to the judgment that it was seeking since it has failed to properly prove its debt; and secondly, in so far as the Bank had purported to prove the sums due by means of the copy documentation exhibited by Remco Appel in his affidavit grounding the Notice of Motion dated 6th May 2011, it had failed to comply with the 'best evidence rule' since the originals of such documentation were available to the Bank and had not been produced to the Court. Mr. O'Mahony had sought certain documentation from the Bank by various letters, copies of which he exhibited in his affidavits and these had not been provided by the Bank.

4. Apart from objections that the Bank had not properly proven the amount claimed to be due, Mr. O'Mahony set forth in his replying affidavits a number of grounds which he submits disclose a *bona fide* defence to the Bank's claim such that the application for liberty to enter final judgment should be adjourned to a full plenary hearing.

5. Having had the contents of the affidavits opened to him, and having heard any submissions that were made both by the Bank and by Mr. O'Mahony, Ryan J. concluded that it was clear that no *bona fide* defence was disclosed in the replying affidavits and that the Bank was therefore entitled to judgment in the amount claimed to be due.

6. The grounds which Mr. O'Mahony had contended showed a *bona fide* defence to the Bank's claim can be summarised as follows:

> (a) There ought to be a set-off between the amount claimed to be due by the Bank, and the amount or value of the security held by the Bank, that this claim for a set-off amounted to a defence to the claim, and that until such time as the value of the security was ascertained, the Bank was estopped from continuing with the proceedings.
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> (b) Since the redemption date specified in the mortgage forming the Bank's security for the debt has not passed, the Bank was estopped from bringing, or continuing, proceedings to recover the debt, and that in so far as the Bank claimed that there was a breach of the terms and conditions of the facility letters under which the monies were advanced, the terms of the mortgage deed prevail.
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> (c) The mortgage deed being the Bank's security was not validly executed, since it pre-dates the commencement of the Land and Conveyancing Law Reform Act, 2009, and in particular section 64 thereof which abolished the requirement that a deed by an individual had to be sealed, and that the mortgage in question is not sealed.
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> (d) The mortgage created by the Bank is not a legal mortgage, but rather an equitable mortgage entitling the Bank, therefore, to equitable remedies only, and that the Bank cannot seek legal remedies on foot of same.
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> (e) The bank has entered into a securitisation agreement with a third party special purpose vehicle in respect of, *inter alia*, Mr. O'Mahony's borrowings, and therefore no longer has any entitlement to the recovery of such loans.
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> (f) The Bank may not obtain judgment for the amount owed by Mr. O'Mahony because it cannot be exposed to an event of default by him since it has granted a Charge to the Central Bank, and further that by granting such Charge the Bank has committed a regulatory breach by not having obtained his prior consent.
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> (g) Given the pre-condition to any drawdown of a facility that the Bank must value the security being offered, and the fact that in this case the Bank satisfied itself as to the value thereof, the par value of the security must always be accepted by the Bank in full and final settlement of the debt owed to the Bank.

(h) The Bank is guilty of reckless lending, disentitling it to recover judgment for the amount if any such loans.

7. The trial judge, having heard and considered Mr. O'Mahony's submissions and those made on behalf of the Bank, unsurprisingly concluded that none of these grounds constituted a *bona fide* defence to the Bank's claim.

8. Ground (a) is simply misconceived. No question of set-off arises as a matter of law unless there is money owed to the plaintiff by the defendant, and money owed by the plaintiff to the defendant. In the present case it is not contended that the Bank owes any money to Mr. O'Mahony. The idea that the value of the security must be set-off against the borrowings is simply wrong.

9. Ground (b) is equally devoid of any merit, given that the bank is not relying on its security in these proceedings. It is simply seeking judgment for the amount owing on foot of monies lent.

10. Ground (c) lacks any relevance to the proceedings herein for the same reason as at (b) since the mortgage is not relied upon in the present proceedings.

11. Ground (d) is irrelevant for the same reason as at (b) and (c).

12. Ground (e) does not provide any possible basis for the defendant to contend that he may have a *bona fide* defence to the plaintiff's claim. It has been averred in the affidavits sworn by Hugo Smith, a Manager of the Bank who works in the Legal & Securities section, that Mr. O'Mahony's loans are not part of any securitisation agreement, and remain with the Bank, and this is confirmed by Miriam Waldron, who is Head of Securitisation at the Bank, who goes on to say that even if these loans were part of any such agreement it would not be a barrier to the Bank to recovery by the Bank, since, *inter alia*, under any such agreement the legal title to the loan would remain with the Bank.

13. Ground (f) is equally unarguable. Even if Mr. O'Mahony is correct that a charge has been granted to the Central Bank over the assets of the Bank, it has not been established even to the low threshold of arguability on a motion for judgment that this would act as a bar to recovery by the Bank, particularly in the absence of any suggestion even, not to mention any evidence, that any such charge may have crystallised.

14. Ground (g) is unarguable, and amounts to a submission that the loans to Mr. O'Mahony are non-recourse to him, and that the Bank must be confined in their recovery efforts to the value of the security upon realisation. That simply cannot be the case without a specific and clear non-recourse provision in the loan agreements, and none has been referred to.

15. Ground (h) also fails completely for the reason submitted by the Bank, namely that there is no tort of reckless lending. There is no authority for the proposition that because with the benefit of hindsight a loan ought not to have been made to the borrower the amount thereof is irrecoverable. It is an unarguable point.

16. For these reasons, this Court is completely satisfied that none of the grounds offered by way of *bona fide* defence to the Bank's claim in the High Court meets the threshold of arguability required to be overcome by a defendant who seeks to have a claim against him adjourned to a plenary hearing. In the present case it is very clear that none of the defences offered by Mr. O'Mahony could possibly succeed, and the High Court judge was correct in giving judgment to the Bank as sought.

17. On this appeal Mr. O'Mahony has introduced some new grounds of appeal. While, as already stated above, he averred in his replying affidavits in a general way that the Bank had failed to properly prove its debt, and that it had failed to provide him with certain documentation which he had sought, and had not produced to the Court the originals of certain documents which he felt should be produced, he had not stated, as he now does on this appeal, that the affidavits sworn by the Bank in relation to the securitisation issue are hearsay and not therefore in compliance with Order 40, rule 4 RSC, or that the affidavit of debt relied upon by the Bank did not comply with the requirements of the Bankers Books Evidence Acts 1879-1989.

18. Since the appellant has at all times been self-represented in these proceedings, this Court has allowed him some leeway, particularly where the Bank through its Counsel was in a position to deal with the new grounds in the course of the appeal. But the rules are clear that a ground not argued in the Court below cannot be argued as part of the appeal except in certain very limited circumstances which in this case do not exist.

19. In his written submissions filed by leave of the Court on the 15th February 2015 the appellant has asserted that in circumstances where "the denial of the debt has been maintained since the commencement of proceedings" (para. 3.4) and "the debt and loan were denied by the defendant in all affidavits" (para. 3.5), mere *prima facie* proof of the debt is insufficient proof of same. Firstly, the appellant is not correct to so aver. None of his replying affidavits deny the debt. In his first affidavit sworn on the 19th October 2011 he states *that "the amount stated in affidavit of Remco Appel is in my belief incorrect".* That is not a denial of the loans or the debt. In his second affidavit sworn on the 5th December 2011 he states *"I deny the balances due as stated by Remco Appel. I require PTSB to prove the actual sum owing…".* That is not a denial of the loans or the debt. In his third affidavit he states *"Subject to proof of the debt claimed by the plaintiff in accordance with the 'best evidence rules' I say and believe in any event the plaintiff is not entitled to recover the debt".* That is not a denial of the loans or the debt. In his fourth affidavit the same paragraph is reproduced. Nowhere in any of these affidavits has Mr. O'Mahony said that he did not borrow the money or that no monies are owed to the Bank on foot of the loans. He makes a number of points as to why he considers that the Bank is not entitled to recover the amount it lent to him, but those must not be seen as a denial of the debt as stated in his said submissions.

20. In such circumstances, this Court is satisfied that the affidavit of debt sworn in support of the Bank's claim is sufficient for the purpose of proving the debt on the motion seeking summary judgment - subject to the argument only now being raised by Mr. O'Mahony in relation to the Bankers Books Evidence Acts which will be addressed shortly.

21. Mr. O'Mahony has also submitted that the affidavit sworn by Miriam Waldron in answer to his securitisation point, and the affidavit of Keith Brady sworn in response to Mr. O'Mahony's replying affidavit sworn on 19th October 2011, offend against the rule against hearsay and are not in compliance with Order 40, rule 4 RSC.

22. The point which Mr. O'Mahony makes in relation to Ms. Waldron's affidavit is that at paragraph 4 thereof she states that she has been advised by Donal O'Kelly & Co, the Bank's solicitors, that the issue of securitisation does not arise in these proceedings. That is the only averment with which he takes issue on the basis that her averment is hearsay. He submits that the trial judge ought not to have had regard to her affidavit because this paragraph contains hearsay evidence.

23. However, even if one paragraph contains hearsay evidence, there is no reason to exclude the entire affidavit if it is otherwise

acceptable. Ms. Waldron as Head of Securitisation at the Bank was clearly in a position to state the position with regard to securitisation, and the fact that Mr. O'Mahony's loans were not part of any securitisation agreement. The sentence about which Mr. O'Mahony complains on the basis of hearsay is unnecessary. However, its inclusion, though hearsay, cannot defeat this application.

24. The complaint made in relation to the affidavit sworn by Keith Brady is in relation to paragraph 2 of his affidavit. He makes the same complaint in relation to that paragraph as he made in relation to paragraph 4 of Ms Waldron's affidavit. Paragraph 2 of Mr. Brady's affidavit states:

> "I am referred to a replying affidavit of the defendant sworn on 19th of October 2011. Most of the items referred by him [sic] are not appropriate to a bankers claim on foot of a loan. Insofar as the defendant refers to 'validation of the debt/the actual accounting' the figures are already set out in the grounding affidavit of Remco Appel and I have brought them up to date in this affidavit. There is no 'invoice' as this is not a sale of goods claim. Nor is it usual to have a certified executed contract. I am advised by the bank's solicitor that the contract is to be found by reference to a letter of offer and the drawdown of the monies by the borrower on foot of the terms set out therein." [emphasis added]

Clearly it is the final underlined sentence of this paragraph about which Mr. O'Mahony complains on the basis of hearsay, and for the same reasons as set out in the previous paragraph in relation to the same complaint in relation to Ms Waldron's affidavit. In so far as the final sentence is hearsay the defendant is correct. But this Court is satisfied that its unnecessary inclusion does not disentitle the plaintiff to judgment.

Bankers Books Evidence Acts 1879 – 1989:

25. This is a point that was not raised before Ryan J. in the High Court. Neither was it raised as a ground of appeal in the original Notice of Appeal filed in the Supreme Court, nor indeed in the Amended Notice of Appeal which Mr. O'Mahony was permitted to file by order of the Supreme Court dated 12th July 2013. Nor was it referred to in written legal submissions filed by Mr. O'Mahony on the 1st November 2013, nor in his further written submissions which he was permitted to file by order of this Court made at a directions hearing on the 4th December 2014, following the transfer of the appeal to this Court pursuant to Article 64 of the Constitution. The first occasion on which this point is raised was in what he called his *'Aide Memoire'* which he handed to the Court and to the other side, and from which he read for the purpose of assisting him to make his submissions to this Court. No doubt the reason for this is that the decision relied upon for the submission, namely that of Cregan J. in *ACC Bank Plc v. Byrne and O'Toole* [2014] IEHC 530, was delivered only on the 31st July 2014. Nevertheless, Counsel for the Bank made arguments to the effect that in so far as it was necessary to prove its debt on an application for summary judgment in the High Court, the Bank had done so in a way which complied with all reasonable and normal requirements, and in compliance with the requirements of the Bankers Books Evidence Acts 1879 – 1989, and that this was particularly the case where at no point in any replying affidavit did Mr. O'Mahony seek to argue that he had not applied for and drawn down the loans in question, or that he had defaulted in relation to the repayment of same, or in any way denied that the money borrowed was repayable. As already referred to, his replying affidavits had raised an issue only as to the correct amount owing to the Bank.

26. These are adversarial proceedings between the Bank and Mr. O'Mahony. The issues which arise for determination in the High Court are those issues raised by the parties. As far as Mr. O'Mahony's case is concerned the issues which were required to be determined in the High Court and which were the subject of the determination of Ryan J. were those raised by him in his replying affidavits, and whether those issues established that he had a bona fide defence to the Bank's claim. The judge decided that none of those issues raised by him met that threshold for the purpose of adjourning the case to a full plenary hearing. It is that determination which is the subject of the present appeal. The grounds of that appeal are those contained in the original Notice of Appeal filed by Mr. O'Mahony, and the Amended Notice of Appeal filed on the 23rd July 2013.

27. The issue as to whether or not the Bank has complied with the requirements of the Bankers Books Evidence Acts 1879 – 1989 is an issue which Mr. O'Mahony could have raised before the High Court. The fact that the judgment of Cregan J. which he now seeks to rely upon was delivered in another case in July 2014 does not mean that it was not a point which Mr. O'Mahony could have raised. He did not do so. The fact that he was at all times representing himself does not mean that different and more favourable rules of procedure apply to him. All litigants, whether legally represented or not, must conduct their litigation by the same rules, although a Court will always give such assistance to an unrepresented litigant as may seem fair and appropriate. Nevertheless the same rules must apply to everybody.

28. In the present case, Mr. O'Mahony has failed to comply with two rules in particular. The first is that contained in Ord. 58, r, 4 RSC which provides that the Notice of Appeal *"shall in every case state the grounds of appeal and the relief sought … "*. Neither his Notice of Appeal nor his Amended Notice of Appeal stated or in any way referred to the ground now sought to be raised in relation to the Bankers Books Evidence Acts.

29. The second rule which would be offended if this Court was decide this issue on this appeal is not one found specifically in the Rules of the Superior Courts but is well-established by case-law, namely that an appellate court will not permit a party to raise on the appeal an issue that was not raised in the court below, except in some exceptional circumstances. The Court can usefully refer to the judgment of Finlay C.J. in *KD v. MC* [1985] I.R. 697 where at p.701 he states:

> *"It is a fundamental principle, arising from the exclusively appellate jurisdiction of this Court in cases such as this that, save in the most exceptional circumstances, the Court shall not hear and determine an issue which has not been tried and decided in the High Court. To that fundamental rule or principle there may be exceptions, but they must be clearly required in the interests of justice. This case can not, in my view, however, provide such an exception."*

30. The ground now sought to be relied upon is a new argument in relation to an issue which was not raised in the court below. Therefore it is not an issue which this Court should determine on this Appeal. The determination of the issue by this Court will have to await another case in which the issue is raised and fully argued in the High Court, and properly raised as a ground of appeal to this Court.

31. This Court is satisfied that the order of Ryan J. is correct, and that this appeal should be dismissed.