THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 109

Record Number 2017/276

Irvine J.
Hogan J.
Whelan J.

BETWEEN/

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

APPELLANTS /

PLAINTIFF

- AND -

TIM CAREY AND FINOLA COLGAN CAREY

RESPONDENTS /

DEFENDANTS

JUDGMENT of Ms. Justice Irvine delivered on the 23rd day of April 2018

1. This is an appeal brought by The Governor and Company of the Bank of Ireland ("the bank") against the judgment and order of the High Court, Barr J., of the 29th May 2017. By his order the High Court judge set aside a judgment obtained by the bank against Tim Carey and Finola Colgan Carey ("the Careys") on the 12th September 2016 in the Central Office for €597,435.44 and a further sum of €396 in respect of costs.

2. The bank maintains that the High Court judge erred in law and in fact in setting aside the judgment. It submits that the High Court judge did not find that the judgment had been obtained in an irregular manner. That being so, the trial judge was not entitled to set aside the judgment unless he was satisfied that the Careys had demonstrated the existence of a *bona fide* defence which had a real prospect of success. The bank asserts that the evidence advanced by the Careys did not support the existence of any such defence. I will return to the more detailed submissions of the parties later.

Background facts
3. The bank commenced the within summary summons proceedings on the 4th December 2013. The claim advanced was in respect of finance made available to the Careys pursuant to a letter of loan offer of the 5th August 2010 which the bank maintains the Careys accepted on the 2nd September 2010.

4. It is not disputed that a copy summary summons was served on the 7th January 2014. The Careys did not enter an appearance to that summons. However, extensive negotiations followed between the parties. For such purpose the Careys were represented by Mr. John Boylan, a financial advisor. It is common case that the bank, by letter of loan offer of the 15th December 2014, made an offer to re-finance the Careys' loans. They did not avail of that offer. The bank ultimately wrote three letters advising the Careys that if they did not sign the proposed replacement letter of offer it would proceed with its claim without any further notice.

5. A notice of intention to proceed was served by the bank on the 13th August 2015 but the Careys still failed to enter an appearance. Accordingly the bank obtained judgment on the 12th September 2016 pursuant to Ord. 13, r. 3. In March 2017 the bank then registered its judgment as a mortgage on five folios of land owned by the Careys in Westmeath.

6. On the 25th October 2016 the Careys brought an application to the High Court to set aside the bank's judgment.

Judgment of the High Court judge
7. The judgment of the High Court judge was delivered ex tempore on the 29th May 2017 and is to be found at pp. 38 to 44 of the transcript made available to this court. The principal findings of the High Court judge were as follows:-

> (i) the Careys had agreed in August 2010 that their existing loans would be re-structured into a loan agreement which would bear loan account number 62087236;
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> (ii) the Careys had accepted that they were given a copy of the summary summons wherein the amount claimed was clearly set out as was the requirement that they enter an appearance if they wished to dispute anything claimed therein. He acknowledged that the Careys denied that they had been shown the original or that it had been properly stamped;
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> (iii) service had been correctly endorsed on the original summons;
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> (iv) the Careys had effectively admitted their indebtedness to the bank and this was consistent with the negotiations which had post dated the service of the summons;
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> (v) there was evidence to suggest that the bank had countermanded the sale of seventy eight acres of land which the Careys' had proposed selling to reduce their indebtedness to the bank;
>
> (vi) a proposal put by the bank to the Careys to re-structure their outstanding debt in December 2014 had not been accepted;

(vii) the Careys had received the notice of intention to proceed on the 13th August 2015 but they had not been advised that once the period of one month referred to in that notice had elapsed the bank might, without any further warning, obtain judgment in the office;

(viii) the bank then waited almost a year before it marked judgment on the 12th September 2016.

8. Having heard the submissions of the parties, the High Court judge correctly set out the legal principles to be applied by the court on an application to set aside a judgment obtained in the Central Office. He then set about the task of applying those principles to the evidence on affidavit. From a reading of his *ex tempore* ruling, it would appear that the High Court judge was satisfied that the bank had complied with the technical requirements of the Rules of Court in obtaining judgment. However, he concluded that the negotiations between the parties may have lulled the Careys into a sense of complacency that proceedings would not be immediately activated against them, and the notice of intention to proceed had not alerted them to the risk that judgment might be marked against them without further warning. That being so he considered it would be unfair to allow the bank rely upon a judgment it obtained 13 months after service of the notice of intention to proceed.

9. The essence of the judgment is captured in the following three sentences from the judges ruling:-

> "And I think that the notice of intention to proceed, which is extremely brief in its terms, probably would not have indicated to them that, if they did not enter an appearance themselves immediately, albeit out of time, to the summons, that they would be under risk without any further notification at all to suffer the entire of the judgment sought in the summons being marked against them in the office. And I think that in those circumstances, it would be unfair to enable the plaintiff to rely on the judgment which it obtained in December 2016, some 13 months after service of the notice of intention to proceed and without any further indication at all to the defendants that any such draconian result was likely to befall them; that in these circumstances I think the defendants have just about put forward sufficient grounds to enable the Court to allow them have the relief sought in the notice of motion."

10. Having considered the transcript of his ruling, I am satisfied that the High Court judge did not address whether or not he considered the Careys had established a *bona fide* defence which had a real prospect of success. This approach is evident from the post script to his judgment wherein he stated that whilst the judgment obtained in the office would be set aside as the result of his order, it might well be the case that he was only postponing what he described at p.44 as "the evil day", when the Careys might have to pay the sum claimed together with continuing interest. It would thus appear that the High Court judge determined the motion on the basis that the judgment had been obtained irregularly notwithstanding the fact that he appeared satisfied that the bank had complied with the Rules of Court.

11. Before referring to the evidence which was before the High Court judge, I consider it appropriate to refer briefly to the principles to be applied on an application to set aside a judgment obtained in the Central Office in summary summons proceedings.

Principles
12. If a defendant can establish that the judgment under scrutiny was obtained irregularly then the court is obliged to set that judgment aside and it must do so regardless of whether the defendant had demonstrated that it had a *bona fide* defence to the claim advance. (See, for example, the decision in *EMO Oil Limited v. Willow Rock Limited t/a McCormack Fuels* [2016] IECA 200.)

13. If, on the other hand, the court on an application to set aside a judgment obtained in the Central Office is satisfied that it was obtained in a regular manner, the burden of proof is on the defendant to establish a *bona fide* defence which has a real prospect of success. That threshold is higher than the arguability test which applies on an application for summary judgment. (See the decision of Lynch J. in *O'Callaghan Limited v. O'Donovan*, Supreme Court, 13th May 1997). Another principle relevant to an application to set aside a judgment obtained in the Central Office is contained in the decision of Peart J. in AIB v. Lyons [2004] IEHC 129, a case in which he concluded that misapprehension on behalf of the defendant as to the process whereby judgment is obtained, does not mean that the court can treat the judgment as one which was obtained in an irregular fashion.

Appellant's submissions
14. Counsel for the bank submits that the High Court judge erred as a matter of law when he set aside the judgment it had obtained in the Central Office in circumstances where he did not identify anything irregular concerning the manner in which it had been obtained. The judge was clearly satisfied as to the manner in which the summons and notice of intention to proceed had been served. That being so, he was not entitled as a matter of law to set aside the judgment unless he was satisfied that the Careys had established a defence that had a real prospect of success. Counsel submits that it can be inferred from the judgment of the High Court judge, and in particular from the post script thereto, that he had considered the matters raised by way of a proposed defence on behalf of the Careys and had discounted them as likely to yield any result in the event of fresh proceedings been instituted by the bank. That being so he was not entitled to set aside the judgment as a matter of law.

15. Counsel submits that if this court accepts that the Careys did not establish, to the satisfaction of the trial judge, that the judgment was irregularly obtained that it must then consider for itself whether the matters advanced by Mr. Carey in his three affidavits demonstrate the existence of a defence which has a real prospect of success. In this regard, he submits that no such potential defence has been advanced.

16. Regarding the matters raised by the Careys as proposed grounds of defence to the bank's claim counsel for the bank argues:-

(i) it is clear from the letter of loan offer of the 5th August 2010 that the Careys signed that loan facility, contrary to what was stated by Mr. Carey in his second affidavit;

(ii) the fact that the loan facility of the 5th August 2010 was for a three month period cannot afford the Careys a defence;

(iii) three months after the execution of the loan agreement, the loan became repayable by the Careys on foot of a demand made by the bank;

(iv) while Mr. Carey in his first affidavit maintained that his liability and that of his wife on foot of the loan offer of the 5th August 2010 had been compromised by agreement between the parties on terms contained in a new letter of loan offer of the 15th December 2014 from which the bank had resiled the evidence clearly established, that notwithstanding three letters calling upon him to sign his acceptance to a loan offer on those terms, he had refused to do so;

(v) insofar as the Careys, in the course of argument on the appeal, had sought to rely on the fact that the bank had countermanded the sale of 78 acres of land which they maintained they had agreed to sell on foot of an agreement reached in December 2013, no such agreement had been contended for by Mr. Carey in any of his three affidavits. If he had done so the bank would have responded to such an assertion in its own affidavits. The agreement relied upon by Mr. Carey in his affidavits was that contained in the letter of loan offer of the 15th December 2014 and that letter post-dated by 11 months the instructions which Mr. Murtagh stated he received from the Careys to sell the land. Consequently, even if the bank had countermanded the sale of those lands it had not done so in breach of the agreement contended for, and

(vi) all other matters of proposed defence such as those pertaining to Elan and Diageo shares and prior commercial transactions between the parties were immaterial and extraneous to the bank's claim for summary judgment and could never provide any basis for a defence to the claim as made.

Respondents' submissions

17. Mrs. Colgan Carey on behalf of herself and her husband filed detailed written submissions with the court. She also made extensive oral submissions in the course of which she submitted that the High Court judge was correct as a matter of law and fact when he concluded that the judgment had been irregularly obtained. She submits that the trial judge was correct to so conclude for many reasons which include the following:-

(i) neither herself or her husband were ever shown the original summons by Mr. Mark Kelly, the summons sever. That rendered the proceedings defective and the subsequent notice of intention to proceed void;

(ii) the original summary summons was not sealed or stamped;

(iii) the affidavit of service was defective as it had to be re-sworn on the 20th April 2016;

(iv) service was not properly endorsed upon the summons as served;

(v) the copy of the summons served was not a true copy of the original;

(vi) in his second supplemental affidavit Mr. Colgan maintains that Mark Kelly in his affidavit of service of the 24th April 2016 incorrectly endorsed the date of service as the 7th January 2014 when it should have been the 10th January 2014 in circumstances where his affidavit advised that he had endorsed the summons three days after service;

(vii) that they did not appear to the summary summons because they knew the summary summons served on them was not a true copy of the original summons, and

(viii) that the affidavit of debt filed by the bank did not comply with Ord. 13, r. 18.

18. Mrs. Colgan Carey further submits that the affidavits filed to support their motion to set aside the judgment obtained by the bank disclosed a defence with a real prospect of success and that this court should be satisfied that this is so. She relies, *inter alia*, on the following matters:-

(i) their denial that they signed the letter of loan offer of the 5th May 2010;

(ii) they had entered into a three month contract with the bank in August 2010. Given the expiry of that period they no longer have any contractual obligations to the bank;

(iii) they had reached an agreement with the bank in December 2013 whereby they would sell 78 acres of their land and that the net proceeds thereof would be paid to the bank in discharge of their liabilities. The bank had unilaterally withdrawn from that agreement and had countermanded the sale;

(iv) insofar as the loan offer of the 15th December 2014 was concerned, they had not refused to sign that agreement. They were still negotiating with the bank when it entered judgment against them. The bank's solicitors, Ahern Roberts O'Rouke Williams, had failed to provide certain clarification which they had sought in a letter of the 4th August 2015.

Decision

19. Having considered the submissions of the parties I am satisfied that the High Court judge, having correctly set out the principles to be applied, fell into error as a matter of law when he set aside the judgment obtained by the bank.

20. In circumstances where the High Court judge did not identify any irregularities concerning the manner in which the judgment was obtained, he was not entitled to set aside the judgment unless satisfied that the Careys had established a *bona fide* defence which had a real prospect of success.

21. It would appear from his judgment that the trial judge considered it likely that the Careys had been lulled into some false sense of security, either by reason of the passage of time following the service of the notice of intention to proceed or as a result of some expectation that they would be given some further notification before the bank would seek to obtain judgment in the Central Office. However, the Rules of Court do not require that any such additional warning or notification be given. Accordingly, it was not open to the High Court judge to conclude, if that is what he did, that there was anything irregular in the bank obtaining judgment without further warning. Any such misunderstanding on the part of the Careys - a misunderstanding which was not, as it happens, contended for by them in their affidavits - provided no legitimate basis upon which the High Court judge might have treated the judgment as one which was irregularly obtained. This was, in any event, made clear by Peart J. in the course of his judgment in *AIB plc v. Lyons*. In that case judgment was obtained against the second named defendant in circumstances where her solicitor believed that before the plaintiff might obtain judgment it would have to issue a motion in that regard, the High Court judge stated as follows:-

"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."

22. No notice of cross appeal was served by the Careys concerning the findings of the trial judge regarding service of the summons upon the defendants. However, given that they are unrepresented I feel that I should briefly refer to a number of arguments which they advanced in order to make clear to them that the bank's judgment was obtained in a regular manner.

23. In the course of the appeal the court was presented with the original summary summons in these proceedings and had the opportunity of comparing it with the copy served on the Careys. Having scrutinised both documents I am fully satisfied that the copy served is indeed a true copy of the original. It is sealed, contrary to the assertions made by the Careys in their submissions and on affidavit. Further, while Ord. 5, r. 9 requires every originating summons to be sealed, it does not have to be stamped as is submitted on behalf of the Careys.

24. Insofar as the Careys submit that they were never shown the original summons when they were served with a copy, this assertion is not made on affidavit. Mr. Mark Kelly, summons server, on the other hand clearly states that he did so in his affidavit of service sworn on the 20th April 2016. I would further observe that there is nothing irregular about the affidavit of service by reason of the fact that it was not sworn until the 20th April 2016. There is no time limit within which the affidavit of service must be sworn. Further, the fact that a fresh affidavit had to be re-sworn because the Central Office would not accept the first affidavit sworn by Mr. Kelly, as the jurat on the document was unclear does not undermine in any way the validity of the affidavit sworn on the 20th April 2016.

25. The date of service endorsed by Mark Kelly on the affidavit of service i.e. the 7th January 2014 is correct. Mr. Kelly did not state in his affidavit of service, as is contended for by Mr. Carey in his third affidavit, that he endorsed the date of service three days after he served the summons. He stated that he endorsed the date of service on the summons later on the day upon which he served it, that being within the three day period permitted by the Rules of Court.

26. In his affidavit of service of the 7th January 2014, Mr Kelly also deposes to the fact that he showed the original of the copy summons to both Mr. and Mrs. Carey when they were served with the copy summons. That averment was never challenged.

27. It is accepted by Mrs. Colgan Carey that in the High Court she did not seek to argue that the summary summons had to comply with the provisions of Ord. 4, r. 12 of the Rules of the Superior Courts, an order which applies to a money lender or an assignee or a personal representative who sues for the recovery of money loaned. That being so she is not entitled to rely upon that rule in the course of this appeal. It is nonetheless worth stating that I am quite satisfied that the aforementioned order is of no application to the bank in the present proceedings who is not a "moneylender" for the purposes of that rule. It is clear from the other provisions of Ord. 4 that the reference to "moneylender" is in the context of the (now repealed) Moneylenders Acts and that it does not apply to a credit institution such as the bank.

28. I should also state that I am satisfied that there was nothing irregular about the period of time that was permitted to elapse between the service of the notice of intention to proceed and the bank marking judgment. That lapse of time does not offend any statutory provision or Rule of Court.

29. As to whether the bank's judgment was regularly obtained, I would make one final observation. Whilst much emphasis was placed on the Carey's letter of the 4th August 2015 concerning the loan offer of the 15th December 2014 wherein they stated that there were a few issues they needed to address before signing that letter, I consider that letter to be of no evidential value in the context of the present appeal. Clearly that letter, as a matter of courtesy, ought to have been replied to at some stage by the bank's solicitors. However, prior to that letter the Careys had received three letters from the bank dated the 27th April 2015, 5th June 2015 and 8th July 2015 making clear that "without further notice" proceedings would be re-commenced and progressed if they did not sign the loan offer. It must have been clear from those letters, the last of which post dates the Careys' letter of the 4th August 2015 that the bank had no intention of engaging further concerning the letter of loan offer of the 15th December 2014. It was a "take it or leave it" situation from the bank's perspective. Further, the notice of intention to proceed which was served a year after that letter made clear that the bank was not willing to enter into any further discussion regarding settlement of the proceedings. Thus, in my view, the bank was fully entitled to proceed to obtain judgment in the manner in which it did.

30. Having regard to all of the aforementioned I am quite satisfied that the High Court judge was correct when he concluded that the judgment had been regularly obtained. He was, however, in error in concluding that he might set the judgment aside because the Careys may have been lulled into a false sense of security by reason of the bank's actions. Having concluded that the judgment was regularly obtained he was only entitled to set the judgment aside if satisfied that the Careys had established a defence which had a real prospect of success. However, he did not do so and once again, by reason of that fact, erred in law.

Have the Careys demonstrated the existence of a defence which has a real prospect of success?

31. It now falls to this court to consider whether the evidence advanced by the Careys on affidavit demonstrate the existence of a defence which has any real prospect of success.

32. Whilst the Careys denied they signed the loan offer of the 5th August 2010 it is clear that when Mr. Brendan Murphy, on behalf of the bank, produced the signed copy of that agreement as an exhibit they did not seek to challenge that evidence. Indeed, they would appear to have embraced that agreement in so far as on this appeal Mrs. Colgan Carey argues that the loan offer they accepted from the bank of the 5th August 2010 was one confined to a three month period. Thus, she contends they have no contractual relations with the bank pursuant to which the bank may now claim recovery of the sums loaned on foot of that agreement. That submission, however, has no legal validity. Mrs. Colgan Carey is correct when she asserts that the loan agreement of the 5th August 2010 was for a period of three months. However, that does not have the legal consequences for which she contends. The bank is clearly entitled, after the expiration of the period of the loan and following demand made, to insist on repayment and if necessary to sue to recover the amount outstanding.

33. The Careys have set out no other basis upon which they might challenge the sum claimed by the bank or its entitlement as a matter of law to seek its recovery.

34. Insofar as the Careys in their oral submissions sought to rely upon a settlement agreement reached with the bank in December 2013 as a result of which they state they instructed their auctioneer to sell 78 acres of land, that is not the case they made on affidavit. The case made on affidavit was that the settlement agreement they wished to rely upon was that contained in the letter of loan offer of the 15th December 2014. Mr. Carey makes this clear in his affidavit of the 25th October 2016 where he states that the bank countermanded the sale of the aforementioned property in breach of the agreement which he specifically identifies as that contained in the exhibit "TC3". That document is the loan offer of the 15th December 2014. Accordingly, any reliance upon the

instructions giving to Mr. Murtagh to sell the 78 acres of land, which he states were received in January 2014, is misplaced as those instructions significantly predate the instruction which Mr Murtagh maintains he received from the bank.

35. Insofar as the Careys rely upon other banking transactions and agreements which pre-date the signing of the loan offer of the 5th August 2010, there is nothing in relation to those transactions to suggest that they could afford the Careys any conceivable defence to the present proceedings. The matters advanced in paragraphs 12 to 18 of Mr. Carey's second affidavit cast the net far and wide in an effort to capture circumstances that might form the basis of a defence to the bank's claim

36. Insofar as Mr. Carey asserts that the three month facility was used to provide the bank with extra security to support their borrowings, the Elan shares to which he refers were clearly held by the bank since 2007. Further, Mr. Carey appears to accept Mr. Murphy's sworn testimony that, contrary to Mr. Carey's belief, the shares had not been sold.

37. While the Careys contend that in some way the bank ought to have advised the court as to precisely what loans were being re-structured in the letter of loan offer of the 5th August 2010, that letter speaks for itself and there was no need for the bank to detail what was clear on the face of the document. Further, the fact that the claim is for a sum of money due on foot of loans that were re-structured, could never afford the Careys any ground of defence to such a claim. While he complains about being disadvantaged in some way by what the bank maintains was a pension backed loan made available in 2007, Mr. Carey does not explain the nature of the claimed disadvantage or how it could impact upon their liability to discharge the sums loaned on the 5th August 2010. Likewise it is hard to see how the fact that the bank gave the Careys a bridging loan in 2007 which they were to pay back within a year and which was in fact repaid with the 2010 facility, could afford them any defence to the bank's claim.

38. Mr. Carey fails to explain how the fact that the bank may have taken a lien on a portfolio of 5,640 Diageo shares owned by his wife could afford them a defence to the within proceedings. Further, it would appear from Mr. Murphy's affidavit that these shares were provided as security for a different loan namely that which is attached to account number 81984055. Further, the bank maintains that Mrs. Colgan Carey sold those shares following which €40,000 was lodged to reduce her liability on the aforementioned facility and the remainder was kept to pay capital gains tax. Whether or not the same were sold by the bank or Mrs. Colgan Carey in my view is not relevant. The shares were sold prior to the letter of loan offer of the 5th August 2010. Consequently, any misconduct on the part of the bank, and I am not accepting that there was any, could never afford the Careys any defence to the claim on foot of that letter of loan offer.

39. In all of the aforementioned circumstances I am satisfied that the Careys did not, in the three affidavits which they put before the High Court judge, discharge the onus of establishing that they had a *bona fide* defence which had a real prospect of success to the bank's claim for summary judgment.

Conclusion

40. On the evidence which was before him, I am satisfied that the High Court judge was bound to conclude, as in fact I believe he did, that the judgment which the bank obtained on the 12th September 2016 for the sum of €597,331.44 and a further sum of €396 in respect of costs, was regularly obtained.

41. Regrettably, for the reasons earlier stated in this judgment I am of the opinion that the High Court judge erred in law by proceeding to treat the judgment as one which was irregularly obtained by reason of the fact that the bank gave no further warning to the Careys of its intention to proceed to judgment in the Central Office following its service of the notice of intention to proceed dated the 10th August 2016 or by reason of the lapse of time between the notice of intention to proceed and the application to mark judgment.

42. On the facts before him, the High Court judge was obliged to treat the judgment as one which was regularly obtained and then proceed to address whether or not the Careys had, in the affidavits that they had filed, established the existence of a *bona fide* defence to the bank's claim which had a real prospect of success. Regrettably, the High Court judge did not address this issue. That being so, in light of the within appeal, it has been necessary for me to consider whether the order of the High Court judge should nonetheless be upheld by reason of the existence of such a defence.

43. For the reasons which I have detailed earlier in this judgment I am satisfied that the Careys did not discharge the requisite burden of proof. They have raised a multiplicity of issues and proposed defences none of which, when fully analysed, have any substance and, for this reason, in my view, the appeal must be allowed.