THE COURT OF APPEAL

[2019] IECA 24

Appeal No. 2014/1111

Peart J.
Whelan J.
Baker J.

BETWEEN/

ALLIED IRISH BANKS PLC

PLAINTIFF/

RESPONDENT

-AND-

LIAM HAZEL

DEFENDANT/

APPELLANT

- AND-

ALEX GIBBONS

DEFENDANT

JUDGMENT delivered on the 1st day of February, 2019 by Ms. Justice Baker

1. This is the appeal of the first defendant against the judgement of Birmingham J. delivered on 26 February 2014 granting the plaintiff respondent ("the Bank") judgment against the appellant in the sum of €290,225.17.

2. The claim of the Bank was made on foot of a guarantee in writing executed by the appellant and dated 22 October 2002 in support of the obligations of a company, Emerald Isle Properties Ltd ("the Company"), in respect of a loan of €1 million granted to the Company in August 2002 to fund the construction of holiday homes on a site in Co. Cork.

3. The appellant was a director, shareholder, and the company secretary of the Company.

4. A separate guarantee was executed by the second defendant, Alex Gibbons, then a solicitor in the firm of P.J. O'Driscoll & Sons, Bandon, Co. Cork, who was also a shareholder and director of the Company and with whom the appellant had a business relationship.

5. In each case, the guarantee was limited to the sum of €250,000 plus interest to the date of demand on the capital sum. Judgment has already been obtained against Mr Gibbons on foot of his guarantee in the sum of €200,000 by way of an agreed compromise figure.

6. The appellant does not deny that he executed the guarantee nor does he argue any of the mitigating factors sometimes pleaded in defence of a claim on foot of a guarantee, such as undue influence, duress, or mistake. The appellant acknowledges that the guarantee was given by way of security for the liabilities of the Company for the loan advanced in August 2002. He also acknowledges that the loan was advanced on foot of an agreement by the Company to create other and additional security in the form of a first legal charge over the development lands in Co. Cork, and that an undertaking to register the charge was given by the then solicitors for the Company, Messrs P.J. O'Driscoll & Sons, on 21 October 2002, executed by Mr Gibbons on behalf of the firm. It seems, in the events, that the charge was not registered, although in recent times, the Bank has obtained a well charging order over the lands and has now perfected its title to the security.

7. The appellant is a litigant in person and raises the following grounds of appeal:

> (a) that the trial judge erred in failing to take into account what he argues was the negligence of the Bank in failing to monitor the actions of Mr. Gibbons, who acted as solicitor for the Company and who failed to complete the formalities of registering the security against the Co. Cork lands or, indeed, to take steps to ensure or procure the completion of registration of the Company as owner of the lands;
>
> (b) that the trial judge erred in failing to allow the appellant to present his counterclaim in the course of the action. The appellant had counterclaimed for damages for negligence and breach of duty arising from the fact that Mr Gibbons failed to perform the obligations he undertook to the Bank and arising from the pleaded failure on the part of the Bank to inform the appellant that the title had not been perfected nor the first charge of the Bank registered against the folio. It was pleaded that the title difficulties gave rise to a loss of value in the holiday home development, and that the appellant had, to the knowledge of the Bank, agreed to purchase a residential unit in the development, the sale of which could not be completed, and as a result whereof, the appellant pleaded he had lost the value of a resale at the height of the property market.

8. In essence, the appellant argues that the Bank was negligent in failing to take steps to perfect the security or to procure that such steps would be taken by Mr Gibbons or another solicitor, and that the Bank owed a duty to him as guarantor of the liabilities of the Company to ensure that the security was in place and that the guarantee would not be called upon.

9. The appellant argues that the Bank had plenty of opportunity to ascertain that Mr Gibbons had failed to perform the obligations contained in his undertaking and that had the Bank moved to perfect its title and security at that point, the development would not have failed and it would have been unnecessary for recourse to be had to the guarantee.

10. The appellant argues that it must have been apparent to the Bank that a failure on the part of Mr Gibbons to complete his obligations was likely to impact upon the reliability of the security and, indirectly, on the secondary security provided by the guarantee.

11. The Bank relies primarily on the fact that the contractual documentation imposes no express duty or obligation upon the Bank in respect of the completion of any aspect of the security supporting the loan or in respect of the monitoring of the obligations on the part of Mr Gibbons. Reliance is placed on the express terms of the guarantee entered into by the appellant, and I propose to first consider those express terms.

The guarantee
12. The guarantee is in standard form and was made on 22 October 2002 in consideration of the Bank agreeing, at the request of Mr Hazel, to afford banking facilities to the Company as borrower. The limit of the guarantee was €250,000 together with interest from the date of demand until full discharge at the identified rate. The appellant executed the guarantee in the presence of Mr Gibbons as witness and the Company is identified as the borrower.

13. Clause 7 of the guarantee is material to the arguments raised by the appellant:

> "This guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by the Bank for all or any part of the moneys hereby guaranteed, nor shall such collateral or other security or any lien to which the Bank may otherwise be entitled or the liability of any person or persons not parties hereto for all or any part of the moneys hereby secured be in anywise [sic] prejudiced or affected by this present guarantee. The Bank shall have full power at its discretion to give time for payment to or make any other arrangement with any other such person or persons without prejudice to this present guarantee or any liability thereunder."

14. The singularity or separateness of the guarantee was, therefore, expressly agreed between the parties.

15. Clause 11 of the guarantee contains an important provision regarding any irregularity in any other security held or held by the Bank in respect of the borrowings of the Company:

> "So far as the law permits this guarantee shall be and continue to be binding and shall not be impaired or revoked nor shall the Guarantors liability hereunder be affected by reason of:
>
> 1) any failure of or irregularity defect or informality in the security given by or on behalf of the Customer or any other person in respect of the liabilities hereby secured or any part thereof; or
>
> 2) any failure of any other person to execute this guarantee or to grant any security in respect of the said liabilities or any part thereof […]".

16. Finally, clause 13 of the guarantee further provides that the guarantee was agreed to be treated as separate from any other security provided or agreed to be provided to the Bank by the Company:

> "This guarantee shall be in addition to and not in substitution for any other guarantee or security for the obligations of the Customer given by the Guarantor to the Bank."

Discussion on effect of guarantee
17. The literal meaning of these clauses does not give rise to any ambiguity, and indeed, the appellant does not argue that the clauses are ambiguous but, rather, than the guarantee has been rendered null and void as a result of what he describes as the fraudulent action of Mr Gibbons and his failure to comply with his undertaking.

18. There can be no doubt that, as a matter of contract, the failure on the part of the Company or its solicitors to perfect the security or any irregularity in that security did not have the effect of rendering the guarantee inoperative, and the parties to the guarantee expressly agreed that failure or defect in any other security did not revoke or impair the liabilities of the guarantor under the guarantee.

19. The combined effect, then, of clauses 7,11, and 13 of the guarantee was that the guarantee was to be treated and agreed to be treated by the parties as a separate and distinct form of security, not dependent upon the validity or effectiveness of any other security for the loan. Such conclusion must, as a matter of contract, mean that the appellant agreed the singular and separate nature of the guarantee executed by him, and that the failure to complete registration of the Bank as owner of a first charge on the Company's lands did not impact upon the entitlement of the Bank to enforce the separate security against him.

20. Therefore, on a contraction of the guarantee and as a matter of contract, the Bank and the appellant as guarantor agreed that the guarantee is not consistent with the argument made by the appellant that the guarantee was to be treated as secondary to and dependent upon the obligation on the part of the Bank to ensure that it was protected by a completed alternative or different security. The opposite arrangement was reached between the parties and, as a matter of contract, the appellant may not now reasonably assert that the failure to register a first legal charge on the lands of the Company can impact upon the enforceability or validity of the guarantee.

Duty of care and negligence of the Bank
21. The appellant argues that, as a matter of the law of negligence, the Bank owed him a duty of care to perfect its own security or take steps to supervise the performance by Mr Gibbons of his undertaking. He offers no authority in support of that proposition but, as a matter of first principle, it seems to me that the argument must fail. The Bank may have had an obligation to its own shareholders to police or otherwise supervise the performance of the undertaking given by Mr Gibbons to perfect the security, but that duty was not owed to the appellant, who must be seen as a stranger, in the contractual sense, to the giving of the undertaking by Mr Gibbons to the Bank.

22. Further, the argument that a duty of care exists or was breached must be seen in the context of the contractual agreement

between Mr Hazel and the Bank and is directly at variance with and is inconsistent with that contract.

23. Hamilton J. dealt with the issue giving his judgment for the Supreme Court in *Kennedy v. AIB* [1998] 2 IR 48, at p 56:

> "[W]here a duty of care exists, whether such duty is tortious or created by contract, the claimant is entitled to take advantage of the remedy which is most advantageous to him subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle the parties must be taken to have agreed that the tortious remedy is to be limited or excluded."

24. He considered the judgment of Lloyd J. in *National Bank of Greece SA v. Pinios Shipping Co (The Maira)* [1988] 2 Lloyds Rep 126 as authority for the proposition that, as held in his judgment in *Kennedy v. AIB*, at p 56:

> "[W]hen parties are in a contractual relationship their mutual obligations arise from their contract and are to be found expressly or by necessary implication in the terms thereof and that obligations in tort which may arise from such contractual relationship can not be greater than those to be found expressly or by necessary implication in their contract."

25. In my view the Bank's duty of care to perfect its own security for which the appellant contends must be judged in the light of these principles.

26. Further, I accept the argument made by counsel for the Bank that it was entitled to rely upon the undertaking given by Mr Gibbons. The appellant argued that the Bank, once it became aware through its direct communications with its local branch manager that the security had not been perfected, had a separate obligation to him to take such steps were necessary to complete the security

27. The primary problem I have with that argument is that the appellant did not give any evidence of the likely effect on the value of the properties at the time he communicated with the Bank of the difficulties of which he had become aware. Apart from this, and having read the transcript of the three days of evidence before Birmingham J., I am satisfied that the trial judge was entitled to come to the conclusion on the facts to which he came, namely that the actions and inactions of Mr Gibbons did not absolve the appellant from his obligations on foot of the guarantee. Furthermore, of relevance to the question of causation, the appellant and his wife were both involved in the management of the Company, and the appellant himself was the secretary of the Company, and had a long number of years' experience and knowledge derived from his work as a planning consultant/architect and surveyor. He must be regarded as having been well aware of the nature of the undertaking provided by Mr Gibbons, and the nature of the security agreed to be provided to the Bank. The appellant cannot be absolved by the inactivity of Mr. Gibbons from any loss that might have resulted from a failure on the part of the Company to itself take steps to perfect its title and complete the security.

28. In the course of his evidence in the High Court, the appellant, in response to a question in cross-examination, said that he carried out his responsibilities as secretary of the Company by relying on Mr Gibbons to perfect the title and the security. The evidence was that the appellant did know, at the time, that the title was not in the Company's name but remained in the name of the vendor for many years and, indeed, there was some evidence in the course of trial that the property was to be taken in the joint personal names of Mr Gibbons and the appellant, and not the Company, because of the direct financial contribution of the appellant to the purchase price of the land.

29. The appellant argues that, as soon as he became aware of the failure by Mr Gibbons to perfect the title and register the Bank's security, his new solicitors wrote on 23 February 2009 to the manager of the Bank of Ireland branch in Clonakilty, Co. Cork, and that he himself had acted with expedition and in a timely manner once he discovered the problems with the title. He did not adduce evidence in the High Court that the perfection of the title at that time and the completion of the Bank's security could or would have resulted in the Company being in a position to discharge some or all of the loan to the Bank, or could or would have enabled him to sell the holiday home he had agreed to purchase. It is common case that the Bank obtained judgment against the Company on 15 July 2011, in the sum of almost €1.5 million, after the Bank called in the loan. The demand letter to the Company was sent by the Bank on 20 July 2009 and demand on foot of the guarantee made on 6 August 2009. The financial crash and loss of property value was well, in train at that time.

30. It would seem clear that the appellant had instructed new solicitors and informed the Bank of the absence of good title, and the fact that its security had not been perfected, some seven years after the guarantee and the borrowings by the Company. In the course of cross-examination in the High Court, the appellant did accept that he himself had not, either in his role as shareholder or director, actively taken steps to perfect the title and he explained this in part by the fact that he had had a very good relationship with the respondent Bank for over thirty-five years. He did not accept, in the course of cross-examination, that the financial crash had already happened by the time his new solicitor had investigated the title and ascertained the difficulties which had prevented the Bank's security been registered. His evidence in that regard was fairly rejected by the trial judge.

31. An appellate court may not reverse a finding of fact by the High Court, unless it is established to its satisfaction that such finding was not supported by credible evidence before the trial judge. I am satisfied that the evidence before Birmingham J. did support his findings of fact, but also that he was correct in his approach to the legal question before him of the interpretation of the guarantee and the determination that the alleged failure of the Bank did not absolve the appellant from meeting his obligations thereunder. In my view, the trial judge had ample evidence to come to the conclusion that no causative link could be shown to exist between any alleged failure of the Bank and any loss of business opportunity or sale value.

Failure to deal with the counterclaim

32. The other ground of appeal is that the trial judge failed to permit the appellant to prosecute his counterclaim but a reading of the digital audio recording from 25 February 2014 makes it clear that the counterclaim was opened in full to Birmingham J. and that he considered the evidential issues giving rise to the counterclaim and permitted the appellant to argue the matters arising in the counterclaim which overlapped to a large extent with the matters raised in defence.

33. The argument now made by Mr. Hazel that the Bank had unlawfully retained the title documents to other property in his name at Lough Hyne, County Cork argued by the appellant as creating a factual difficulty which made it impossible for him to continue in his chosen profession was not canvassed before the High Court and may not form the basis of any appeal to this Court.

34. The issues raised in defence to the claim were broadly similar to or overlapped with the issues and facts on which the counterclaim relied, and I am satisfied that the trial judge did give due consideration to the matters raised in the counterclaim and correctly came to the conclusion that the counterclaim was not supported by the evidence.

Conclusion
35. In his *ex tempore* judgment, Birmingham J. expressed some sympathy for the appellant but nonetheless considered that the evidence did not support his counterclaim or the matters raised in defence. In the course of the trial, the appellant had described the circumstances in which he found himself as a "nightmare" and, in this Court, he described himself as been "perplexed" by the failure of Mr Gibbons to perform his obligations both to the Company and to the Bank the result of which was that he suffered catastrophic loss. His arguments that he is being punished for the failures of Mr Gibbons are not borne out by the evidence nor, indeed, by the plain language of the contract made between himself and the Bank by which he guaranteed the liabilities of the Company in a manner that expressly precludes the argument he now makes.

36. The appellant has failed to argue any legal principle which could support his argument that the Bank had an obligation to him as a trustee, or that the Bank owed him a fiduciary duty in regard to the borrowings. The guarantee, in its express terms, permits the Bank to call upon the appellant to discharge the amount guaranteed, and while I can have sympathy for the financial catastrophe that has befallen the appellant, he accepts that he entered into the guarantee for the purpose for which the Bank contends.

37. For these reasons the appeal must be dismissed.