THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 395

Record No. 2016/300

Peart J.
Whelan J.
McGovern J.

BETWEEN/

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF/RESPONDENT

- AND -

MARTIN SMALL

DEFENDANT/APPELLANT

JUDGMENT of the Court delivered on the 19th day of December 2018 by Mr. Justice McGovern

1. This is an appeal against a judgment of MacEochaidh J. delivered on the 3rd June 2016 in which he granted summary judgment to the respondent in the sums of €408,079.93 and €2,212,042.93 against the appellant. The High Court judge remitted for plenary hearing a disputed amount of €400,000 being part of the sum claimed by the respondent in the summary summons. The claim arose on foot of two facility letters. The first was dated the 24th October 2005 and was for a sum of €1,038,500 of which a balance (including interest) of €408,079.93 remained outstanding. That loan had an account number 19056151 and was referred to in the Special Endorsement of Claim as "Loan Account No. 1". The other facility letter was dated the 21st November 2007 in respect of a sum of €2,163,978. It had a loan account number of 85277016 ("Loan Account No. 2"). As will appear later in this judgment two facility letters dated the 21st November 2007 issued but significantly both the amount of the loan and the account number are the same in both facility letters.

Legal test for summary judgment
2. The test for summary judgment is now so familiar and well established that it almost otiose to repeat it. In *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, at p. 7, McKechnie J. having reviewed the relevant case law on the topic stated at para. 9:-

> *"From these cases it seems to me that the following is a summary of the present position:-*
>
> *(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;*
>
> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;*
>
> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;*
>
> *(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;*
>
> *(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;*
>
> *(ix) leave to defend should be granted unless it is very clear that there is no defence;*
>
> *(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;*
>
> *(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;*

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

3. In more recent times the Supreme Court has re-iterated the test in *Irish Bank Resolution Corporation (In Special Liquidation) v. McCaughey* [2014] 1 I.R. 749 in which the court re-affirmed the judgment of Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 where he said at p. 623:-

> *"…the fundamental questions to be posed in an application such as this remain: is it "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?"*

4. It is not sufficient for a defendant in summary proceedings to set up a defence based on mere assertions without offering some evidence in support of those claims.

5. The appellant relies on *ACC Bank Ireland plc v. Fahey & Ors.* [2010] IEHC 41 as that was a case where the defendants (as in this case) denied signing the facility letter in issue and the matter was remitted to plenary hearing. In the appeal before this court there are two facility letters in issue both dated the 21st November 2007 and the appellant maintains that he did not sign one of them. Insofar as the ACC case is concerned it is worth noting that Kelly J. (as he then was) approved a passage from *Chitty on Contracts* (29th edition) at para. 38-229 where the author stated:-

> *"If money is proved, or admitted, to have been paid by A to B then in the absence of any circumstances suggesting a presumption of advancement, there is prima facie an obligation to repay the money; and accordingly, if B claims that the money was intended as a gift, the onus is on him to prove this fact."*

Background

6. A curious feature of this case is that the respondent issued two facility letters to the appellant and his former partner (now deceased) on the 21st November 2007. The two facility letters were almost identical save that one of them contained four **"Conditions Precedent to Drawdown"** and the other contained six conditions. For ease of reference the respective facility letters will be referred to as the "four condition facility" and the "six condition facility", respectively. During the course of the High Court hearing, counsel for the appellant informed the court that his client was not challenging "the accounting process" (see transcript, 2nd June 2016, p. 42, lines 17-19). By this I understand him to mean that the appellant was not disputing the figures relied on by the respondent in calculating the debt. The respondent sued on foot of the four condition facility and the appellant's counsel agreed that it was suing on the correct contract while at the same time drawing the court's attention to the six condition facility. The position adopted on behalf of the appellant in the High Court appears to have been somewhat inconsistent because on one hand counsel suggested that the respondent may have sued on the wrong contract and on the other hand agreed that it had sued on the correct contract, namely the four condition facility (see transcript, 2nd June 2016, pp. 43, 44 and 56). At all events what ultimately happened was the High Court judge entered judgment on behalf of the respondent on the basis of the six condition facility while remitting part of the claim (€400,000) to plenary hearing. It is clear from the transcript of the High Court judgment that the judge identified that sum by reference to condition six. (See transcript 3rd June 2016, p. 8, lines 20-29).

7. A comparative study of the two facility letters of the 21st November 2007 shows that apart from the additional **Conditions Precedent to Drawdown** in the six condition facility the only other difference is to be found under the heading **"Terms of Facilities and Repayment"** on p. 1 of each facility letter. In the four condition facility the clause reads:

> "Exact repayments will be determined on date of drawdown based on the interest rate then prevailing:
>
> 1. The Loan is to be repaid in full within 12 months from the date hereof"

In the six condition facility the clause reads:-

> "Exact repayments will be determined on date of drawdown based on the interest rate then prevailing:
>
> 1. The loan is to be repaid in full within twelve months from the date hereof. *In the interim 100% sites fines to continue to apply from the sales of residential units at Knockcroghery & once the development loan in respect of these units is cleared in full the residual is to be applied in permanent reduction of this facility."*

I have underlined the additional words to be found in the six condition facility.

8. In each facility the *"Amount & Type of Facility"* is described in identical terms:-

> "1. €2,163,978 (two million, one hundred and sixty three thousand, nine hundred and seventy eight euro) by way of Loan (Existing – Increase of €500,000)."

The purpose of the facility is also stated in identical terms in both letters.

9. Moving on to the *Conditions Precedent to Drawdown* the first four conditions in each facility are identical in their terms. In the six condition facility the following additional clauses appear:-

> "5. Satisfactory Audited Accounts for the period ending 2006 to be provided in respect of Martin Small in line with accounts held for 2005.
>
> 6. Euro 400,000 of the funds approved contained in this letter of offer to be applied in permanent debt reduction to the accounts of F. Raftery, Paddy Finns, Lisroyne & Raftery Civil Engineering with all approved overdraft facilities in respect of the aforementioned to be cancelled & the accounts of Lisroyne, Paddy Finns, Raftery Civil Engineering are to be closed. The balance of the 400,000 is to be applied in permanent debt reduction to the facilities of F&H Raftery."

10. While the appellant claims that he never saw the six condition facility, a form of acceptance appended to it contains his signature and that of his former partner although there is no date affixed alongside the signatures. The appellant admits that he signed the four condition facility and his signature also appears with that of his former partner on the Form of Acceptance and the signatures are

stated to have been affixed on the 10th December 2007.

Defence
11. The summary proceedings were admitted into the Commercial Court and in the usual practice of that court directions were given requiring the defendant to set out the nature of his defence (if any) on affidavit and a date was duly fixed for the summary judgment hearing.

12. A number of affidavits were sworn on behalf of the parties. In the various affidavits sworn by the appellant he fails to engage with the principal issue namely whether the monies were lent on foot of the facility letters and whether the sums claimed are due and owing. In short the appellant does not dispute the sums claimed but rather raises issues as to the manner in which the monies were applied by his former partner and others, including the respondent. In an affidavit sworn by the appellant on the 1st April 2014 he states at para. 7:-

> *"In relation to paragraph 7, the plaintiff is making reference to signed facility letters where the defendant has at no stage denied his entering or engagement in such loans but signed same facility letters in good faith that there would be no inappropriate behaviour by the Plaintiff, its Servants or Agents that would undermine the defendant's interests in anyway."*

13. The appellant commenced other proceedings against the respondent, the widow of his former partner and a former solicitor of the partnership which set out his concerns about the way in which the borrowed funds were dispersed. These claims do not afford a defence to the summary proceedings. The summary judgment hearing took place on the 2nd June 2016. On the 24th May 2016 in the connected plenary proceedings bearing Record Number 2014/454P, Mr. Conleth Harlow solicitor swore an affidavit in which he stated at para 17:-

> *"…I say that the [appellant] attended at my office on the 13th December 2007 at which time he expressly approved and authorised the six [6] conditions precedent contained in the Loan Offer letter dated the 21st November 2007 and, in particular, and as previously deposed to by me, expressly confirmed approved, agreed to and directed the manner in which the loan proceeds in question should be dispersed which accorded fully with the terms and conditions precedent contained in the Loan Offer letter e-mailed to my office by Dermot Freehill of the Bank on the 11th December 2011 at approximately 14.50."*

14. While the appellant was given the opportunity by the High Court judge to put in a further affidavit dealing with this matter he declined to do so although it is suggested that an affidavit was prepared.

Judgment in the High Court
15. The respondent is not cross appealing the order of the High Court judge to remit the sum of €400,000 to plenary hearing. It follows that the appellant will have an opportunity to test the evidence surrounding his liability for this sum including the issue of whether condition 6 applies.

16. What this court has to decide is whether or not the High Court judge was correct in granting summary judgment having regard to a number of issues. First, this court must determine whether the trial judge applied the correct legal test before granting summary judgment. Secondly, this court must decide whether the High Court judgment can stand having regard to the fact that the proceedings were brought on foot of the four condition facility whereas the judge awarded judgment on the basis of the six condition facility. This point must be considered in the light of the appellant's position where he now claims the respondent sued on the wrong contract.

17. Taking the last point first, it seems to me that there is no credible basis upon which the appellant can claim that he was unaware of the six condition facility. His signature (albeit it undated) appears on the Form of Acceptance attached to that facility letter. Furthermore, the affidavit of Conleth Harlow sworn on the 24th May 2016 says that he signed that facility letter in his office on the 13th December 2007. Furthermore, the High Court judge referred to evidence which was produced by the bank in one of the plenary proceedings taken by the appellant where there was affidavit evidence that the respondent received a letter from the appellant's solicitor dated the 14th December 2007 making it perfectly plain that the appellant's solicitor was *"…agreeing that the monies are to be borrowed, not in accordance with a condition (sic) with a letter which had four conditions, but in accordance with a letter which had six conditions."* The appellant has not engaged to a meaningful extent on that issue although he was given an opportunity to do so. On this issue there is nothing more than what might be termed a "mere assertion" by the appellant. Furthermore, this court cannot ignore the fact that the appellant asserts that the respondent has sued on the wrong contract, namely the four condition facility, from which it can be inferred that he is no longer repudiating the six condition facility. The High Court judge found that the appellant's position on this issue was lacking in credibility and it is difficult to see how he could have come to any other conclusion.

18. It is somewhat unsatisfactory that the High Court judge decided the issue on the basis of a facility letter which was not relied on in the pleadings. But at the end of the day this is of little consequence, for the reasons I set out below.

19. The two facility letters were essentially identical apart from conditions 5 and 6 in the *Conditions Precedent to Drawdown* but the two additional conditions have no bearing on this appeal because condition 5 merely requires the appellant to provide audited accounts and condition 6 refers to a figure which has been remitted for plenary hearing and has not been cross appealed by the respondent.

20. At the hearing of the appeal, the appellant made it clear that he was relying on the fact that the respondent sued on foot of the wrong contract. He also made that point in the High Court. (See transcript 2nd June, 2016, pp. 78 and 91). Counsel said that this was his sole point and maintained that position on the appeal. At no time did the appellant deny that he and his former partner borrowed the monies which are claimed, but relies on matters surrounding the manner in which the funds were dispersed which does not afford a defence to the summary judgment claim.

Conclusion
21. As conditions 5 and 6 in the six condition facility are of no significance having regard to the fact that there is no cross-appeal, the remaining obligations on the appellant are the same under either of the facility letters of the 21st November 2007.

22. While the judge's approach was unusual in that he gave judgment on a facility letter not relied on in the pleadings that raises the question as to whether the matter should be sent back to the High Court for further consideration. The letters of demand issued on the 27th February 2013 and these proceedings were commenced on the 4th April 2013. A considerable time has elapsed since then. It would be wholly futile to refer the matter back to the High Court for further consideration if this court is satisfied that the appellant's

liability for the debt exists and has been correctly calculated. The appellant has already made it clear that he does not dispute the calculations and there can be no question that the sums claimed are due because he has failed to engage on that issue but, sought to raise issues in other proceedings which do not offer a defence.

23. I am satisfied that the High Court judge applied the correct legal test to be applied in applications for summary judgment. The appellant has not established a credible defence to the claim in respect of which summary judgment was granted. I am also satisfied that in the particular circumstances of this case it makes no difference whether the claim is based on the four condition facility or six condition facility so far as the summary judgment is concerned and it would be quite futile to remit the matter back to the High Court which would only result in further unnecessary delay and prejudice to the respondent.

24. I would dismiss the appeal.