THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 316

Record Number: 2015 494

Finlay Geoghegan J.
Peart J.
Whelan J.

Between:

ACC LOAN MANAGEMENT DAC

PLAINTIFF/RESPONDENT

- AND -

ERWIN O'TOOLE

DEFENDANT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 6TH DAY OF DECEMBER 2017

1. By order of the High Court (Binchy J.) made on the 6th July 2015 the plaintiff ("ACC" or "the bank"") was granted summary judgment against the defendant on foot of its notice of motion issued pursuant to O. 37 of the Rules of the Superior Courts.

2. At the hearing of that motion in the High Court the defendant had sought to have the bank's motion adjourned to full plenary hearing on the basis that in his replying affidavit he had raised one or more potential defences to the bank's claim which met the necessary threshold of arguability as set forth in judgments such as that of Hardiman J. in *Aer Rianta v. Ryanair Ltd* [2001] 4 I.R. 607, and that of McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, to name but two, and which, he submitted, required oral evidence to be heard for a fair determination.

3. The test for having a summary judgment claim adjourned to a plenary hearing is by now well-known. It can be summarised as being that the defendant must establish on affidavit a *bona fide* and arguable defence, which is based on credible evidence, and which is not mere assertion. As stated by Hardiman J. in *Aer Rianta v. Ryanair Ltd* it must be "very clear" that the defendant has no defence. In her judgment in *Danske Bank v. Quinn* [2016] IECA 96, Irvine J. stated the following with which I respectfully agree:

> "15. There is no dispute between the parties as to the principles to be applied by the court on an application for summary judgment. To the forefront of the court's mind must be the test laid down by Hardiman J. in Aer Rianta v. Ryanair Limited [2001] 4 I.R. 607 where he described the test in the following terms:–
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> > 'In my view the fundamental question to be posed on an application such as this remains: 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 defendants' affidavits failed to disclose even an arguable defence?'
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> 16. Of importance also, in the context of the legal issues raised by the defendants on this appeal is the decision of Clarke J. in *McGrath v. O'Driscoll* [2007] 1 ILRM 203, where he stated, in the context of a summary judgment application:–
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> > 'So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents),but should only do so where the issues which arise are relatively straightforward and where there is no risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

A short factual background

4. By its facility letter dated the 3rd May 2002 ACC had made a loan offer to a company named John O'Toole Construction Co. Limited, of which the defendant is a director, in the form of an overdraft facility up to the sum of €100,000 on certain terms and conditions, which was repayable on demand and no later than 1st May 2003. One of those conditions was that the defendant would execute a personal guarantee and indemnity for the loan to the company, and he executed such a guarantee and indemnity on the 3rd May 2002. The loan facility was accepted by the company on the 31st May 2002.

5. The security conditions for the loan were the following:

> (i) a company covenant;
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> (ii) The personal guarantee of John O'Toole and the defendant supported by a first legal mortgage and charge over certain lands at Leagaun, Moycullen, Co. Galway in the ownership of the defendant;
>
> (iii) An assignment over deposit monies in the sum of €48,000.

6. The company in due course defaulted on the loan, and by letter of demand dated the 1st April 2005 ACC called upon the company to pay all sums due and owing as of that date, namely the sum of €130,283.26. At the same time it wrote also to the defendant, as guarantor, to inform him of the company's default, and threatened to take action against him, *inter alia* on foot of the guarantee and indemnity, in the event that the sum claimed to be due and owing was not discharged.

7. Despite having sent these letters of demand on the 1st April 2005, these proceedings by way of summary summons were not issued until the 4th January 2013. Solicitors acting for the defendant entered an appearance thereto on the 13th May 2013. The bank's notice of motion seeking liberty to enter summary judgment for the amount claimed to be due and owing was issued on the 13th January 2014 with a return date for the 6th February 2014. This motion for judgment was grounded upon the affidavit of Gerard

Ryan sworn on the 7th January 2014, wherein he stated *inter alia* that as of the date of swearing thereof the amount due and owing to the bank, inclusive of interest was €261,305.20.

8. In his replying affidavit sworn on the 3rd February 2014 the defendant referred to one of the conditions specified in the loan facility, namely the assignment over certain cash deposits of €48,000, and stated that in view of these deposits his exposure as guarantor was limited to a sum of €52,000 plus interest for a twelve month period. He stated also that the bank had failed to explain what had happened to these deposit monies. In addition to that question, the defendant stated that the bank had failed to explain its delay in bringing these proceedings, and that the bank's claim was statute barred given that the company's default occurred on the 1st May 2003.

9. The bank filed a second affidavit by way of response, being that of Pamela Murphy sworn on the 26th June 2014. In relation to the cash deposits, this affidavit explained that the bank had exercised its right of set-off in respect of these monies (€46,286) on the 5th September 2011, and had applied them in reduction of the amount due by the company. However, this affidavit went on to state that it had made an error in the calculation of interest due as claimed in the summary summons, by not taking account of the set-off when making that interest calculation, and sought to amend its claim for judgment to a lower sum of €182,705.21.

10. That affidavit of Pamela Murphy also denied that the bank's claim was statute barred, and made the point that the guarantee and indemnity dated the 3rd May 2002 was executed by the defendant under seal. It does not go further by stating that because it is an instrument executed under seal a 12 year limitation period applies to the bank's claim on foot of it, but clearly that was the point that the bank was making in regard to the claim by the defendant that its claim was statute barred.

11. Prior to the hearing of the bank's motion for judgment in the High Court ultimately on the 25th May 2015, the defendant's solicitor wrote to the bank's solicitor outlining the two issues being relied upon by the defendant for the purpose of seeking a plenary hearing.

12. The first such issue was that while the guarantee was stated to be "Signed *Sealed* and Delivered" [emphasis provided] by the defendant on the date of its execution, the document bore no seal, and was therefore a document in reality that was not under seal. Neither did the document appear to have a seal on it. In its second affidavit the bank had referred to the document as being an instrument under seal. The significance of this issue is that if the document is an instrument executed under seal a limitation period for the commencement of these proceedings of twelve years applies and they are not statute barred. On the other hand, if it is a document not executed under seal, a limitation period of six years applies, and arguably these proceedings are statute barred. So, the seal issue is not a mere technical point. Section 11(5)(a) of the Statute of Limitations Act, 1957 provides:-

> "11.(5) The following actions shall not be brought after the expiration of twelve years from the date on which the cause of action accrued:-
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> (a) an action upon an instrument under seal, other than an action upon an instrument under seal to recover:-–
> (i) arrears of a rent charge or of a conventional rent, or
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> (ii) any principal sum of money secured by a mortgage or other charge, or
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> (iii) arrears of interest in respect of any sun of money secured by a mortgage or other charge, or
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> (iv) arrears of an annuity charged on personal property."

13. The second issue relied upon by the defendant is the question of the set-off of the deposit monies referred to in the loan facility letter, and the date by which such set-off ought to have occurred. The defendant contends that the bank ought to have effected the set-off on the date by which the company's overdraft was required to be paid off, namely the 1st May 2003, or at the latest either the date on which it made a demand for the payment of the monies namely the 1st April 2005, or at the latest the following day being the date on which the company went into liquidation. The defendant contends that if the set-off had been effected by any of these dates, the claim for interest by the bank would have been significantly reduced. In these circumstances the defendant argued that the bank was not entitled to the full sum for interest being claimed.

14. The trial judge heard submissions from counsel for the bank, and from the defendant's solicitor, his counsel not being available on the date in question. Having heard these submissions and having considered the affidavit evidence he concluded that the defendant had not established a *bona fide* arguable defence to the bank's claim, and granted summary judgment.

15. On the issue of the seal or the lack of it on the guarantee and indemnity, the trial judge stated:-

> "Based on the case law opened to the Court by counsel for the plaintiff I am satisfied that a seal in the sense of a physical seal or indentation is not required in order to constitute the guarantee an instrument under seal. If nothing else, the document is adequate to estop the guarantor from asserting that he did not seal the guarantee. I am also satisfied that the guarantee is in its terms a deed although it does not use the word "deed"."

16. The trial judge went on to conclude that the proceedings were not therefore statute barred.

17. As for the issue related to the date on which the set-off of the deposit was applied to the monies owing by the company, the trial judge stated in his view the facility letter was simply referring to deposit monies that were intended to be placed on deposit, rather than stating that monies in that amount (€48,000) had already been placed on deposit. He stated also that he was satisfied that due credit had been given for the monies on deposit and that no replying affidavit had been filed by the defendant to cast doubt upon the figures calculated by the bank as being due and owing by the defendant.

18. On this appeal the defendant has urged that the issue of whether the absence of an actual seal on the guarantee and indemnity document, combined with the defendant's averment that he did not seal the document when executing the document, renders it an instrument not executed under seal, or whether the mere fact that the document is stated on its face to be been "Signed Sealed and Delivered" means that it is deemed to be an instrument under seal for the purpose of s. 11(5)(a) of the Act of 1957 regardless of the absence of actual sealing by the guarantor, is something which has not as yet been the subject of a judgment in this jurisdiction. It has been submitted that insofar as there have been some decided cases on the point not only in the United Kingdom, but farther afield from Australia, and Canada, these are not authoritative in this jurisdiction, and in any event do not make the position clear. Insofar as these proceedings are still at an interlocutory stage, it would not be appropriate for me to express any view on the authorities that have been opened to this Court on the point. That should await a full hearing at first instance.

19. The issue raised is a question of law to be determined. It is a point of considerable importance to the defendant because its answer will determine whether or not the bank's claim under the guarantee is statute barred. There is little doubt that the trial judge did not have the benefit of as extensive submissions on the point as have been made to this Court on appeal. It is an issue that in my mind would benefit from a determination at a full hearing, rather than one that can be fairly disposed of on a motion for judgment.

20. The authorities make clear that a defendant ought not to be shut out from raising a defence to a claim for summary judgment unless, to use the words of Hardiman J. in *Aer Rianta v. Ryanair Limited* "it is very clear that the defendant has no case". Where the issue sought to be argued by way of defence is an issue of law, and the state of the law on the issue in this jurisdiction has not been finally decided and is not therefore clear, I am not satisfied that in respect of this issue that it is clear that the defendant has no case, and would allow the appeal on this ground and direct a plenary hearing.

21. I would also take a different view from the trial judge in relation to the defence to the claim for a significant part of the claim for interest that is based on what the defendant claims to be a needless delay by the bank in effecting a set-off of the deposit monies against the sum due by the company. Clearly if these deposits should have been offset against the liability of the company at an earlier date than September 2011 – for example on the date on which the overdraft was required to be discharged, namely 1st May 2003, or the date on which the bank sent its letter of demand, namely the 1st April 2005, or the following day when the company went into liquidation, the defendant as guarantor would not have been exposed to a claim against him for interest on that sum of €48,000 approx between such earlier date and the actual set-off date in September 2011. In my view the fair determination of that question may reasonably depend on findings of fact to be made following the giving of oral evidence by the bank as to the reasons for any delay in effecting the set-off. It is not clear that the defendant has no defence based on that argument.

22. For all these reasons I would allow the appeal and direct that the matter be adjourned to plenary hearing with a condition that the defendant be permitted to defend on two arguable grounds namely (1) that the guarantee is not an "instrument under seal" within the meaning of s. 11(5)(a) of the Statute of Limitations Act 1957, and (2) that ACC ought to have set off the deposit held on a date or dates earlier than 5th September 2011, and with appropriate directions as to pleadings to be delivered for that purpose.