THE COURT OF APPEAL

Neutral Citation Number [2019] IECA 296

Record Number: 2017/239

Edwards J.
McGovern J.
Donnelly J.

BETWEEN/

ALLIED IRISH BANKS PLC

PLAINTIFF/RESPONDENT

- AND –

PADDY MCKEOWN and ADELAIDE McCARTHY

DEFENDANTS/APPELLANTS

JUDGMENT delivered by Ms. Justice Donnelly on the 28th day of November 2019

Introduction

1. On the 12th May, 2017, Costello J gave liberty to the plaintiff bank (hereinafter "the respondent") to enter judgment against the first defendant in the sum of €1,469,251.43 and against the second defendant in the sum of €1,467,102.96. The sum against the first defendant represented an award against him personally in the sum of €1,429,166.22 and an award on a joint and several basis with the second defendant, in the sum of €40,548.60 (those sums less surcharge interest of €463.39). The sum against the second defendant was sought in the sum of €1,387,003.82 and €40,000 (those sums less surcharge interest of €449.46).

2. The first and second defendants have appealed against the judgment and order of the High Court. They will be referred to as the appellants in this judgment. As it has some relevance to the issues in this appeal, it must be noted that the appellants were legally represented in the High Court and the Notice of expedited appeal was filed by their solicitor and settled by counsel. They represented themselves at the hearing of the appeal.

The Issues before the High Court

3. The appellants carried on the business of professional landlords. They are husband and wife. They own a portfolio of commercial properties in Cork city. By letter of loan offer dated the 20th May, 2013, the respondent offered to refinance three facilities of the first appellant. Repayment was:

> "On demand at the pleasure of the Bank subject to repayment/refinance on 31/12/2013. In the interim interest is to be funded by way of a monthly standing order in [respect of a specified amount*]".*

4. A further letter of loan offer of the same date was made to both appellants and accepted by them. This related to a loan account and an overdraft facility. This was said to be repayable "[o]n demand at the pleasure of the Bank subject to repayment/refinance by 31.12.2013".

5. Security for the facilities included two letters of guarantee from the second appellant for €1,650,000 and interest and €40,000 and interest in each case. The first guarantee was held as supporting security facilities 1 and 2 and the second was held as supporting security for facility 3. The first appellant expressly waived his entitlement to take independent legal advice prior to signing the letter which he signed and accepted on the 24th May, 2013. The funds were drawn down by way of refinancing i.e. they had previously been drawn down in respect of the existing facilities. It is and was common case before the High Court that the facilities were not repaid or refinanced and each of the loan accounts remained outstanding.

6. At the High Court, the appellants sought liberty to defend the proceedings and argued that they had established an arguable ground of defence in respect of: -

    (a) The proper construction of the letters of May 2013;

    (b) The alleged improper motives of the respondent in its dealings with the appellants and in particular in seeking summary judgment in these proceedings; and

    (c) That the guarantees granted by the second appellant were discharged by a material alternation of the underlying loans.

7. The High Court judgment records that "*the defendants advanced a variety of other arguments which were not pursued at the hearing of this case and therefore do not feature in this judgment.*" Despite that statement a number of those grounds were argued at the oral hearing. In respect of all the issues argued before her, the trial judge rejected the case made out on behalf of the appellants and gave liberty to enter final judgment as set out above.

The Grounds of Appeal

8. The notice of expedited appeal lists ten grounds of appeal. Grounds 1 to 3 relate to the interpretation of the loan offer of May 2013. Ground 4 appears to contain an error in excluding the word "not". It seems the ground meant to refer to the trial judge erring in law and in fact in not holding that the respondent demanded repayment of the loan in bad faith and pursuant to ulterior motives. Ground 5 repeats a claim that the guarantees were invalid and unenforceable against the second appellant. Ground 6 is a general plea that the trial judge erred in holding that the appellants did not have a valid defence. Ground 7 is a general plea relating to a valid counterclaim. Ground 8 relates to a stay of execution. Ground 9 refers to a failure to have regard to the supplemental affidavits of the appellants. Ground 10 claims that there was a failure of natural justice by not giving the appellants a right to be heard and a fair hearing.

9. The written legal submissions of the appellants, which were filed by them in person, refer to 21 issues to be decided at the appeal. Many of these issues were not contained in the notice of expedited appeal and/or were expressly abandoned at the hearing in the High Court.

Issues Not Properly Before the Court of Appeal

New issue at the oral hearing

10. At the hearing of the appeal, the second appellant, on her own behalf and on behalf of the first appellant submitted that the High Court had been deceived by the respondent and by counsel making statements misrepresenting fact. This was explained as a reference by counsel to over €7,000,000 owed by the appellants to the respondent. On a query from the bench, this came from a reference in the transcript to that figure. It was abundantly clear from the transcript (including from its context within italics) that the reference to €7,000,000 was contained in a quote that counsel for the respondent had clearly read from another case. It was only after this was pointed out that the appellants withdrew this allegation of deceit.

New issues advanced only in written submissions

11. In their written submissions, the appellants raised issues concerning proof of debt (under a number of separate sub-headings). As stated above, this was not at issue in the High Court proceedings, was not part of the notice of expedited appeal and is therefore not correctly before this Court as a ground of appeal. This point will not be considered further and is rejected.

12. The appellants also claimed that the judge was dismissive of their argument regarding the three zero balance mortgages unlawfully retained as security by the bank in the May 2013 agreements. This was not contained in the notice of expedited appeal nor was this argument developed any further in the oral or written submissions. There appears to be no real criticism of the trial judge's summary of the respondent's release of security. For all these reasons this point will not be considered further and is rejected.

13. The appellants complain that the total amount owed was circa €1.5 million but that the award was for circa €3 million. Apart from the fact that this was not a ground of appeal, it is clear that this issue is misconceived. The judgment was entered against each appellant on the basis set out above. Any monies realised by the respondent in executing against either of the appellants will result in a *pro tanto* reduction of their respective indebtedness.

14. The appellants, in their written submissions, raised for the first time an issue with the Central Bank's Tracker Mortgage Examination. This is not a matter which is relevant to any issue properly before this Court by way of appeal. This point will not be considered further and is rejected.

15. The appellants claim discovery in their written submissions. Discovery was only raised after judgment was given. It was not (for good reason) before the High Court and is not a matter properly before this Court. This point will not be considered further and is rejected.

16. The appellants claim that at the time proceedings issued, one of the security documents was in the name of AIB Mortgage Bank. It is not at all surprising this issue was not

argued before the High Court and was not a ground of appeal. In any event, it is not properly before this Court and the point will not be considered further and is rejected.

17. The appellants made a further claim in relation to the costs of the proceedings and claim the respondent's behaviour has exacerbated the costs. This is done without context. In any event this particular issue as regards costs is not properly before the court at this point in the proceedings.

18. The appellants claim that there was no proof of drawdown in 2013. This is against a background where this was a restructuring of loans. This argument was not contained in the grounds of appeal. Apart from noting that such an argument has already been described as "*a contrived and empty argument devoid of any merit whatsoever*" in *Bank of Ireland v Flanagan* [2015] IECA 56 this point will not be considered further and is rejected.

19. Another new ground advanced in written submissions is, *in toto*, as follows: "Three Sustainable Solutions encompassing all loans including the Family Home Tracker Mortgage were offered by AIB Financial Solutions Group". It is impossible to understand the point being advanced here. As there is no context for same, as it was not a ground in the notice of expedited appeal and as no further explanation was given at oral hearing, this point will not be considered further and is rejected.

Issues advanced in written and oral submissions on appeal only

20. The appellants sought to advance on appeal an argument that the respondent had no locus standi in the proceedings. This related to a claim that the entity named as the plaintiff in the proceedings "Allied Irish Banks PLC" was not an entity that had sent the facility letters.

21. Although this point or a similar point had been mentioned in the affidavits of the appellants before the High Court (although simultaneously contradicted by references to the plaintiff *inter alia*, seeking guarantees prior to the agreements of May 2013), it was not pursued in written or oral submissions before the High Court. Moreover, this ground did not form part of the notice of expedited appeal. Furthermore, the appellants sought leave to admit new grounds of appeal on, *inter alia* "New evidence of the Identity and Locus Standi of the Plaintiff Allied Irish Banks PLC". This motion was refused by Order of Ms. Justice Irvine on the 20th October, 2017.

22. Under these circumstances this Court is being asked to act as a court of first instance in respect of this issue. Such a request is occurring where the appellants were legally represented at the hearing before the High Court. No explanation for the failure to pursue this application in the High Court is before this Court (the written submissions only refer to the ground itself but not the reason why it should now be accepted). There is simply no basis upon which this Court should take the exceptional step of permitting such a ground to be argued for the first time on appeal. This point is therefore rejected.

Issues Raised in the Notice of Appeal

23. The appellants raised an issue of natural justice regarding their right to be heard and a fair hearing. In the written submissions, they simply referred to the right to be heard and natural and constitutional justice and made reference to another Court of Appeal case by its record number. This ground of appeal appears to refer to the request by the appellants' counsel to reply to counsel for the respondent. At the end of counsel for the respondent's reply, the appellants' counsel stated to the High Court "I will have to address some of the points [counsel] has made". This was refused by the trial judge on the basis that the respondent's counsel was replying to the submissions made on behalf of the appellants and he had not gone beyond what had been submitted by counsel for the appellants. This was entirely in accordance with the appropriate procedure for the conduct of cases. There was no unfairness and no breach of natural justice. This ground of appeal is rejected.

24. In circumstances where a stay on further execution of the High Court judgment was placed by order of the President of the Court of Appeal, save to the extent that I will deal with the issue of the counterclaim below, it is unnecessary to consider the question of a stay pending appeal.

25. The other matters contained in the notice of expedited appeal are encompassed within the grounds of appeal set out below.

The Legal Principles

26. No issue was taken by the appellants with the general legal principles concerning applications for summary judgment upon which the trial judge relied. These are found in *inter alia*, in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 IR 607, *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1 and *IBRC v. McCaughey* [2014] I.R 749. It is unnecessary to repeat those well-known principles, save to say summary judgment is only to granted where it is "very clear" to the court that the defendant has no case and that there are either no issues to be tried or only issues which are simple and easily determined. It is insufficient for the defence to merely assert on affidavit an arguable defence. The court must look at the entirety of the circumstance in deciding whether there is a fair or reasonable probability of a real or *bona fide* defence and that any assertions made are credible in the light of established facts.

27. It is in the application of the above principles that the appellants submit that the trial judge erred. They submit that it cannot be said to be very clear that they had no arguable defence.

Issues raised in the High Court and in the Notice of Expedited Appeal

On Demand Clauses

28. The appellants pursued at the oral hearing, the issue of the whether the "on demand clause" permitted the respondent to make the demand at any time. The two letters of loan sanction had slightly different terminology in the "on demand clause". The first stated that it was "On demand at the pleasure of the Bank subject to repayment/refinance on 31/12/2013" and the second stated "On demand at the pleasure of the Bank subject to repayment/refinance by 31/12/2013".

29. At the hearing of the appeal, the appellants highlighted the difference between "on" and "by" in the two letters. They submitted that no one had made a demand *on* the stated date or *by* the stated date. They submitted that these were not simply "on demand clauses"; the letters they submitted demonstrated an intent to do something else with the loans. The facilities had been offered "subject to the terms and conditions set out in this letter and subject to the Bank's General Terms and Conditions Governing Business Lending".

30. At the High Court, it had been argued on behalf of the appellants that the import of the letters, by particular reference to the word "refinance", was that a reasonable opportunity would be given to the appellants to refinance. It was claimed the letters required a reasonable offer to have been made and none was made. What was a reasonable offer would be decided at the trial of the action. As the trial judge commented, the implication of this argument was that the respondent was not at liberty to choose whether or on what terms to offer to refinance the loans as it had agreed to some unspecified reasonable refinancing.

31. The trial judge rejected the construction advanced by the appellants at the trial. She did so in light of the decisions of the High Court in *National Asset Management Ltd. v. McNulty* [2013] IEHC 369 and *ACC Bank Ltd Plc v Kelly* [2011] IEHC 7. The observations of Clarke J in *ACC Bank Ltd Plc v Kelly* at para 7.2 are apt when he said: "*The ordinary meaning of a loan being repayable on demand is that a person who gives the loan is entitled to demand repayment. The terminology used in describing the other repayment terms is again clear. Those terms only applied where there is no demand. It is by no means unusual for commercial property lending facility to be payable on demand.*"

32. In those cases, the facilities were stated to be repayable on demand "without prejudice". I agree with the High Court judge that there is no distinction between a clause which is "subject to" certain terms or which is "without prejudice" to certain terms.

33. The ordinary meaning of these "on demand" clauses is that the respondent was entitled to demand repayment. This was at their pleasure subject to repayment/refinancing by or on the 31st December, 2013. The ordinary meaning of this is that if there had been a repayment or a refinancing on or before the 31st December, 2013, the demand for repayment pursuant to either letter of May 2013 could no longer be made. If there had been repayment, obviously no further demand for repayment would be relevant or permitted. If there had been a refinancing between the parties then that repayment would have been subject to that further refinancing agreement.

34. In those circumstances, the facilities were payable on demand and the respondent was entitled to call in the loans as and when it did. This ground of appeal is rejected.

Improper Motives

35. The appellants sought to defend their case in the High Court on the basis that the respondent acted for improper motives in its dealing with them and in particular in seeking judgment in these proceedings. The High Court judgment records the many

issues that the appellants had with the manner in which they were dealt with by the respondent. These issues were many and varied. Their complaints regarding the respondent's release of security are listed at para. 15 of the High Court judgment.

36. The trial judge stated that a considerable part of the appellants' complaint related to the treatment of their tracker mortgage in respect of their family home. That facility did not form part of these proceedings and the trial judge held that the issues that they raised in relation to that facility do not give rise to a defence to the sums claimed in these proceedings. In written submissions, the appellants did not advance any specific legal or factual reason to demonstrate that the trial judge was mistaken in law and in fact in her determination that the issues that they have raised in relation to that facility do not give rise to a defence to the sums claimed in these proceedings. In oral submissions, the appellants sought to advance that negotiations with respect to the house had become part of the restructuring negotiations. I am satisfied however that as regards the issue with the family home there is no reason to hold that the trial judge was incorrect in law or in fact in her determination. No arguable defence to these proceedings has been made out in respect of any issue as regards the family home.

37. At the hearing of this appeal, the appellants submitted in an oblique fashion, that the respondent bank had wrongly and improperly behaved with respect to calling in these loans. They submitted that they were not in default with their loans but that they had been overcharged in respect of the mortgage. Unfortunately, at the hearing of the appeal, the appellants' main focus as to improper behaviour was on their misconceived submission that counsel for the respondent stated that the appellants owed €7,000,000. I have dealt with that submission at paragraph 10 above.

38. The appellants submitted at the hearing that the respondent had dealt with them unfairly in respect of the restructuring of the loans and the calling in of the loans. This submission appeared in substance to be directed at their claim in respect of the "on demand" clause which I have dealt with above.

39. In respect of their allegations in the High Court as to improper motives, the trial judge held that they had made no more than a mere assertion that the respondent bank ought not to have treated them as it did. She also held that they had not established how the alleged improper motives of the respondent, even if proven, would amount to a defence to the claim for summary judgment by the respondent in respect of the on demand facility that expired on the 31st December 2013. She noted that it was remarkable that, in the plethora of allegations advanced against the respondent, it is not stated that the respondent represented that it would not call in the loan in accordance with the terms of the facility. She held that no case had been made out that the alleged improper motives, even if established, would provide an answer to the claim to be repaid monies that the appellants accept they borrowed and have not repaid. The trial judge correctly observed that questions of security and of the appointment of a receiver over certain assets do not arise in these proceedings. She held that the appellants had not established a fair or reasonable probability of having a real or *bona fide* defence.

40. In my view there was no error in law or in fact on the part of the trial judge in respect of this matter. She correctly identified that the improper motives were made by way of mere assertions. More fundamentally, she identified that these improper motives, even if established, did not provide an arguable defence to the respondent's claim.

The Guarantees

41. The second appellant submits that the trial judged wrongfully stated in her judgment that the second appellant did not swear and affidavit in the proceedings but relied upon the affidavit of the first appellant. The position was that very late supplemental affidavits were filed by the appellants. Counsel for the respondent at one point stated: "I'm not objecting to the Court seeing those supplemental affidavits, I think nothing turns on them". Counsel for the appellants did not demur on that. Moreover, he did not open the second appellant's affidavit. He only opened the first appellant's affidavit to refer to a newspaper article exhibited by him therein.

42. In her judgment, the trial judge dealt with the issue of the guarantee as raised in the affidavit of the first appellant which purported to deal with the guarantees under which the second appellant was sued. She dealt with the legal argument put before her. In the notice of expedited appeal, in their written submissions and at the hearing of the appeal, the appellants did not point to any particular averment in the affidavit, which was material to the issue upon which the High Court adjudicated on an arguable defence arising out of the guarantees. For all these reasons, I am quite satisfied that there is no material error and no want of natural justice by reason of the misstatement of the position as regards the swearing of an affidavit by the second appellant.

43. In her judgment, the trial judge rejected the second appellant's arguments that (a) because she "refused" to provide any further guarantees, the existing guarantees were discharged and (b) that the guarantees had been discharged where there were material changes in the underlying contractual obligations between the respondent and the first appellant. The trial judge referred to clause 2 of the first guarantee dated the 2nd March, 2009 which was a continuing guarantee. She also cited clause 6(i) which gave the respondent liberty to determine, enlarge or vary any credit to the first appellant (borrower) without notice to the second appellant (guarantor).

44. The trial judge accepted that that the guarantee was a continuing one and that it would include the sums guaranteed up to the amount referred to therein of €1,650,000. Clause 6(i) permitted either the enlargement or the variation of the first appellant's credit brought about by the facility of May 2013. She also held that there was no obligation on the bank to obtain an alternative or fresh or additional guarantee. A failure to do so did not discharge the existing guarantee. She held similarly in respect of the identical (save for the limit guaranteed) second guarantee.

45. I am satisfied that the trial judge did not err in so holding. The interpretation of the guarantees was very clear as a matter of law and did not provide the arguable defence contended for by the appellants. For this reason, all points of appeal in respect of the guarantees are rejected.

Counterclaim

46. The appellants in their notice of expedited appeal and in their written submissions claimed that the trial judge erred in finding that they did not have a valid counterclaim. This was not elucidated further at the hearing. Their first counterclaim related to the alleged premature or improper calling in of the loans. The second counterclaim referred to alleged overcharging.

47. The trial judge held that the appellants first counterclaim amounted to no more than a reassertion of the grounds of defence which she had already rejected. In relying on the decision of Clarke J. in *Moohan v S & R Motors Donegal Ltd.* [2008] 3 I.R. 656 in deciding that she would not put a stay on her judgment. In so deciding, the trial judge made no error of fact or of law. I therefore reject this point of appeal.

48. In respect of the claim of overcharging, the trial judge identified the amount allegedly overcharged as €57,857.67 and said that this amounted to an independent claim. The trial judge could not resolve the factual dispute in relation to this claim. She ruled however that given the scale of the discrepancy between the debt due by the appellants, a set off would mean very little. In the exercise of her discretion she declined to put a stay on her judgment.

49. In their written submissions, the appellants submitted that the trial judge omitted a second assessment of overcharging on their accounts. It appears that the affidavit of the first appellant had referred to two reports. One report was by an Eddie Fitzgerald and the second was by "Cáit". Mr. Fitzgerald had identified the alleged overcharging. The other report identified overcharging of circa €52,000 on one facility. This had been included in the earlier reports. On behalf of the respondent, David Coleman swore a supplemental affidavit identifying that the height of the overcharging complaint was the figure of €57,857.67. Neither in their supplemental affidavits nor in the hearing at the High Court, did the appellants take issue with this amount.

50. I am satisfied that the trial judge did not err in her identification of the height of the amount being claimed as overcharged. I am also satisfied that in accordance with the principles in *Moohan*, she did not err in declining to put a stay on any part of the judgments to be entered in favour of the respondent against the appellants.

Conclusion

51. The appellants in written and oral submissions have sought to argue certain grounds that were not argued in the High Court and/or were not included in the grounds of appeal. The appellants were legally represented in the High Court. No reason has been advanced as to why these grounds were not so argued. In all the circumstances, these grounds are not properly before this Court and are rejected.

52. In relation to the grounds of appeal which are properly before this Court, I have concluded that there was no error of fact or of law on the part of the trial judge. She correctly applied the well-established jurisprudence.

53. Accordingly, I dismiss this appeal.