THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 324

[480/2017]

Irvine J.

McCarthy J.

Costello J.

BETWEEN

LAUNCESTON PROPERTY FINANCE DESIGNATED ACTIVITY COMPANY

PLAINTIFF/RESPONDENT

AND

DAVID WRIGHT

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Patrick McCarthy delivered on the 18th day of December 2019

1. This is an appeal by the defendant Mr. David Wright, ("Mr. Wright") against an order of the High Court (Kelly P.) made on the 5th October, 2017. The Court granted judgment against Mr. Wright in the sum of €1,742,842.27 and remitted the balance of the plaintiff's claim to plenary hearing.

Factual background:-

2. By facility letter dated the 23rd September, 2008, Mr Wright obtained a loan facility in the amount of €2,252,000 from Anglo Irish Bank Corporation Plc. ("Anglo"). In these proceedings, it is contended that the said loan was acquired by Launceston Property Finance Designated Activity Company ("Launceston") on the 23rd May, 2014. Due to default on the part of Mr Wright in meeting his obligations under the loan facility, Launceston, by notice of motion dated the 24th May, 2017, applied to the High Court for summary judgment to the sum of €2,553,830.80 together with continuing interest from the 23rd May, 2017, until judgment. The motion was heard on the 5th of October, 2017.

3. Further to the notice of expedited appeal written submissions were exchanged between the parties. This Court does not intend to engage in detail with all of the matters which Mr Wright committed to his written submissions, as the same do not marry well with his amended notice of expedited appeal which he delivered with the respondent's consent. I will however address each of the arguments which he advanced before this Court in support of his contention that the order of Kelly P. should be set aside.

Recusal and Adjournment

4. Mr Wright first asserts that Kelly P. erred in law in failing to recuse himself from engaging with Launceston's application for summary judgment. Allied to this ground of appeal is his further submission that the High Court judge erred in law in failing to adjourn the proceedings. He supports both grounds of appeal on the basis that at the time, he had engaged lawyers with a view to pursuing a claim against the entire Irish judiciary in the European Court of Human Rights. In such circumstances his proceedings should have been postponed because of apprehended bias.

5. Having considered the *ex tempore* ruling of the President of the High Court, I have to say that I can find no fault in the reasons which he advanced for refusing to recuse himself

from entertaining Launceston's application or with his refusal of Mr Wright's adjournment application. The judge correctly, in my view, observed that whilst Mr Wright may have prepared a statement of claim for the purpose of pursuing a claim in the European Court of Human Rights, no such proceedings had been admitted to that court at that time. Furthermore, the judge was also correct to conclude that any such claim as might be advanced by Mr Wright would likely be rejected in circumstances where Article 35 of the European Convention on Human Rights requires that the applicant must first exhaust his or her domestic remedies. More particularly, however, the learned President relied upon the constitutional mandate which requires judges to hear and determine claims brought before the Court with the result that it was not open to Mr Wright to contrive a situation whereby Launceston could be denied access to the courts by reason only of the fact that he intended to bring proceedings before the European Court of Human Rights against the entire judiciary thereby ensuring, on the basis of his argument, that no judge could properly try any case against Mr Wright. The application was clearly an effort to frustrate the plaintiff's entitlement to access to the courts to have its claim resolved.

6. I am also satisfied the High Court judge did not err in law or in the manner in which he exercised his discretion when he refused to adjourn the proceedings to await the outcome of Mr Wright's appeal in other proceedings which indirectly concerned the same loan agreement and which had been brought by the receiver (Record No. 2016/9072P).

7. Having considered the nature of those proceedings, wherein the claim advanced was for an injunction and the delivery up by Mr Wright of vacant possession of the property securing the underlying loan, it is clear that the outcome of those proceedings could never have had any bearing upon Launceston's entitlement to summary judgment in respect of the liquidated sum claimed on foot of the loan agreement. In my view, Kelly P. correctly

refused the adjournment and exercised his discretion in an appropriate manner having regard to the nature of the receiver's proceedings.

The Conduct of the Hearing

8. Mr Wright criticises the learned President for the manner in which the hearing, when commenced, was conducted. He submits that the President:-

"Interfered with the presentation of the defence by the defendant in a grossly excessive and unjustified extent in a manner that went well beyond interruption needed to clarify the defendant's application by questioning him as to whether or not he had borrowed the money or not."

and further, he submits that the judge "continued" to interrupt him during his submissions, going beyond what was acceptable, such that he did not receive a fair trial (or hearing). The appellant claims that he was at a disadvantage by virtue of the fact that he was unrepresented and that had he had legal representation, he would not have had to answer to an inquiry as to whether or not he had actually borrowed the sum claimed. These are propositions which I reject: the extent of the interruptions of the learned President were minimal and it is perfectly plain that they were directed to clarifying what was in issue. Further, insofar as enquiries were made or questions asked of Mr. Wright, they were of the class of questions which are commonplace in cases of this kind; and could not have adversely interfered in any way with his presentation of the case. In particular, it was perfectly legitimate for the President to enquire of Mr Wright whether he had borrowed the sum in dispute, and such enquiries are commonly made by judges in cases of this kind.

9. Mr Wright further submits that he was disadvantaged by the manner in which the plaintiff presented its case, and also alleges that Kelly P.:-

"Showed a degree of indulgence to the plaintiff/respondent in permitting the late introduction of unsworn evidence without notice in contrast to the refusal to permit the defendant/appellant's evidence because it was not on affidavit".

Given the extent to which Mr Wright had been involved in litigation whether represented or not up to that point, it cannot have been the case that he did not understand that it was necessary to present evidence on affidavit and no criticism can be made of the judge for enforcing the basic rule that testimony must be sworn or made on affirmation. There was no indulgence shown to the plaintiff by the "late introduction of unsworn evidence"; that simply did not occur. Insofar as documents were presented or handed into the court, it is manifest from the course of the hearing that these materials had long been in Mr Wright's hands with the possible exception of the document described as "Loan Balance at 30th September 2017 with credit for difference between gross sale proceeds and net sale proceeds (already applied)". And, it is plain that this was merely produced to assist in the arithmetic which arose, a practice which is commonplace and not prejudicial in any respect. In this connection he asserts that "documents kept flying to me through the case" and, during the hearing; that: -

"[He had difficulty] In following their [presentation] and mine because you are trying to mix between the two. And I don't have somebody sitting up here in front of me handing this information or checking information".

I cannot see how, in the nature of the hearing this could have been so.

10. Mr Wright also makes specific complaint that he had not been provided with certain bank statements before the hearing; this is manifestly not the case and as a businessman it seems unthinkable that he had not fully considered his liabilities to the bank by reference

to the statements and otherwise and had a full opportunity of doing so: it must be noted also that he was sued on the mortgage as aforesaid and was obviously thoroughly conversant with the liabilities by virtue of those proceedings alone.

Substantive Issues

11. In addition to the arguments already canvassed, Mr Wright submits that the learned trial judge failed to have regard to what he contends were illegal acts on the part of Anglo Irish Bank (who might be described as the predecessor in title of the plaintiff). He alleges that in the claim made "they" have ignored "indisputable evidence of criminality" on the part of [the bank] that "contaminated" what he describes as the original documents. He refers to what he alleges was widespread deception by Anglo Irish Bank and submits that the trial judge failed to give adequate reasons in this context for rejecting any defence he might have had by virtue of such matters. I cannot accept that that is so: these allegations, even if well founded, (and, there is no, or no admissible evidence supporting them) could never form any basis for a defence to Launceston's claim for summary judgment.

12. Mr. Wright furthermore drew attention to the fact that a difference occurs in the account numbers or what has otherwise been described as the "Borrower I.D." in and between sundry documents before the Court; I am satisfied that the President was entitled to conclude that any such discrepancy did not entitle Mr Wright to a plenary hearing and it appears to me that there is an ample explanation for it – such that it is manifest that regardless of the numbers one is considering the same liability and the same debt – a mere assertion by the appellant to the contrary does not, in and of itself, give rise to a defence.

13. Mr. Wright also relies upon the fact that what he calls the "full loan document" is missing from the plaintiff's exhibits. This arises, plainly, by virtue of a confusion as

between the mortgage securing his liability and the liability for the borrowing as a contract debt in the ordinary way, regardless of whether or not it was secured.

14. I am also satisfied that there is no substance to Mr. Wright's contention that the judgment entered against him in the High Court should be set aside because of any insufficiency in the proofs as to the assignment of his liability by Anglo to the plaintiff. In this regard Mr. Wright maintains that the exhibits relied upon by Launceston to establish the onward sale of his loan were not sufficient for such purpose. The transfer documentation had been redacted to protect the identities of other debtors not parties to these proceedings. That redaction does not provide him with any legal basis upon which he might defend the proceedings and cannot be categorised as a failure on the part of Launceston to make full and frank disclosure regarding the transfer of his loan.

15. In the course of his judgment, Kelly P. relied upon the decision of Finlay Geoghegan J. in *O'Rourke v. Considine* [2011] IEHC 191 wherein she identified the four conditions which had to be satisfied to effect a valid legal assignment of a debt as are provided for in s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877. In the course of his judgment the President was satisfied that each of these four conditions were met. Furthermore, whilst the transfer had been heavily redacted, as was emphasised by Mr Wright, it was nonetheless clear from the affidavits of Mr. Horgan on behalf of the transferor and Mr. Burke on behalf of the transferee, that Mr. Wright's loan had been transferred. It was not necessary for Launceston to exhibit the agreement between the transferor of the transferee to assign Mr. Wright's loan in light of the uncontested and unconditional transfer which had taken place which was always sufficient proof of the assignment of the debt under the Judicature Act.

16. Apart from the aforementioned objections based upon an alleged insufficiency in Launceston's proofs, Mr. Wright submits that the High Court judge erred in law in failing

to remit the entirety of the claim to plenary hearing. He contends that the extent of his true liabilities on foot of the loan facility could only be ascertained that such a hearing.

17. As to the amount itself, the appellant makes three principal complaints in the course of his submissions. First, he maintains that it is not clear that in the sum claimed by Launceston it has given him credit for rent which it received in respect of the properties securing the loan. The amount of rent concerned amounts to a sum in the region of €16,400. Second, he also states that he was incorrectly debited with a sum of €299.27 on the 5th August, 2014 and this has led to a situation whereby all subsequent statements of account are inaccurate to the extent of €299.27 and hence his outstanding liabilities are less than the sum claimed. Third, in oral submission before us (there is no reference to the issue in the Amended Notice of Appeal) Mr Wright submits that he made VAT payments in respect of, or in connection with, certain properties on which his liabilities were secured for which he is entitled to credit which has been withheld.

Legal principles and application

18. The principles to be applied by a court in an application for summary judgment are summarised by McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 IR 1 and are as follows:-

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 issue 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 *bone fide* defence; or as is sometimes put, "is what the defendant says is 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 not be 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 *bone 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.

19. In *First National Commercial Bank Plc. v. Anglin* [1996] 1 IR 75, Hardiman J. isolated what he characterises as the "*fundamental question to be posed on an application [for summary judgment]..[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?*"

20. The task of Kelly P. was to decide whether the matters raised by Mr Wright on affidavit sufficed to demonstrate that he had a *bona fide* defence to the claim advanced. In many cases, the presiding judge will grant judgment for the full sum, or remit the full claim for plenary hearing. However, it is often the case that the judge will grant judgment for a sum in respect of which no bona fide defence has been identified and remit the balance of the claim for plenary hearing. That is what the learned President did in the instant case.

21. It is relevant to note that Mr Wright should have been in a position to advance certain arguments before the High Court which he sought to raise for the first time on appeal. If he wished to rely upon those arguments he ought to have done so. The proceedings were before the court for the better part of the year and there is no suggestion that he could not have raised them before Kelly P. Normally this Court will not permit an appellant to raise arguments which were open to him to raise at first instance on appeal and it would be open to this Court to reject some of the grounds of appeal in this case on this basis without even considering the merits of the argument. However, as arguments were heard on the merits of the grounds raised, I will not decide the appeal on this basis.

22. The argument advanced in relation to the €299.27 was not advanced in the High Court. The discrepancy was only noticed between the date of the High Court judgment and

the hearing before this court. Thus, the President cannot be blamed for failing to have regard to this irregularity. It has been submitted by Mr Wright that his liability, at the time of the judgement, was less to the extent of €299 (at least) than the sum claimed. In any event, the irregularity in respect of the sum of €299.27 provided, at best, a *bona fide* defence to that miniscule portion of the liability, in circumstances where Launceston had, for the purposes of the application for summary judgment, agreed to give Mr Wright credit for the gross rather than the net proceeds of sale of the security. It could not be the case that Mr Wright was entitled to credit for the gross proceeds of sale. At best he had an argument as to the difference between the net and gross proceeds of sale. Unsurprisingly no argument was advanced that this would be less than the disputed €299.27. The trial judge remitted to plenary hearing the balance of the claim, including the amount of the costs of the sale. Thus Mr Doherty is correct when he says that the court can be absolutely satisfied that Mr Wright's liabilities extend (and I would say at least extend) to the amount in which judgment was given by the President.

23. The relevant evidence as to rental income is to be found in the Affidavit of Jeremy Irwin sworn on the 11th April 2019. This Court directed that such affidavit be received in lieu of an amended notice of opposition to be filed by the respondents. At paragraph 29 (f) of that affidavit, Mr. Irwin deposes to the fact (controverted in Mr. Wright's affidavit of the 24th of May 2017) that the rental income was credited against Mr Wright's liabilities and that he was notified of this fact on the 25th of May 2017. As to the alleged failure on the part of Launceston to give him credit in respect of certain sums paid by way of VAT, no evidence was put before Kelly P. in respect of this proposed line of defence and neither was it relied upon in the Notice of Appeal. That being so it is not open to the court to have regard to this submission on the appeal.

24. As a result of Mr. Wright's challenge to the updated figures which were made available in Mr. Prenderville's affidavit of 4th October, 2017, Launceston, as referred to above, produced the document entitled "Loan Balance at 30th September 2017 with credit for difference between gross sale proceeds and net sale proceeds (already applied)". This shows that the sum due on 3rd October, 2017 of €2,221,248. 22 was reduced by a sum of €164,733.54 to reflect the costs of the sale of the secured properties. That sum (€2,056,209.67) was then reduced further to give Mr. Wright the benefit of the difference between the gross and net sale price of the property, resulting in a further reduction of €313,367.40. It was in such circumstances that the final figure of 1,742,842.27 was arrived at. The balance of the claim was remitted to plenary hearing. Thus even if there was an over charging of interest in the amount claimed (€299.27) or a failure to give credit for any rent received (€16,400), it is not possible that Mr Wright's liabilities to Launceston could have been less than the amount in respect of which judgement was given.

25. Furthermore, in so reducing the sum, the High Court judge was not making any final determination as to the sum due by Mr Wright. He was making sure that he did not underestimate the extent of any potential defence that Mr Wright might have. For example, while clause 14 of the general conditions of the loan agreement renders Mr Wright liable in respect of the receiver's costs in relation to the sale of his properties, the High Court judge excluded that sum (€164,733.54) from his calculations, with the result that it has been remitted to plenary hearing.

26. It seems to me that Kelly P. applied the fundamental test aforesaid insofar as he granted summary judgment, a portion of the claim being remitted, as it was, for plenary hearing. Here, there is no issue of credibility or of law on any relevant point, and apart altogether from the fact that there are no grounds for criticism of the President, there is no defence in law.

27. In conclusion, I see no basis for this appeal and I would accordingly dismiss it.