THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 112

Record Number: 2019/146

High Court Record Number: 2015/1059 S

Donnelly J.
Noonan J.
Ni Raifeartaigh J.

BETWEEN/

ALLIED IRISH BANKS PLC

PLAINTIFF/RESPONDENT

- AND -

ARNOLD FANNING, SHEILA FANNING AND JAMES FANNING

DEFENDANTS/APPELLANTS

EX TEMPORE JUDGMENT of the Court delivered by Mr. Justice Noonan on the 16th day of January, 2020

1. This is an appeal from the judgment and order of the High Court (Barrett J.) of 19th March, 2009 whereby the court acceded to an application for summary judgment against the second and third appellants ("Mrs. Fanning and Mr. Fanning Junior") in the amount of €250,000 against Mrs. Fanning and €300,000 against Mr. Fanning Jnr. The first defendant ("Mr. Fanning Senior.") was the husband of Mrs. Fanning and the father of Mr. Fanning Jnr. Mr. Fanning Senior passed away on 28th March, 2017. No order was sought against him or his estate in the High Court.

2. The background to the claim is that the Fannings appear to have owned a printing business in the Midlands which was a limited liability company called Midland Web Printing Limited ("Midland"). Mr. Fanning Senior and Mrs. Fanning were at all material times directors of that company. Mrs. Fanning has sworn two affidavits in these proceedings while Mr. Fanning Jnr. has sworn none. In her first affidavit, Mrs. Fanning avers that she was never involved in the administrative side of the business, which she left to her husband and son and she worked as a compositor in the business until her retirement prior to 2000.

3. She concedes however, that she continued as a director and executed various documents on behalf of the company, including most of the facility letters referred to in these proceedings. It would seem that ultimately, the business failed and I note that both the late Mr. Fanning Senior and Mrs. Fanning have suffered from ill-health for some time,

which I am sure must have been a factor in all this, quite apart from the severe effects of the economic recession. In that regard, I have considerable sympathy for the Fannings, who I am sure struggled hard to keep their business afloat and regrettably, doubtless through no fault of their own, did not succeed.

4. The bank's claim herein is on foot of personal guarantees signed by the defendants in respect of Midland's indebtedness to the bank. Although the loan facility in issue here was given in 2011, the guarantee executed by Mr. Fanning Senior and Mrs. Fanning goes back to 2008, suggesting that the 2011 facility may have been some form of renewal or restructuring of pre-existing facilities.

5. The letter of sanction relied upon by the bank in these proceedings is dated 21st of February, 2011 authorising two overdrafts of €250,000 and €50,000 respectively. In respect of the €250,000 overdraft, the repayment terms provided that it was to be reviewed on 30th September, 2011 and in relation to the second facility of €50,000, that was to be repaid by the 15th March, 2011, suggesting it was a very short term arrangement. This letter of sanction was signed by both Mr. Fanning Snr. and Mrs. Fanning on 21st February, 2011. The security provisions refer to a letter of guarantee dated 31st January, 2008 for the sum of €250,000, signed by Mr. and Mrs. Fanning. That guarantee is in standard form and covers all present and future advances to the company up to the limit specified and there is no issue about that. A second guarantee was executed by Mr. Fanning Jnr. on the same date as the letter of sanction, the 21st February, 2011 guaranteeing Midland's liabilities to the bank up to a maximum of €300,000. Again, there is no issue about this guarantee.

6. Apart from the sanction letter of 21st February, 2011, it is necessary to refer to three subsequent letters of sanction upon which Mrs. Fanning relies. In her second affidavit, Mrs. Fanning exhibits another letter of sanction she came cross dated 11th October, 2012 which deals only with the overdraft of €250,000. It makes no reference to the second facility of €50,000, perhaps because it had at this stage been repaid as required by the first facility letter. Although the second facility letter has blank spaces for the signatures of Mr. Fanning and Mrs. Fanning, it appears not to have been executed. A copy was sent to Mr. Fanning by the bank on 11th October, 2012 with a covering letter stating: -

> "The borrower: Midlands Web Printing Limited
>
> Facility: €250,000 overdraft
>
> Dear Arnold
>
> We hold a guarantee from you for the facilities specified above.
>
> We will like to notify you that we have agreed with the borrower to change the terms of the facilities as set out in the enclosed copy of our letter to the borrower dated 11th October, 2012…"

7. The letter of sanction provided that the repayment was to be reviewed on 31st January, 2013 and Mr. and Mrs. Fanning's letters of guarantee, which are described as "supported" were to be among the security required. The third letter of sanction is exhibited in Mr. McGuinness's affidavit of the 12th February, 2019 and is dated the 13th May, 2013. This again relates to the sum of €250,000 but is now described as a loan account, the purpose of the sanction being stated as "take out of overdraft facility". The security is the same letter of guarantee from Mr. and Mrs. Fanning. It is signed by Mr. Fanning only. The loan was repayable over five years by way of equal monthly instalments of €4,717.

8. The bank's evidence about this letter of sanction is contained in one of the affidavits of its witness, Brian McGuinness. His evidence in this regard is to be found in a supplemental affidavit sworn on 12th February, 2019, in which he avers that the amount referred to in this facility was not drawn down. This was because an error was found in the facility letter in that the word "supported" was not included in respect of the security provided by Mrs. Fanning. The significance of that word is not explained, but insofar as Mr. McGuinness swears that the amount of the facility was never drawn down, his evidence is uncontroverted. There is nothing to suggest that the monthly payments envisaged by the letter were ever made and the only bank statement of the company as 'Exhibit 7' of Mr. McGuinness' first affidavit shows no such payments between January 2015 and February 2016.

9. The fourth and final facility letter to which reference is made is dated 21st June, 2013 and is exhibited in Mrs. Fanning's first affidavit. It appears in all respects to be identical to the letter of sanction of the previous month, save that in the security section, the word "supported" now appears after Mrs. Fanning's letter of guarantee which was absent in the May letter. This final letter of sanction is signed by Mr. Fanning Snr. only but there is no date on his signature. Mr. McGuinness deals with this last letter in his supplemental affidavit. In that regard, he exhibits a letter from the bank to Mr. Fanning Jnr., dated 3rd April, 2014 which states: -

> "Re: Letter of offer dated 21st June, 2013 to Midland Web Printing Limited
>
> Dear James
>
> I refer to your letter received 24th of March inst., which included a copy of a letter of offer dated 21st June, 2013 and which was signed by Arnold and Sheila Fanning on 19th March, 2014.
>
> As I explained to you on our telephone conversation, that letter of offer is out of date since June 2013 and is therefore no longer considered a valid offer/legal agreement."

10. The undisputed evidence of Mr. McGuinness is that as of the 16th December, 2014, a sum in excess of €302,000 was due by Midland to the bank. On 10th March, 2014, the bank made a demand to Midland for payment of the then outstanding sum of just over €280,000. A subsequent demand was made by the bank's solicitors on the 8th May, 2015

for the larger sum due as of December 2014. It is important to note that there is no dispute, but that these sums were advanced to Midland and not repaid. Subsequent demands for payment on foot of the guarantees were made of Mr. and Mrs. Fanning by letters of 18th March, 2014 and 8th May, 2015 and of Mr. Fanning Jnr. by letter of 7th July, 2014 and 8th May 2015.

11. These proceedings were issued by way of summary summons on 10th June, 2015 and followed up by a motion for summary judgment on 31st March, 2017. In her replying affidavits Mrs. Fanning essentially raised four points by way of defence in the High Court:-

    (1) She has no recollection of signing the guarantee.

    (2) She has a cross claim against AIB arising out of an investment in the Belfry Fund, which she claims to have been negligently sold to her, *inter alia*.

    (3) She complained that AIB acted unlawfully in encashing an insurance policy held as security for the facility.

    (4) The letter of sanction of 21st February, 2011 on foot of which this claim is made was superseded by the subsequent letter of 13th May, 2013 and therefore the company cannot be sued on foot of the earlier defunct facility and she has thus no liability as guarantor.

12. Each of these points was considered in an interim judgment given by Barrett J. on 29th January, 2019 and he discounted defences one, two and three. With regard to defence four, he gave the bank an opportunity to address this in a supplemental affidavit before determining the matter finally. That supplemental affidavit was sworn by Mr. McGuinness on 12th February, 2019 and when the matter came back before the trial judge on 19th March, 2019, he was satisfied that it explained matters sufficiently to enable him to give judgment against the defendants.

13. It is fair to say that defences one, two and three have now been abandoned by Mrs. Fanning and Mr. Fanning Jnr. and the principle issue remaining is whether or not the bank is entitled to judgment having regard to the position about the various facility letters. I do not believe it is necessary to rehearse in any detail the legal principles to be applied to applications for summary judgment. The *locus classicus* remains *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 which held that the test is whether or not the defendant has established that he or she has a fair or reasonable probability of having a *bona fide* defence. That has been described and considered in a vast number of subsequent judgments, to which it is unnecessary to refer.

14. Sometimes the test posited is whether, as Hardiman J. noted in *Aer Rianta*, it is very clear that the defendant has no defence. More recent decisions have emphasised that the defence must be credible in the sense of having some reality to it. Consequently, what are commonly described as "bare assertions" are insufficient to enable the case to be remitted for plenary hearing where they are unsupported by any documentary or other

corroborating evidence or indeed are contradicted by such evidence. This cuts both ways as recently recognised by the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84.

15. The defendants submit, correctly in my view, that it would have been open to the trial judge to remit the matter for plenary hearing on 29th January, 2019 given the shortfall in the bank's evidence. However, he took the pragmatic, and in my view more appropriate, course of allowing the bank to put in a further short affidavit to deal with this sole remaining point. To have sent the entire matter to a full plenary hearing on the basis of a simple matter such as this, which could be readily corrected by a short supplemental affidavit, would in my view have been quite disproportionate and unwarranted. However, in fairness to the defendants, they make no complaint about this.

16. Their main complaint is that the explanation given by Mr. McGuinness in his last affidavit that the letter of sanction of 13th May, 2013 did not become operative as the money was not drawn down, the reason being the absence of the word "supported" after the reference in the security section to Mrs. Fanning's guarantee, amounts to no more than a bare assertion and is thus insufficient to entitle the bank to summary judgment. The defendants effectively contend that sauce for the goose is sauce for the gander. However, I do not think it is correct to suggest that this is a bare assertion.

17. Mr. McGuinness says that the May letter was not acted upon because of a defect in its wording. Whether it was defective or not, the evidence shows that a letter in identical terms was issued a few weeks later in June, 2013 with the allegedly defective wording rectified. This appears to me at a minimum to corroborate the evidence of Mr. McGuinness that the May, 2013 letter never became operative. For different reasons, the June, 2013 letter did not take effect either. It is also corroborated by what might be described as the course of dealing between the parties since Midland itself sought to rely on the June, 2013 facility in correspondence with the bank on the presumed basis that it had come into effect; clearly suggesting that the May 2013 letter never came into effect. I am therefore satisfied that there was more than ample evidence which entitled the trial judge to conclude that the letter of sanction of 13th May, 2013 never took effect and the previous letter of 21st February, 2011 remained extant. The trial judge was therefore correct in my view to conclude that this point did not give rise to any arguable defence.

18. A further complaint is made in the grounds of appeal that the trial judge was wrong to hold that the letter of sanction of 11th October, 2012 never took effect because it was not executed by the company, although this was not argued in the High Court. I assume that this contention is advanced on the basis that the letter of the same date from the bank to Mr. Fanning Senior gave him notice as a guarantor that the terms of the facilities had been changed. Of course it may well be true to say that there had been a discussion verbally about the matter, no doubt with Mr. Fanning Senior himself, in anticipation of the formal execution of the letter of sanction by the company. This never happened and it seems to me therefore the trial judge was perfectly entitled to conclude that the 2012 letter of sanction had never become operative.

19. A further point is raised by the appellants before this Court, that the bank, in order to pursue the appellants on foot of the guarantees, was obliged to prove the underlying debt of the company and thus the entitlement to sue on foot of the guarantees. This is not, however, one of the appellants' grounds of appeal, nor does it appear to have been argued in the court below, and accordingly, cannot be entertained by this Court. Similarly the suggestion made today that some form of resulting trust arose from the circumstances described does not give rise to any arguable defence and was not argued in the High Court.

20. In any event, it seems to me that there is no substance in that point, as Mr. McGuinness in his first affidavit averred that the sum was due, and exhibited an extract from the company's bank account in that regard. He also indicated at the outset of his affidavit that he had access to all the relevant computer and other books and records of the plaintiff in relation to the accounts and labilities of the company. It therefore seems to me that this could not be classed as bare assertion.

21. For all these reasons therefore, I can detect no error in the judgment of the High Court and I would dismiss this appeal.