THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 126
Record Number: 2018/119

Whelan J.
Donnelly J.
Power J.

BETWEEN/

DANKSE BANK A/S

Plaintiff/Respondent

- AND -

JOHN KELLY

Defendant/Appellant

EX TEMPORE JUDGMENT of Ms. Justice Power delivered on the 12th day of March 2020

1. This is an appeal of an order for summary judgment of the High Court made on 12 March 2018 (Meenan J.) wherein the trial judge made an order for €1,502,175.00 in favour of the respondent bank, Danske Bank A/S ('the bank').

2. A loan facility of €1,500,000.00 was advanced to Mr. Kelly ('the appellant') pursuant to a facility letter dated 12 October 2007. It was to be repaid by 240 consecutive monthly instalments. It also provided that in the event of default, the principal loan and interest accruing thereon would become immediately due and payable.

3. The loan facility was drawn down on or around November 2007. As security, the bank first took legal mortgages over 3 separate properties. The appellant also had another current account with the bank, which the bank claimed was overdrawn without authorisation.

4. By letter dated 7 May 2009, the bank sent a letter of demand by registered post to the appellant, following default of repayments on the loan, and an unauthorised overdrawing of the current account. Repayment was sought in the sum of €**1,590,614.92**. This amount was comprised of an outstanding sum of €1,502,175.00 on the loan account and an outstanding sum of €88,439.92 on the current account, respectively. The sum demanded did not include interest that had accrued on both accounts.

5. Meanwhile on 17 November 2009, a receiver was appointed in respect of the appellant's secured assets and realisations in the sum of €99,877 were made.

6. By further letter dated 25 July 2013, the bank demanded payment of the outstanding balance of **€1,875,317.02** (which included the sums due, as above, on the loan account and the current account plus interest).

7. The bank claims that the appellant has failed, refused or neglected to discharge the sum demanded and which had fallen due.

8. On 18 February 2015, two payments were made by the appellant in respect of the current account in the sum of €11,540 and €2,500. These were made from the secured assets and reduced the total sum outstanding **to €1,861,277.02.**

9. The bank issued proceedings on 6 May 2015 seeking judgment in that sum of €1,861,277.02, with interest and costs.

10. Since the issuing of proceedings, the bank has decided to waive the interest in respect of the principal sum (which interest stood at €245,333.49). Realisations from the secured assets referred to above cleared the outstanding balance on the current account.

11. By notice of motion dated 20 January 2017, the bank sought liberty to enter final judgment against the appellant in the sum of €1,502,175.00.

12. A motion for liberty to enter final judgment was heard on 12 February 2018 and on that day Meenan J. held that the plaintiff was entitled to judgment in the sum sought.

High Court Judgment

13. The trial judge noted that the test for summary judgment was that which was set out in *Aer Rianta cpt v. Ryanair Ltd.* [2001] 4 I.R. 607. He, therefore, had to consider whether the appellant had a defence to the claim made by the bank.

14. He noted that the first defence raised was that the claim was statute-barred. The appellant pointed to a letter which he claims was issued by the bank in April 2009 thus making the claim statute-barred as proceedings issued on 6 May 2015. The High Court judge held that if the appellant wanted to rely on an earlier letter, then it was incumbent upon him to exhibit it. The bank had produced evidence of a letter of demand sent by registered post and exhibited proof of a posting date of 8 May 2009. There was no evidence that this letter of demand was not received or returned. In these circumstances the asserted defence regarding the Statute of Limitations Act 1957 (the 'Statute') was not an arguable defence.

15. The second point raised by the appellant by way of defence was that the bank had not put forward any evidence that his loan was included in the agreement wherein the business of that bank was transferred to Danske Bank. The trial judge noted that Dankse Bank A/S was the successor to National Irish Bank Limited pursuant to the Central Bank Act 1971 (Approval of Scheme of National Irish Bank Limited and Danske Bank A/S) Order 2007, as approved by the Minister for Finance. In response to the appellant's second claim, the trial judge considered that the bank was entitled to rely upon the facility letter and the documentation in evidence before the court without providing further proof of the loan. Accordingly, he held that the appellant did not have an arguable defence in respect of the transfer of the loan between National Irish Bank Limited and Danske Bank A/S.

Grounds of Appeal

16. The appellant has raised 10 grounds of appeal many of which overlap. Essentially, at the hearing these were addressed by reference to the two principal arguments made before this Court.

17. The first alleges a failure on the part of the trial judge to have any due regard to the argument made by the appellant concerning the alleged transfer of assets to the bank not having been proven.

18. The second alleges a failure on the part of the trial judge to deal appropriately with the point raised regarding the Statute.

Decision

19. As the trial judge correctly noted, the law to be applied when dealing with an application for summary judgment is as stated in the case of *Aer Rianta cpt v. Ryanair Ltd* (at p. 623). In that case, Hardiman J. stated that:

> *"The fundamental questions to be posed on an application such as this are:*
>
> - *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?"*

20. The appellant has submitted, again before this Court, that the bank's claim that it has, in fact, succeeded to the rights and entitlements of National Irish Bank Limited is a matter in respect of which he is entitled to formal proof. The bank replies that the facility letter of October 2007 actually post-dated the transfer of assets between National Irish Bank Limited and Danske Bank A/S which occurred on 1 April 2007. In this regard, reference was made to S.I. no. 29/2007 (the Central Bank Act 1971 (Approval of Scheme of National Irish Bank

Limited and Danske Bank A/S) Order 2007. I see little or no merit to the appellant's claim that he has an arguable defence on this point and I see no reason to depart from the reasoning of the trial judge in this regard.

21. As to the second issue, namely, the Statute, the appellant submits that insofar as the bank now seeks to rely on s. 36(1)(a) of the Statute, the plea on this section was not a matter raised or argued before the High Court. Were this Court to rule on that matter or have regard thereto, the appellant would, in fact, be deprived of his right to appeal on that point. I agree with counsel for the appellant and, consequently, I do not consider that this is a matter that is properly before this Court. Consequently, this Court cannot have regard to this plea in this appeal.

22. I turn now to the appellant's submission made both before the High Court and before this Court to the effect that the bank's claim is statute-barred because its own records indicate that a letter demanding repayment was issued in April 2009. If that were to be established, successfully, by the appellant then he argues that the claim against him would be statute-barred. That is a defence which he submits he would be entitled to raise if the proceedings were to be sent to plenary hearing.

23. The bank submits that the High Court judge was entitled to find that if the appellant wanted to rely on an earlier letter, then it was incumbent upon him to exhibit it. Meenan J. was also entitled to find that the bank had produced evidence of a letter of demand sent by registered post and that it had exhibited proof of posting dated 8 May 2009. There was no evidence that this letter of demand was not received or returned. The bank has submitted that this Court should not engage in a complete re-hearing of the case and that it should only interfere with the trial judge's findings where the decision is 'untenable'.

24. The appellant had raised an argument, based on the bank's own records, that the case is statute-barred. Were no other record of demand available, that may have entitled the plaintiff

to raise an issue in defence, in terms of the Statute. The bank has not explained on affidavit how this reference in its own records to a letter issuing in April 2009 came about. It prefers to focus, understandably, upon the later letter which, in its view, establishes that the proceedings were brought within six years of the date of demand for payment.

25. The fact that other demands post-dating April 2009 were made does not, in itself, allow the bank to close its eyes to a record within its own possession which indicates that an earlier demand for payment issued in April 2009. Were discovery of relevant bank records to be ordered, further documents relevant to the entry dated April 2009, which states that a letter of demand issued at that time, may be disclosed.

26. These are certainly matters within the bank's control. The appellant, in my view, should not be deprived of raising an arguable defence in circumstances where the bank's own records raise a question as to whether the claim was brought within six years of the demand having been made. Whether the period of 6 years or 12 years is the relevant statutory limitation period in this case is not a matter which this Court has to decide. As noted earlier, I confine myself strictly to the matters which were before the High Court.

27. Given the significance of what is involved when summary judgment is granted I approach this appeal in the light of what McKechnie J. said in *Harrisgrange Limited v Duncan* [2003] 4 I.R. 1, namely, '*the power to grant summary judgment should be granted with discernible caution'*. Since issues concerning the Statute are, inevitably, associated with issues of fact, I am not satisfied that the issue of fact as to whether or not a letter of demand did issue in April 2009 is something that can be determined without having recourse to a plenary hearing. A document is before the Court which states that 'demand letters issued in April 09' and this is a matter which, when finally determined, may go to the defence of this claim. Discovery may shed further light on this.

28. Applying the test for summary judgment (*per* Hardiman J.) I cannot say that it is *'very clear'* that the defendant has no case. I cannot say that the issue of whether a letter issued in April 09 is one which is '*easily determined'*. I cannot say that the appellant has failed to disclose even an '*arguable defence'*.

29. I consider that the appellant is entitled to have the matter proceed to plenary hearing, which may involve the trial of a preliminary issue on the Statute.

30. In view of the reasons set out herein I would allow the appeal.