



THE COURT OF APPEAL

Record No. 2017/455

**McGovern J.
Costello J.
Donnelly J.**

BETWEEN/

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

RESPONDENT

- AND-

PÁDRAIG KELLY AND BRIDGET (OTHERWISE BRIDIE) KELLY

APPELLANTS

JUDGMENT of Mr. Justice McGovern delivered on the 28th day of November 2019

1. This is an appeal from an order of Noonan J. made on 27 July 2017 wherein he granted summary judgment against the appellants in favour of the respondent in the sum of €117,184.96.
2. The proceedings were commenced on foot of a guarantee provided by the appellants as security for the provision of credit to Ballymitty Supply Stores Limited ("the company"). The appellants were directors of the company. The company went into voluntary liquidation on 1 September 2010.
3. There are a significant number of grounds of appeal but they can be distilled into the following: -
 - (a) the trial judge erred in proceeding with the motion for summary judgment before hearing the appellants' motion to compel the respondent to furnish all bank statements and loan offers for all loans taken out by the company since 1981. The appellants claim that if their motion had been heard first it would have had a material effect on the outcome of the respondent's claim;
 - (b) the trial judge erred in finding that the bank statements covering a period of just one year could be safely relied on in ascertaining the ultimate balance due on all accounts which were secured by the personal guarantees of the appellants;
 - (c) the trial judge erred in holding that the allegations of overcharging of interest on the company's account was a bare assertion and did not constitute an arguable defence in circumstances where the total amount of overcharging was likely to be roughly equivalent to the alleged debt;
 - (d) the trial judge erred in law in holding that the allegation that the respondent had forced the company into liquidation thereby discharging the personal guarantee did not constitute an arguable defence;

- (e) the trial judge erred in law in holding that the personal guarantee being relied on had been validly executed and in holding that the guarantee was unenforceable in the absence of legal advice;
 - (f) the trial judge erred in law in refusing to allow the appellants' solicitor to outline in detail the legal principles governing the exercise of summary jurisdiction.
4. In paragraph one of the appellants' written legal submissions they state: -

"The nub of the defence to this claim was that the plaintiff had forced [the company] into liquidation to deprive its manager of her capacity as co-executor of the estate of the late Paddy Donnelly to scrutinise his alleged will of 4 December 2009 and its passage through probate as the plaintiff had a hidden interest in that estate. The defendants further contend that the plaintiff had deliberately frustrated the sale of the business premises of [the company] for sums of €180,000 and €175,000 to ensure the business premises was sold at a lower price thereby ensuring that there would be residual debt to enable the plaintiff to enforce the guarantee against the elderly mother and brother of the said manager and co-executor and thereby neutralise the said manager in her capacity as co-executor of the said will of the late Paddy Donnelly".

However, the grounds of appeal which have been filed do not include any issue referable to the administration of the estate of the said Paddy Donnelly deceased and it is difficult to see how this matter could have had any relevance to whether or not the respondent was entitled to summary judgment against the appellants. In any event this issue was not canvassed or pursued on the appeal and it is not therefore necessary for this court to consider the matter further.

5. There was no disagreement between the parties concerning the legal principles applicable to an application for summary judgment. These are to be found, *inter alia*, in *Aer Rianta CPT v. Ryanair Limited (No 1)* [2001] 4 IR 607 ("*Aer Rianta v Ryanair*"), *Harrisrange Limited v. Duncan* [2002] IEHC 14, [2003] 4 IR 1, and *Irish Bank Resolution Corporation (in special liquidation) v Gerard McCaughey* [2014] IESC 44, [2014] 1 IR 749 ("*IBRC v McCaughey*"). The principle emerging from these cases are so well known and accepted that it would be otiose to repeat them here other than in the most general terms. If summary judgment is to be granted it must be "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. A mere assertion in an affidavit sworn by or on behalf of a defendant is not sufficient to enable a defendant to be granted leave to defend. The court must look at the whole situation and decide 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. The appellants argue that the High Court judge did not follow the principles to be found in this line of jurisprudence and that it could not be said to be "very clear" that the appellants had no defence, nor one which could be described as arguable.

6. It is against the background of the agreed jurisprudence that this court should assess the findings of the High Court judge in order to determine whether he was entitled to grant summary judgment to the respondent.
7. The appellants claim that the trial judge refused to allow the appellants' solicitor to set out in detail the legal principles governing the exercise of summary jurisdiction. I have read the transcript of the summary judgment hearing and it is quite clear that Mr. Maher, on behalf of the appellants referred to a number of the well known cases on the topic and the effect of those decisions. He referred to *MacEnroe v Allied Irish Banks Ltd* [1980] ILRM 171 (p.10, 12 and 19), *Allied Irish Banks plc v Marino Motor Works Ltd* [2017] IEHC 522 (p.13), the generally accepted principles relating to applications for summary judgment (p.16-17), *Aer Rianta v Ryanair* (p.18 and 21), *Harrisrange Limited v Duncan*, and *IBRC v McCaughey* (p. 18), and *Allied Irish Banks Plc v Darcy* [2016] IECA 214, [2016] 1 IR 588 (p.20). At no point in the transcript does it record a complaint from Mr. Maher that he was not properly allowed to refer to the relevant jurisprudence in an adequate manner. There was nothing controversial about the jurisprudence referred to as it is habitually referred to in applications of this nature and the law on the topic is very well settled. While this complaint was not pursued to any real extent in legal argument on the appeal I am satisfied that there is no substance to the complaint.

The facts

8. On 5 April 2004 both appellants signed guarantees whereby they guaranteed the indebtedness of the company. Both appellants were directors of the company.
9. On 20 July 2010 the company wrote to the respondent informing it that it was unable to pay the monthly premium due on 14 July 2010 in the sum of €921.34 in order to keep the company premises insured. On 1 September 2010 Mr. Philip Tubritt wrote to the respondent informing it that at a meeting of creditors of the company held on that date pursuant to s.266 of the Companies Act 1963 he was appointed liquidator of the company. This is *prima facie* evidence that the company was insolvent. In an affidavit sworn on 19 October 2015 Mr. Michael Murphy, an official with the respondent, stated that in recent times the company experienced financial difficulties and this was conceded by the appellants in para. 6 of an affidavit sworn by the first named appellant on 12 June 2015 in which he stated: "We say and believe that during the first six months of 2010 we were having difficulties with our business as the result of the collapse of the economy". Mr. Murphy stated that the respondent had a voluntary scheme in place for customers who were experiencing trading difficulties whereby an enterprise advisor was appointed to provide business advice to such companies. Mr. Bob Chestnut was the advisor appointed in respect of the company which had a significant level of debt at this time.
10. On 9 July 2010 the appellants submitted a proposal which included a request for additional funding of €60,000 but this request was declined as the company had no repayment capacity. The respondent claimed that the appellants contacted the respondent on 20 July 2010 and spoke with Ms. Helen New who noted at the time that the appellants had informed her they had decided to cease trading on 23 July 2010 as the company had no working capital and they requested the appointment of a receiver rather

than liquidation. This request was declined. In an affidavit sworn on 21 October 2015 Pádraig Kelly on behalf of the appellants disputed the figures relied on by the respondent, denied any valid letters of guarantee and indemnity and claimed that the respondent had forced the liquidation on the company. The appellants made these assertions in spite of the fact that the letters of guarantee duly signed by them had been exhibited in the affidavit grounding the application for summary judgment sworn by Mr. Michael Murphy on 11 May 2015. The appellants made no attempts to suggest why the figures relied on by the respondent were wrong. It is clear that the sum claimed on foot of the guarantee is the balance due on three loan accounts, namely, accounts number 52017795, 38969562 and 40006183. While the appellants claimed that they were not furnished with all the relevant documentation relating to those accounts there is no doubt that they were furnished with the relevant details under cover of a letter dated 25 May 2016 which was fourteen months prior to the hearing before Noonan J. which is the subject of this appeal.

11. In an affidavit sworn on 12 June 2015 Pádraig Kelly stated that sometime around the last week of July 2010 Helen New from the respondent's debt recovery section phoned the appellants to say that they had seven days to pay off the outstanding loans and that if they failed to do so they should hand back the keys and close the business. If the court accepts that evidence as true, for the purposes of an application for summary judgment, it does not amount to a defence of the claim. All it establishes is that the respondent was no longer prepared to afford further credit to the appellants. In so far as there was any controversy about what was said by Helen New it was not necessary for the High Court judge to resolve that issue in order to determine the application before him.

First ground of defence

12. In an affidavit sworn on 21 October 2016 the first named appellant sets out the purported defence to the claim for summary judgment. What is described as the "first grounds of defence" (sic) involves the recital of events leading up to the liquidation followed by a number of paragraphs under the heading "Explanation for forced liquidation". The appellants claim that the respondent acted in a vindictive and deceitful attack on the company for the purpose of compromising Breda Kelly Walsh (the sister of the first named appellant, and daughter of the second named appellant) in order to deprive her of her capacity to raise questions about a will made by Paddy Donnelly deceased at a time when she was one of two executors of his will. As I have stated earlier in this judgment this matter was not pursued as part of the appeal and it is difficult to see how the facts outlined in connection with that matter could raise any possible defence to the claim for summary judgment.

Second ground of defence

13. The second ground of defence is based on the alleged failure on the part of the respondent to provide certain documents to enable secured assets of the company to be sold at their true value. The defence raised consists of nothing more than mere assertion and is robustly contradicted in an affidavit of John Conville sworn on 12 December 2016 which exhibits extensive documentation to support his averments. This includes a document entitled "Issues relating to the sale of the property" prepared by the solicitors acting on behalf of the liquidator. This document sets out in considerable detail why the

proposed sales did not proceed. There were issues related to the percolation area for a septic tank, an enforcement notice in respect of commercial rates which had not been discharged, and a range of valuations between €300,000 and €180,000. At the time of the liquidator's appointment the debt due to the respondent was €183,747.32. On 19 May 2011 an offer of €184,500 was made by Mr. Pat Roche for the property but on 7 June 2011, and prior to the respondent reverting to the liquidator in respect of the offer, the offer was withdrawn. Around the same time an offer of €174,500 was made by Mr. Brendan Neville and the respondent agreed to release its mortgage over the property upon receipt of the balance of proceeds of sale after discharge of various liabilities affecting the properties and the costs of sale. Although contracts issued to Mr. Neville's solicitor he withdrew from the transaction on 15 August 2011. In September 2011 an offer of €100,000 was received for the shop by Mr. Padraig Harris and Mr. Seamus Allis and a separate offer of €40,000 was made for the yard by Mr. John McKeown. These offers were accepted and contracts were issued to both parties. Due to title issues and issues associated with the percolation area from the septic tank and waste water treatment the figure offered by Messrs. Harris and Allis was discounted by €20,000. Subsequently the purchasers indicated they would only complete the sale subject to the grant of planning permission for remedial work which was required. This was not acceptable to the respondent and ultimately Messrs. Harris and Allis withdrew from the sale. Mr. Greg Neville indicated he was prepared to purchase the shop for €75,000 and contracts were issued to his solicitor but he subsequently withdrew from the transaction. Ultimately Mr. John McKeown offered to purchase the shop for €75,000 and the yard for €40,000 and this offer was accepted and the matter was concluded after various deductions, costs and fees the balance of €67,440.17 was forwarded to the respondent and the mortgages were discharged and credit was given to the debt owed by the company and ultimately the appellants.

14. Applying the established jurisprudence to the facts one finds that what were mere assertions on the part of the appellants were met by a comprehensive response backed up by evidence which completely undermined the assertions made by the appellants. In those circumstances the assertions were not credible. Accordingly, this alleged ground of defence does not meet the threshold required for a plenary hearing.

Third ground of defence

15. This ground appears to be based on excessive interest charges. But other than making that assertion the appellants have not supported it with any evidence. Bank statements were exhibited with the affidavit grounding the application for summary judgment and these show that the company was extensively overdrawn and the interest charged from time to time was set out. There has been no meaningful attempt on the part of the appellants to say in what way and to what extent the interest charged was either incorrect under the terms of the loan agreements or was excessive. The appellants' assertions in relation to interest charges are no more than that and do not meet the threshold for establishing an arguable defence.

Fourth ground of defence

16. In this purported ground of defence the appellants state that the guarantees are invalid and of no legal effect because the bank acted deceitfully and fraudulently. The alleged deceit and fraud is that which has already been referred to and rejected as not constituting an arguable defence. It also appears to include the allegation of overcharging of interest which was already contained in the third ground of defence. The facility letters were exhibited and they have been signed and accepted by the appellants. The guarantee and indemnity signed by each appellant in respect of the debts of the company have also been exhibited. They are clear on their face, have been signed by each of the appellants in the presence of witnesses and they have also signed certificates concerning independent legal advice wherein they stated they did not wish to be so advised. The appellants cannot simply repudiate the documents which they signed. They are bound by them. See *ACC Bank plc v. Kelly & Another* [2011] IEHC 7 where Clarke J. stated at para. 7.3:-

“I am not satisfied that any person taking the trouble to read the clause in question could have any difficulty in understanding what it meant. Even if someone had such difficulty then it is incumbent on such a person to take advice. It must be remembered that these are not consumer transactions. The Kellys were involved in quite a significant business and had borrowings in excess of €7m. This was, therefore, a commercial banking transaction. Many people in such circumstances do take professional advice whether from accountants or lawyers. There is no obligation, of course, to do so. But someone who signs commercial banking documents without taking advice on them runs a risk which they must accept. They will be bound by the terms which they sign up to.”

17. The appellants have not in any way established an arguable defence but have made a number of assertions which are either not backed up by any evidence or which are demonstrably incorrect in view of the documentary evidence furnished by the respondent. In those circumstances the assertions made by the appellants are simply not credible and do not meet the test required to have the determination of this claim remitted to plenary hearing.

The discovery motion

18. The appellants claim that a motion for discovery which they brought in the High Court should have been heard before the claim for summary judgment. In my view the High Court judge was quite correct in dealing with the summary judgment application first. It would have been an unnecessary waste of scarce court time and resources to embark upon the hearing of a discovery motion until such time as it was determined whether the case was to proceed to plenary hearing. In *Irish Life and Permanent plc trading as Permanent TSB v. Hanrahan & Another* [2015] IECA 125 Kelly J. considered this very point on an appeal from a refusal by Moriarity J. in the High Court to grant an application for discovery where a motion for liberty to enter final judgment was still pending in the Masters Court. Kelly J. observed at p.3 that “It is by reference to the pleadings that the question of the entitlement to discovery falls to be determined.” In dismissing the appeal the Court held at p. 3:-

“In my view, Moriarity J. was correct in taking the view which he did. This is not the appropriate time for an order for discovery to be made. The issues have not yet been defined. They have not been identified. They will not be identified until such time as pleadings have closed between the parties if the case gets to that stage”.

19. The process of discovery is not to enable a party to identify grounds capable of establishing a cause of action. See *Keating v. Radio Telefis Éireann & ors* [2013] IESC 22.
20. In my view the High Court judge was correct in hearing the application for summary judgment in advance of the application for discovery and I would dismiss the appeal in so far as it is based on that ground.
21. So far as the substantive appeal is concerned the High Court judge correctly applied the established jurisprudence to the facts of this case and I am satisfied that no error can be found in his decision to grant summary judgment.
22. I would dismiss the appeal.