THE COURT OF APPEAL

Neutral Citation Number: [2021] IECA 130
Court of Appeal Record Number: 2018/431
High Court Record Number: 2017/2440S

Noonan J.
Haughton J.
Ní Raifeartaigh J.

BETWEEN/

PROMONTORIA (ARROW) LIMITED

PLAINTIFF/RESPONDENT

-AND-

CATHAL MALLON

DEFENDANT/APPELLANT

-AND-

MICHAEL SHANAHAN

DEFENDANT

JUDGMENT (*ex tempore*) of the Court delivered by Mr. Justice Noonan on the 20th day of April, 2021

1. The application before the court today is one brought by the first defendant/appellant, Mr. Mallon, to amend his grounds of appeal in this appeal from an order of the High Court granting summary judgment against him.

2. Promontoria's predecessor herein, the EBS Building Society, issued a letter of loan offer to the defendants on the 28th June, 2006. The amount offered was €1.8M for the purposes of the purchase of a one acre development site at Mill Lane, Shankill, County Dublin which was proposed to be purchased for the sum of €2.5M. The loan initially was to have been a two year interest only loan but its terms were extended in 2008 and again in 2009. There is no dispute but that the facility letter was executed by both defendants, the money was drawn down and the site purchased. The subsequent amended loan offer letters dated respectively the 2nd November, 2008 and the 24th March, 2009 were also executed by both defendants.

3. The loan was ultimately transferred to NALM and on to the plaintiff on the 11th December, 2015. Thereafter a demand for payment was made by Promontoria on the 7th July, 2016. A summary summons was issued on the 7th November, 2017 followed up by

motions for summary judgment. The application for summary judgment was grounded upon the affidavit of Lisa Burns, who is an associate director employed by Link ASI Limited, described as the servicer of the plaintiff who provides loan administration and asset management services in respect of the loans of the defendants that are owned by Promontoria. Ms. Burns says that she is authorised by the plaintiff to make the affidavit and does so from an examination of the plaintiff's books and records. This affidavit also doubled as an affidavit grounding an application to admit the case to the Commercial List of the High Court.

4. In the grounding affidavit, Ms. Burns exhibits a number of documents including the facility letter and the amendments thereto that I have described, the deed of assignment between NALM and Promontoria, the demand for payment, a statement of the balances due and a deed of appointment dated 23rd September, 2016 of a receiver over the site. Ms. Burns' affidavit was sworn on the 10th November, 2017 and in response, Mr. Mallon swore an affidavit on the 11th December, 2017. I think it fair to say that this affidavit takes no issue with anything Ms. Burns says in her affidavit, other than referring to his personal circumstances, with two exceptions. The first is that he claims that he did not enter into an "open ended joint and several personal guarantee" with the EBS. The second is a statement that: -

> "13. My best recollection of lengthy bank negotiations which took place between seven and twelve years ago is that the EBS accepted an unfettered claim on the land as security for the loan."

5. I assume that the thrust of this latter statement is intended to be that the lender's recourse was to be confined to the property rather than to Mr. Mallon, although this is far from clear. As already noted, Mr. Mallon does not deny that he executed the various facility letters, that the money was drawn down or that the site was purchased. A second affidavit was sworn by Ms. Burns on the 29th January, 2018 but significantly, it was sworn in response, not to the affidavit of Mr. Mallon, but rather to an affidavit of Mr. Shanahan sworn on the 15th January, 2018 which is not before this court. One can infer from this affidavit however that Mr. Shanahan was claiming that he did not consider that he had assumed any personal liability in executing the facility letters and was suggesting, like Mr. Mallon, that there was a limited recourse agreement.

6. It would appear that Mr. Shanahan also made claims about meetings that took place between himself and Philip Butler and Conor Boyle of EBS in 2006. Mr. Mallon makes no reference to these meetings in his affidavits. Mr. Mallon swore two subsequent affidavits on the 24th May and 26th September, 2018. The first of those refers purely to his medical condition. The second and final affidavit sworn by Mr. Mallon returns to the theme of non-recourse suggesting that he could not possibly have undertaken a personal liability given his financial circumstances.

7. He suggests that unless there is an opportunity for discovery, it would not be possible for him to show the emails dealing with what he describes as "hard negotiations" over loan terms. He then appears to make an appeal to the court for any relief the court can give

him from the claim for judgment on six separate personal bases which are essentially *ad misericordiam* pleas as to why he would suffer hardship if judgment were to be granted against him. Of note, Mr. Mallon says that he had tried to settle the matter without admission of liability and had made various offers to Promontoria which he specifies. That is the sum total of the evidence put before the High Court by Mr. Mallon.

8. I think it important to point out that at no stage in any of his affidavits or, apparently, in his submissions before the High Court, did Mr. Mallon raise any question or issue concerning the plaintiff's claim in terms of how it was particularised or any complaint concerning the amount claimed. Similarly, he raised no issue as to the plaintiff's proofs and in particular the capacity of the plaintiff's deponents to give the evidence they purported to give.

9. It would appear that the claim against Mr. Shanahan came before the Commercial Court on the 22nd March, 2018 when McGovern J. granted judgment against him. The claim against Mr. Mallon came before Twomey J. who gave an *ex tempore* judgment on the 11th October, 2018 granting a decree in the sum of €1.9M against Mr. Mallon. This was subject to a stay pending appeal on terms.

10. In his judgment, the trial judge set out the facts as I have outlined them above noting that judgment had already been granted against Mr. Shanahan by McGovern J. The judge noted that Mr. Mallon accepts that the money was borrowed and not repaid. He noted that two defences were raised, first the non-recourse defence and second, that the matter should go to plenary hearing so that Mr. Mallon could look for discovery to assist him in establishing his defence.

11. The judge traversed the well-settled legal principles for the grant of summary judgment. He noted that the suggestion by Mr. Mallon that the loan was agreed to be a non-recourse loan was contradicted by the documents executed by him and that there was no evidence to substantiate the assertion by Mr. Mallon in this regard. He characterised it as a "mere assertion". Given the fact that Mr. Mallon had signed at least three different versions of the facility letter, the trial judge concluded that this defence was not credible. He then dealt with the personal guarantee point which he found was not of assistance to the defence given that there was no guarantee involved. Finally, he turned to the question on discovery and noted that the law was that there should be some rational basis for discovery rather than simple bald assertions of fact. In the trial judge's view this did not give rise to any right to discovery and could, accordingly, not amount to a credible defence in itself. He granted judgment accordingly.

12. Mr. Mallon, now with the benefit of a legal team, served a Notice of Appeal raising essentially three grounds. First, that there was evidence of a meeting on the 27th July, 2006 between Messrs. Butler, Boyle and the defendants wherein it was agreed that the loan would be non-recourse. How this arises is unclear because it is not mentioned anywhere in Mr. Mallon's affidavits. The second ground of appeal was that Mr. Mallon did not appreciate that he was entering into joint and several liability and that there was a contest on the facts in this regard which should have entitled Mr. Mallon to a plenary

hearing. The third ground of appeal is that the evidence put before the court by Mr. Mallon did give rise to a right of discovery and thus a right to a plenary hearing.

13. The notice of appeal was filed on the 16th November, 2018 with the Respondent's Notice having been filed on the 4th December, 2018. The motion before the court today was issued on the 25th February, 2021 seeking an order pursuant to O. 86, r. 10(1) of the Rules of the Superior Courts giving Mr. Mallon leave to amend his Notice of Appeal. It is proposed to add two new grounds in the following terms:

> "4. The plaintiffs have not properly pleaded the particulars of the amount claimed. The plaintiffs have not relied on documents created in the course of dealing and the court has not been told how the third party deponents have access to information from the plaintiff or the original lender.
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> 5. There was insufficient evidence before the court of the type of business records carrying indications of reliability and there was not evidence sufficient to establish a course of dealing between Promontoria and the appellant."

14. The motion before this court is grounded on the affidavit of Barry O'Donoghue, the plaintiff's solicitor and the essential basis for this application is set out in para. 4 of Mr. O'Donoghue's affidavit: -

> "Since the notice of appeal was filed, the Supreme Court delivered the decision in *Bank of Ireland Mortgage Bank v Joseph O'Malley* [2019] IESC 84 and this court upheld the decision of the *High Court in Promontoria (Aran) Limited v Burns* [2019] IEHC 7."

15. I think the latter reference is intended to be the Court of Appeal decision which is [2020] IECA 87.

16. At para. 7 of his affidavit, Mr. O'Donoghue avers that the proposed amendment is not substantial and does not change the nature of the appeal suggesting it will be expanded simply to examine the respondent's proofs.

17. That is to be contrasted somewhat with what is stated in the appellant's written submissions herein which state (at para. 24) that the new grounds will require new evidence, without specifying what that evidence may be. It is further suggested that the new grounds are consistent with and closely related to the grounds argued in the High Court. I cannot accept that proposition. The new grounds appear to me to be neither consistent with or related to the grounds argued in the High Court, but rather diametrically opposed to them.

18. *O'Malley* was concerned with the requirements of O. 4, r. 4 which requires that the indorsement of claim in summary proceedings must state specifically and with all necessary particulars the relief claimed and the grounds thereof. As explained in *O'Malley*, the essential enquiry for the court is whether the summons, or documents to which it refers, give sufficient detail on the plaintiff's claim to enable the defendant to

decide whether he should pay it or not. As I pointed out in *Havbell DAC v Hilliard* (unreported, Court of Appeal, 18 December 2020), referenced in the respondent's submissions, *O'Malley* did not introduce new law but rather was a restatement of the law as it existed for well over a century.

19. The Supreme Court provided a timely reminder that the frailties of mere assertions are not confined to defendants and a plaintiff still has the obligation to adduce sufficient evidence to establish a *prima facie* case with sufficient particulars before the defendant can be called upon to answer that case. As already noted, Mr. Mallon never raised the slightest issue in the High Court in this case concerning the computation of the claim.

20. On the contrary, he in effect admitted the claim but sought in a rather vague way to suggest that the parties intended that recourse could not be had to Mr. Mallon personally, an assertion entirely contradicted by the documentary evidence as the trial judge pointed out.

21. *Promontoria (Aran) Limited v Burns* [2020] IECA 87 on the other hand was concerned with the nature of the evidence adduced in summary judgment applications, particularly where the plaintiff was not the original lender but rather an assignee thereof. Issues concerning the rule against hearsay arose in those proceedings not just from the fact that the plaintiff was an assignee but also that the principal deponent was a further step removed from the plaintiff.

22. However, none of that was raised in any shape or form in the High Court nor can it reasonably be suggested that *Burns* introduced any new rule of law or practice which changed the landscape. It was always open to a defendant to take issue with the ability of particular deponents to swear affidavits deposing to matters not directly within their own knowledge, a point frequently and for many years made by litigants in many cases. That this is so is demonstrated by the large number of authorities dating from before the High Court hearing in the present case, dealing with the question of proof of records, referenced in *Burns* itself. These include; *Moorview Developments Ltd v. First Active plc* [2010] IEHC 274; *Bank of Scotland plc v Stapleton* [2012] IEHC 549; *Bank of Scotland plc v Fergus* [2012] 4 IR 428; *Governor and Company of Bank of Ireland v. Keehan* [2013 IEHC 631; *Ulster Bank Ireland Limited v Dermody* [2014] IEHC 140; *Ulster Bank Ireland Limited v. Egan* [2015] IECA 85; *Ulster Bank Ireland Limited v O'Brien* [2015] 2 IR 656. Indeed in *Burns* itself the sole defence raised by Mr. Burns was that the *Bank of Scotland plc v Stapleton* case applied and all of the documents before the court were in the nature of hearsay. Accordingly, there is nothing new in this point in my view.

23. However, of central importance in this application is the fact that if either of these points had been made in the High Court, the respondent may well have been able to answer them either by delivering further particulars, amending their pleadings if necessary and swearing further affidavits to address the point. Perhaps indeed if Mr. Mallon had legal representation in the High Court, precisely these points would have been made and it is understandable that given that he is now represented, these issues are raised for the first time on appeal.

24. However, as had been repeatedly said, the rules are the same for everyone, be they represented or not. In *Lough Swilly Shellfish Growers Co-Operative Society Limited v Bradley & Ors* [2013] 1 I.R. 227, O'Donnell J. referred to a "spectrum" of cases where new evidence or arguments might arise on appeal. At one end of the spectrum (the difficult end from the appellant's point of view), lay cases where new evidence would have to be adduced or where arguments sought to be made that were diametrically opposed to those made in the court below. That is the situation that arises here.

25. At the other end of the spectrum are cases where a new formulation of argument was made on appeal in relation to a point already advanced in the High Court which called for no new evidence or materials. The raising of the *O'Malley* point on appeal was considered in this court by Haughton J. in *AIB v O'Callaghan* [2020] IECA 318 which again was a case where the *O'Malley* decision was given in the interregnum between the High Court and the appeal before the Court of Appeal.

26. As in this case, Haughton J. pointed to the fact that it was at all times open to the appellants to agitate any concerns they had as to the adequacy of the particulars in the summons in the High Court and as here, had it been raised, it is likely that the trial judge would have afforded the bank an opportunity to mend their hand. Also as in the present case, in *O'Callaghan* there was no denial that the money had been drawn down, that the loan sanction had been executed and no prejudice was claimed arising from the level of particularisation.

27. I reached a similar conclusion in the *Hilliard* case. The same logic must perforce apply to an argument made on appeal for the first time about the ability of the plaintiff's deponents to swear affidavits as it does to the level of particulars given. As the appellant rightly says, these new grounds are concerned with a further examination of the plaintiff's proofs, but such examination was at all times equally open to the plaintiff in the High Court, had he chosen to pursue it. I accept of course that the threshold for introducing new evidence and arguments on appeal in summary judgment cases is probably somewhat reduced beyond that which applies in plenary proceedings, as the recent decision of the Supreme Court in *Ennis v Allied Irish Bank plc* [2021] IESC 12 makes clear.

28. That also was a summary judgment application by a bank where judgment was given in the High Court and an appeal dismissed by the Court of Appeal. The defendant alleged that the agreement on foot of which he was sued by the bank did not represent what had actually been agreed but was unable to put this beyond mere assertion. However, after the High Court judgment, as a result of a freedom of information request, he obtained documents from the bank comprising emails which appeared to lend support to his contentions as to what had actually been agreed at the material time.

29. Had this been available in the High Court, it would certainly have given rise to an arguable defence, as the Supreme Court held. Speaking for the court, McMenamin J. reviewed the law concerning new evidence/arguments on appeal in different categories of case including plenary proceedings, interlocutory proceedings and summary proceedings.

He noted, in the context of plenary proceedings, that it was well settled since *K.D. v M.C.* [1985] 1 IR 697 that save in the most exceptional circumstances, the appellate court should not hear and determine an issue which had not been tried and decided in the High Court, although there may be exceptions in the interests of justice.

30. At paras. 18 – 19 of the judgment, McMenamin J. explains why it is essential that all points available to be argued are put before the court of first instance: -

> "18. But, although a grant of leave to argue new points, or raise new evidence, may arise in the interests of justice, it must be viewed from another perspective. Exceptions are not to be seen as a licence for lax procedure. There are serious competing considerations which will also concern a court when new arguments are sought to be raised on appeal. A person entitled to win a case should not be faced with the prospect of losing it because a valid and decisive point was not made at the trial at first instance. There are real dangers in allowing a practice which is over-lax in permitting new grounds to be raised on appeal. Parties must be required to make their full cases at trial. An over-generous approach to permitting new grounds to be raised on appeal for the first time could only encourage either sloppiness, imprecision, or lead to attempts to take a tactical advantage (*per* Clarke J. (as he then was) in *Ambrose* paras. 4.11 – 4.13).
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> 19. Whilst agreeing with what had been said in *Lough Swilly*, in *Ambrose*, Clarke J. went on to emphasise that a case which would necessarily involve new evidence, and not simply a new legal argument, would place much greater weight on the side of the equation which lay against permitting a new point to be raised for the first time on appeal. There, the risk of real prejudice will be significant. Speaking in the context of that appeal, he pointed out that the prospects of a new trial would be difficult to avoid, and that the need to encourage a party to bring forward its full case at trial would carry more weight (para. 4.14)."

31. Although this was said in the context of plenary trials, it seems to me that they apply, albeit to a less strict degree, in summary proceedings where, as noted by McMenamin J. at para. 21, "the courts tend to adopt a more flexible approach in applications to raise new arguments." McMenamin J referred in this regard to *Lopes v Minister for Justice, Equality and Law Reform* [2014] IESC 21; [2014] 2 IR 301; *Irish Bank Resolution Company (in special liquidation) v McCaughey* [2014] IESC 44; [2014] 1 IR 749; *Moylist Construction Ltd v Doheny* [2016] IESC 9, [2016] 2 IR 283 as examples of cases of the "more flexible approach" in non-plenary cases. However, lest it be thought that the *Ennis* decision has recalibrated the balance in this area of law in any dramatic way, it is fair to note that although McMenamin J. allowed for greater flexibility in non-plenary cases, he said (at paragraph 15 of his judgment) that the *K.D.* principle remained "the general principle" i.e. that it was a fundamental principle that save in the most exceptional circumstances, the court should not hear and determine an issue which has not been tried and decided in the High Court. He also said that while there were exceptions, they must

be "clearly required in the interests of justice". McMenamin J. viewed the *Ennis* case as falling within the category of "truly exceptional".

32. One of the difficulties that arose in *Ennis* was that there appeared to be an element of confusion in the Court of Appeal concerning the new evidence, with the full court perhaps being under the impression that it remained to be determined whether that evidence should be admitted. In fact, an order had already been made by the directions judge that the evidence should be admitted although for whatever reason, sight may have been lost of that fact. Commenting on the judgment, McMenamin J. said (at para. 57): -

> "… The judgment of the Court of Appeal addressed the criteria for allowing new material on appeals, stating that a party would be permitted to raise issues on appeal only in certain limited circumstances. The judgment referred to the passage from Finlay C.J.'s judgment in *K.D.*, cited earlier, and to some of the wording in *Lough Swilly*, which dealt with the 'spectrum of cases'. It cited the judgment in *Koger Inc. and Anor v O'Donnell and Ors* [2013] IESC 28, where Clarke J. (as he then was) held that the Court of Appeal had a discretion to allow a new point to be argued on appeal but would not exercise its discretion in cases in which the new point that the plaintiff sought to raise was completely opposed to the points raised during the trial in the High Court (paras. 12 – 14) …"

33. At paragraph 76, McMenamin J. emphasised that the features present in *Ennis* made the circumstances of the case truly exceptional and placed it within a rare category. There is however in my view nothing exceptional about the facts of the present case or indeed the circumstances giving rise to this application. It seems to me that in reality no valid reason has been advanced why the new arguments now sought to be made could not have been made in the High Court. In truth, the answer to that question appears to be that Mr. Mallon was not represented in the High Court. The reasons for that are not material and I note in passing that in his first affidavit, Mr. Mallon said (at para. 2) that counsel's fees were beyond his means and regrettably he found himself as a lay litigant before the court.

34. That situation now appears to have changed. Whilst one of course must sympathise with the difficulty any litigant faces who is unable to afford legal representation or is ineligible for legal aid, for the reasons explained by McMenamin J. that cannot give rise to a right to agitate a new case on appeal, now with the benefit of legal advice. *Ennis* and the authorities canvassed therein repeatedly refer to the need for the court to be mindful of an injustice arising in considering an application of this kind. Mr. Mallon has not satisfied me that any injustice will arise in the absence of these new grounds being permitted.

35. For these reasons, accordingly, I would refuse this application.