



THE COURT OF APPEAL

[2019] IECA 277

Record Number: 2017 580

**Irvine J.
Baker J.
Donnelly J.**

BETWEEN/

EBS LIMITED

RESPONDENT

- AND -

ANN DEMPSEY

APPELLANT

JUDGMENT of the Court delivered by Ms. Justice Donnelly on the 31st day of October 2019

1. This is an appeal against the refusal of the High Court to set aside a judgment obtained by EBS Limited (“EBS”) against the appellant in default of appearance in the amount of €860,485.75 plus costs in the amount of €384.00 (the “default judgment”).
2. The proceedings were initiated by summary summons issued on the 18th December, 2013. EBS sought judgment against the appellant on foot of the terms of a loan facility letter dated 18th April, 2005 pursuant to which EBS advanced to the appellant a loan in the amount of €860,000. The default judgment was entered in the Central Office of the High Court on the 7th July, 2014.
3. Two issues arose for consideration on the hearing of the motion in the High Court. These were: -
 - (a) Whether the appellant had been properly served with summary summons; and
 - (b) whether the appellant had a good defence to the claim of EBS.
4. At the hearing of this appeal those two points were pursued but it should be noted that the good defence claimed by the appellant was entirely different to that advanced in the High Court. It was acknowledged by EBS that if there had been no proper service of the summary summons, then the default judgment should be set aside without any need to establish an arguable or good defence.

The evidence before the High Court

5. The affidavit of service upon which judgment was given was initially sworn by Colum Smith on the 7th February, 2014. In that affidavit he averred as follows: -

"At the time of such service aforesaid, I showed the original of the said summons to the defendant who identified herself to me."

6. That affidavit was re-sworn on the 27th May, 2014. That affidavit contained handwritten additions inserted into the original. The new paragraph three now reads as follows: -

"At the time of such service aforesaid, I showed the original of the said summons to the defendant whose appearance I was acquainted with."

7. According to the solicitor for EBS, the affidavit was re-sworn because when it was presented to the Central Office of the High Court by the solicitors for EBS, they were informed of a change in protocol. This meant the Central Office would no longer accept an affidavit of service which merely specified that the party being served had identified themselves to the party effecting service. Instead, in order to mark judgment in default of appearance, the Central Office now requires all affidavits of service to specify that the appearance of the party being served was known to the party effecting service at the time such service was effected.
8. In her affidavit grounding her application to set aside judgment, the appellant averred that she did not identify herself to Mr. Smith, nor was he acquainted with her appearance on the 27th January, 2014. She said he did not personally serve her at Oasis Florists, her business, on the said date as she was not at the premises at that date. She said she was at the house of one of her sisters for an annual event with her sisters and did not return home until late that evening. She said that when she was not in attendance at her florist shop, another employee, Aisling Fanning, worked alone on the premises with the exception of busy periods such as St. Valentine's Day. She stated she believed that on the 27th January, 2014 Aisling Fanning was working alone in Oasis Florists. She said that given the nature of the business of being a florist she maintained a daily business diary and retained copies of orders. She exhibited the daily business diary from the 25th January, 2014 to the 1st February, 2014. This did not contain any information relevant to the proceedings.
9. Aisling Fanning also swore an affidavit saying that on the 27th January, 2014, she was working alone in Oasis Florists for the entire day as the defendant was away. She said that Mr. Smith did not attend Oasis Florists on the 27th January, 2014 and that in the circumstances, he did not serve any documents on the defendant on that date.
10. Mr. Smith, a professional summons server, swore an affidavit in reply to the motion. Having set out the circumstances in which his affidavit of service had come to be amended, he went on to describe the manner in which service was effected. He said that he first tried to serve the summons on the 15th January, 2014. Before trying to effect service he had noted various images of the appellant from a Google search of her business website, her association with Terenure Traders Association and her Facebook public profile. He said that he had attended her private residence, and he spoke with a young man who identified himself as her son. He called back at the time he was advised she would return, but there was no answer. On that date, he also attended the business

of Oasis Florists and was advised by a female member of staff that the appellant would be likely to return around 4pm. He returned after that time but the appellant did not appear to be in attendance. He then described that between the 15th January, 2014 and 23rd January, 2014, he made a number of further attempts to effect personal service on the appellant at her place of residence. There was no response on each occasion.

11. On the morning of the 23rd January, 2014, Mr. Smith attended personally outside the appellant's residence and waited there for almost two hours in the hope he might encounter her. Ultimately, he was told by another woman that the appellant had already left but he was not given an answer as to what time the appellant ordinarily left the property. He stated that on the basis of those matters, he formed a view that the appellant was deliberately evading service of the proceedings.
12. Mr. Smith said that in those circumstances he attended personally with his wife at the appellant's business premises on the afternoon of the 23rd January, 2014. Mr. Smith and his wife indicated they were planning a large event and sought to speak to the appellant directly. They were advised that the appellant was not present. Subsequently, Mr. Smith's wife contacted the shop looking to speak with the appellant and was told the appellant would be present at the business premises on the 27th January, 2014 if she wished to call in.
13. Mr. Smith said that he called to the premises at approximately 3 pm and effected personal service on the appellant. He said he was acquainted with her appearance from the Google search. He said that as he was effecting service on the appellant, she identified herself to him and stated "you have been looking for me" or words to that effect. He said in those circumstances he has no doubt but that he effected personal service of the summary summons on the defendant on the 27th January, 2014 in the manner detailed in his affidavit of service.
14. He disputed the relevance of diary entries. He made a general comment that it would be unusual for a party to record the fact that they have been served with proceedings seeking judgment for personal debts in the books for records of their business. In relation to the averment by Ms. Fanning that he did not call to the premises on the given day, he says that at the time he effected service there was no other person evidently present in the retail section of the premises.
15. Peter McKenna, solicitor for EBS also swore an affidavit. Of particular note in his affidavit is that on the 3rd December, 2013, his firm had sent a letter demanding payment of the amount outstanding on foot of the loan facility forming the subject matter of the proceedings. He said that it was apparent from the contents of the letter that the appellant was informed that the commencement of the proceedings was imminent unless she cleared her liability to EBS. Furthermore, a letter was sent on the 13th March, 2014 noting that service had been effected and advising the appellant of a failure to enter an appearance to the proceedings. The letter warned her that if she did not make appropriate proposals to EBS, then EBS would proceed to make judgment in default of appearance against her. She was strongly urged in the letter to seek advice from a

solicitor. He said no explanation whatsoever was offered by the appellant in her affidavit, for her failure to respond to the aforesaid correspondence. He said that this was matter to which the court was entitled to have regard in assessing her credibility.

16. In response, the appellant swore a supplemental affidavit. She took issue with what had been sworn by Mr. Smith. She pointed out that in his re-sworn affidavit, he had deleted the averment that the appellant identified herself to him. She said that she was present in the business all day on the 14th and 15th January, 2014; and if he had been acquainted with her appearance, he could have effected personal service on either of those dates. She again denied being present at the business on the 27th January, 2014 and specifically denied saying the words "you have been looking for me".
17. Mr. Smith swore a second affidavit. In this he gave further details of what he described as his extensive efforts to serve the appellant. He gave various explanations as to why he had tried so often to serve her, including the fact that he was a native of Terenure Road and familiar with the area.
18. In reply to that affidavit, the appellant swore a second supplemental affidavit. The appellant pointed out that she works approximately eighty-five percent of the time while Ms. Fanning works the remainder of the time. Ordinarily it is rare other than for busy periods such as Valentine's Day that both herself and Ms. Fanning are in attendance in the shop at the same time by reason of a work rota. She pointed out that there were no other members of staff. She pointed out that the business was operated from a very small premises, slightly larger than a kiosk. She again strenuously denied having identified herself to Mr. Smith and denied saying the words "you have been looking for me".
19. The appellant averred that Mr. Smith did not personally serve her with the summons on the 27th January, 2014, as at the time of the purported service on that day she was not at the premises known as Oasis Florists. She also said that she was not personally served with the summons at any time.
20. The appellant also swore an affidavit setting out why she claimed she had a defence to the EBS claim on the merits that it had a reasonable prospect of success.

The judgment of the High Court

21. The trial judge set out the conflicting evidence before him. He gave his decision on the issue with regard to service of the summons as follows: -

"It is of course impossible for a court to seek to determine in a situation where affidavits contradict each other where the truth lies. The court notes that as this is the application by the defendant it is surprising that no application was made to cross-examine Colum Smith or Peter McKenna on their affidavits where they are so trenchantly opposed. It appears to the court that this failure to seek to cross-examine the summons server and the solicitor who engaged him and who had carriage of the

proceedings places the defendant in the position that the court is satisfied that she was served as claimed by Mr. Smith.

Further despite Mr. Smith's evidence on affidavit evidence that he had called to her residence on a number of occasions there is no affidavit from either her son who answered the door or any other person who resides with the defendant in relation to these events. It is also clear that the solicitors on behalf of the plaintiffs wrote prior to the issue of the summons and also subsequently to the service of the summons and at no stage did the defendant seek to raise an issue with these solicitors as one would expect to say that she had not got the summons.

Whilst it might also have been helpful for Mr. Smith's wife to have sworn an affidavit nevertheless the defendant does not dispute that some event was suggested to her by Mr. and Mrs. Smith when they called to the business premises on the 27th January, 2014 nor does Ms. Fanning make any reference to same. In all the circumstances the court is satisfied in the absence of a motion to cross-examine Mr. Smith by the defendant that the defendant was served with the summons."

The appeal

Irregularity in the service of the summons

22. Order 13, rule 11 provides that where final judgment is entered pursuant to any of the rules of that order, the court may set aside or vary such judgment upon such terms as may be just. As the trial judge correctly indicated the authorities disclose two distinct categories of case upon which the discretion may be exercised. The first is where there was some irregularity in the proceedings or the procedure by which the judgment sought to be set aside or varied was obtained; and secondly, where the judgment was obtained in a regular manner but the defendant may have a good defence to the claim and the interests of justice require that he should be given the opportunity to defend the proceedings.
23. As stated by Peart J. in *Allied Irish Banks Plc. v. Lyons* [2004] IEHC 129 at para. 12 and quoted with approval in this court: -

"Clearly a wide discretion is given to the Court in its task of achieving justice between the parties, but the interests of both parties must be taken into account in the weighing exercise undertaken by the Court in considering the interest of each party..."
24. There is much authority to the effect that as regards default judgments, the courts will require strict compliance with the rules. This has been said to be "extremely important having regard to the potential grave consequences for any defendant against whom judgment is obtained." Per Irvine J. in *McGrath v. Godfrey* [2016] IECA 178 at para. 22. Undoubtedly, if a person has not been served at all there is a gross defect of the most fundamental nature and therefore no compliance with the rules. The issue in the present case however is one of proof. That is, proof as to whether or not service was actually effected.

25. The question of proof of service means that the primary issue on this appeal is whether Mr. Smith's affidavit of service on the appellant was correctly accepted as credible by the trial judge or whether it should have been rejected and the affidavit evidence of the appellant and her employee accepted in its stead. I am satisfied, that there was no defect in the re-sworn affidavit of service filed with the Central Office and that was never an argument in the proceedings. Instead, the change in the affidavit was called in aid by the appellant to support her contention that Mr. Smith's evidence stating she was served should be rejected. Thus, the focus at the trial and on the appeal was whether there was an irregularity in the service of the summons.
26. This raises the question of whether the trial judge was incorrect in his finding of fact that the appellant had been served with the summons. In her submissions, the appellant argues that the weight of the evidence, in particular the corroborative evidence of Ms. Fanning and the two narratives set out in the original affidavit of service of Mr. Smith supported the appellant's contention that she was not served. In particular, the appellant states that the learned trial judge determined the conflict of fact with regard to service by drawing an inference from the absence of a motion to cross-examine Mr. Smith by the appellant that she had been served with the summons. It is submitted that the lack of cross-examination was the sole rationale given by the trial judge for determining the appellant was served with the summons.
27. The appellant relies on *Hay v. O'Grady* [1992] 1 I.R. 210 which was summarised in a judgment of the Court of Appeal *Emerald Isle Assurances and Investments Ltd. v. Dorgan* [2016] IECA 12. Furthermore, she relies on a decision of Hogan J. in the Court of Appeal in *Lynch v. Cooney* [2016] IECA 1. Hogan J. had pointed to the necessity for the trial court to engage with the facts in the case. The appellant submitted that the trial judge did not engage with the evidence. It was submitted that when the trial judge stated the impossibility of determining the conflict of fact with regard to service that he should have adjourned the hearing of the motion and directed the attendance of all witnesses for the purposes of hearing oral testimony so as to determine the conflicts of fact.
28. Although no authority was open to the Court as to where the burden of proof lay in an application to set aside a judgment, I am of the view that the appeal was correctly premised on the principle that the burden must lie with the party seeking to set aside the judgment. This is a logical corollary of the position that the obtaining of the judgment must be accorded some standing and therefore requires a defendant to point to some factor at a minimum to demonstrate irregularity. This is entirely consistent with the requirement that there must be strict compliance shown by a plaintiff. A defendant seeking to set aside a default judgment must present to the court a *prima facie* case giving rise to a concern that there has not been strict compliance.
29. During the course of his submissions, counsel for the appellant argued that the affidavit of the employee, Ms. Fanning amounted to a shifting of the burden of proof. In so submitting, it appears counsel was suggesting that on the facts, the evidential burden had shifted back onto the plaintiff not that as a matter of law the legal burden of proof had

shifted. In the appellant's submission therefore, this corroborative affidavit of Ms. Fanning tilted proceedings in his favour and no cross-examination was required.

30. Insofar as the appellant has relied upon the number of affidavits to support his contention that an evidential burden shifts, the passage in McGrath, *Evidence* (2nd ed., Round Hall, 2014 at p169) is apposite: -

"In general, the common law eschews any quantitative requirements with regard to testimony, concentrating instead on the qualitative aspect of such evidence."

31. This suggests that a burden, even an evidential burden, cannot be said to shift, merely because one party has put forward a greater number of witnesses than the other. Equally, the courts are always alert to the weight to be given to apparently corroborative evidence based upon relationships between witnesses or other potentially relevant factors. Moreover, the statement by the trial judge that it was impossible to determine where the truth lies in a situation where the affidavits contradicted each other is one which is often to be found in legal decisions. The matter is resolved in those circumstances by reference to the question of where the burden of proof lies. As Hedigan J stated in *Finnegan v. Superintendent of Tallaght Garda Station* [2017] IECA 222 an applicant bearing a burden of proof cannot have a conflict of affidavit evidence resolved in his favour. Hedigan J stated: -

"It was submitted that this Court can prefer one account over another. The respondent could have applied to give oral evidence or cross-examine the Garda witnesses. The respondent, as the applicant, bore the burden of proof and as such, a conflict of affidavit evidence could not be resolved in his favour."

32. The appellant submitted that if the trial judge was of the view that the conflict could not be resolved without cross-examination that he should have adjourned the hearing of the case for that purpose. That submission must be rejected. Under the adversarial system in operation in these courts, a moving party bears the burden of being ready to present the case. If he or she have not satisfied that burden, there is no obligation on a trial judge to point this out and give a further opportunity to satisfy that burden. That is not to say that a trial judge, in the exercise of his or her discretion, may not, in an exceptional case, suggest an adjournment for the purpose of enabling the Court to determine the real issues in the case in the interests of justice. That, as stated, would arise only in exceptional circumstances. The interests of justice demand that parties are ready to proceed with and adduce evidence to prove their cases at the time listed for the hearing of that case. It would in general be contrary to the interests of justice to require courts to adjourn merely because a party has through error, oversight or inability been unable to prove a case to the required burden of proof.

33. In all those circumstances therefore, the trial judge was entitled as a matter of law and on the facts to determine that it was, in his words, "impossible to determine where the truth [lay]" where there was a clear conflict on the affidavits as to a central item of evidence: whether the appellant was served or not served with the summons. In those

circumstances it was clear that he was entitled to hold that the appellant had not discharged the burden to demonstrate that there was irregularity in the service.

34. I am of the view that this decision was entirely reasonable based upon the conflict of evidence in the case. The credibility was at issue on both sides, as indicated by the affidavit of Mr. McKenna pointing towards the failure of the appellant to deal with receipt of letters. There is no doubt that credibility as to the averments lay at the heart of the decision and where there was such a clear conflict on basic facts, the trial judge correctly identified the failure to cross-examine Mr. Smith and Mr. McKenna as a crucial factor in his decision. In the absence of cross-examination, the conflict of affidavit evidence could not be resolved in favour of the appellant.

35. It is important also to note that the Supreme Court has recently addressed the issue of the resolution of factual disputes. Although that decision was given in the context of the hearing of judicial review proceedings, the principles are apposite. In *RAS Medical Limited v. Royal College of Surgeons in Ireland* [2019] IESC 4 the Supreme Court stated (Clarke C.J. at para 7.4): -

“However, where reliance is placed on evidence to be found either in affidavits, in documents exhibited in affidavits, or in documents which are presented by agreement to the court, then a more difficult situation arises where it is suggested that there is a conflict of evidence whose resolution is necessary to the proper determination of the proceedings. Just as it is inappropriate to argue in a trial conducted on oral evidence that the evidence of a witness should not be accepted, either on grounds of lack of credibility or unreliability, without having given that witness a fair opportunity to answer any issues arising in that context, so also is it impermissible to ask a decider of fact (such as the trial judge in this case) to determine contested questions of fact on the basis of affidavit evidence or documentation alone.”

36. At para 7.6 Clarke C.J. stated: -

“But it is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact.”

37. In my view, the principles set out in *RAS Medical Limited* demonstrate the correctness of the approach adopted by the trial judge in this case. For the reasons set out herein, I would dismiss the appellant's appeal on the irregularity of the service on her of the summons.

A good defence?

38. At the hearing of the motion, the appellant put forward four grounds of defence on the merits. These were:

- (i) incorrect sum claimed by the plaintiff;
- (ii) affidavit of debt incorrect;
- (iii) clause 7 valuation/condition precedent not complied with; and
- (iv) preferred commercial loan over family home loan.

39. At the hearing before this court, the appellant sought to advance a new proposed ground of defence, namely, that the loan was invalid in light of the respondent's breach of the Consumer Protection Code, 2012. At the hearing of the appeal, counsel for the appellant effectively conceded that his only real grounds of defence were the new points he was raising in relation to the Consumer Protection Code, 2012.

40. In my view, having considered the points raised in the written submissions and dealt with by the trial judge, none of the grounds advanced in the High Court reached the low threshold required under the decision in *Aer Rianta Cpt v. Ryanair Ltd* [2001] IESC 94. There had been an error at one point in the summary summons but it had no bearing on the amount claimed by the appellant as of the 17th December, 2013 and contained in the affidavit grounding the motion for judgment. It is not disputed that this figure was accurate. There was therefore no material error of calculation.

41. In relation to the affidavit of debt, it had been claimed that no credit had been given for a particular sum. It appears that the manner in which the respondent confined its claim, by not seeking additional contractual interest, meant that the sum claimed was not in excess of the amount due and owing from the appellant on the 4th June, 2014.

42. The third ground related to clause 7 of the facility letter which the appellant contended required EBS to be satisfied that an independent valuation showed a loan to value ratio of not more than seventy-five percent. There is no suggestion in the facility letter that this was a condition precedent. Furthermore, it is clearly a clause which operated for the benefit of EBS alone. Moreover, two valuation reports had been obtained by the appellant. Nothing in clause 7 gives rise to an arguable ground of defence.

43. Finally, in respect of the allocation of payments, the appellant contends that the respondent had acted in breach of a purported arrangement reached with her regarding the appropriate allocation of payments made by her between three separate loan facilities

with the respondent, two of which had nothing to do with the proceedings. These arguments fall on lack of evidence and indeed relevance.

44. The new point relating to the Code of Conduct on Mortgage Arrears, 2013 and the obligation of a financial institution to comply therewith were only advanced at the last possible moment in these proceedings. It was not advanced in the High Court nor was it put forward in the Notice of Appeal nor indeed in the written submissions that had been filed. Counsel for the appellant submitted that the Court on appeal was obliged to adopt a process which was fair and in the interests of justice and that there were means by which the court could mitigate against any prejudice *e.g.* by way of costs order.
45. In relying on the substantive point, counsel referred to para 5.1 of the judgment delivered by Clarke J. in *Irish Life and Permanent plc v. Dunne* [2016] I.R. 92. and also the judgment of Peart J. in *Bank of Ireland v. Quinn* [2016] IECA 30 at para. 49.
46. Such an eleventh hour change to the basis upon which a case has been argued must be regarded *prima facie* as contrary to the interests of justice. As a general rule, an opposing party should be entitled to have their case heard at first instance with a right of appeal if dissatisfied with the outcome. Although it may be permissible in certain circumstances to hear arguments *de nova* on appeal, the circumstances must surely diminish where the grounds are only raised on the day of the appeal.
47. I do not consider that this court has to make a final determination that the ground should not be entertained simply because I am of the view that the factual basis for the claim under the Consumer Credit Code has not been laid. As it was not an argument in contemplation of the appellant or her lawyers at the High Court, it is clear that no attention was given to giving a factual basis for what, if any, breaches of the Code are actually alleged to have been committed by EBS. Even in legal argument, counsel for the appellant did not point to any particular breaches that could be said to arise on the evidence before the court. In those circumstances, I am satisfied that this theoretical contention on the part of the appellant does not give rise to any good or arguable ground of defence.
48. Furthermore, even if there were breaches of the Code, it has not been demonstrated that those breaches would amount to a good defence to an otherwise *prima facie* obligation to repay money borrowed by the appellant from EBS. See for example the decision of McGovern J. in *Freeman and Another v. Bank of Scotland Plc and Others* [2014] IEHC 284.
49. Finally, with regard to a new claim in relation to appropriation of payments, the appellant claimed that it was for her to decide the account to which a credit goes. The appellant has relied upon Odgers, *Paget's Law of Banking* (15th edn. LexisNexis UK, 2018 at pp. 239 - 241) to show that in general the debtor has the first right to appropriate a payment to a particular debt. In my view, again, this does not amount to a good defence in circumstances where at the very least the factual basis for the exercise of this right of appropriation has not been demonstrated in the pleadings.

Conclusion

50. In seeking an order to set aside the judgment obtained in default in the Central Office by EBS, the onus lay on the appellant to satisfy the court that (a) service of the summons was irregular or (b) that she had a good and arguable defence to these proceedings. In circumstances where there was a clear conflict on the affidavits concerning the central issue in the motion, that is whether the professional summons server had actually served the appellant, the trial judge was correct in finding that this issue was impossible to decide without oral evidence. In circumstances where the appellant had not sought to cross-examine the professional summons server and the solicitor for EBS, the appellant has failed to discharge the onus of proof.
51. In relation to the grounds of defence raised in the High Court, the trial judge correctly concluded that these did not, on the facts, amount to a good defence. In relation to the points raised at the eleventh hour in this appeal, those points do not disclose a good or arguable ground of appeal.
52. I therefore dismiss this appeal.