THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 128

Record Number 2017/296

Irvine J.
Whelan J.
Gilligan J.

BETWEEN/

ALLIED IRISH BANKS PLC

PLAINTIFF/

RESPONDENT

- AND -

PATRICK STACK AND MARY STACK

DEFENDANTS/

APPELLANTS

JUDGMENT of Ms. Justice Irvine delivered on the 10th day of May 2018

1. This is an appeal brought by Patrick Stack and Mary Stack ("Mr. & Mrs. Stack") against the order of the High Court, Noonan J., dated the 26th May 2017. By his order dated the 26th May 2017 he granted judgment against Mr. & Mrs. Stack for a sum of €2,253,590.84. He also made an order that they pay the costs of the proceedings when taxed and ascertained.

2. By notice of appeal, undated, the defendants seek an order from this court to set aside the order of the High Court judge and replace it with an order referring the proceedings to a plenary hearing.

Background
3. By summary summons dated the 12th February 2015 Allied Irish Banks plc ("the bank") issued summary summons proceedings seeking judgment against Mr. & Mrs. Stack jointly and severally for a sum of €3,016,995 on foot of guarantees allegedly signed by them on the 13th July 2010.

4. By notice of motion dated the 28th May 2015 the bank sought liberty to enter final judgment for the sum earlier mentioned. That application was grounded which upon the affidavit of Mr. Conal Regan sworn on the 18th May 2015.

5. In his affidavit, Mr. Regan set out the background to the sum claimed. He referred to the fact that by letter of loan sanction dated the 6th July 2010 the bank offered to make available to Carrignagour Limited ("the company") a loan facility of €3,920,000 subject to the conditions therein contained. According to Mr. Regan, the purpose of the loan was to continue and extend the company's then existing banking facilities. The terms of the facility provided that security for the loan was to be provided by guarantees executed by Mr. & Mrs. Stack.

6. Unfortunately, the company ran into financial difficulties and was placed in liquidation on the 30th November 2012 with the result that it was not in a position to meet its liability to the bank following demand made of the liquidator by letter dated the 11th December 2012.

7. By reason of the failure of the company to discharge the sums allegedly due on foot of the facility provided further to the letter of loan offer of the 6th July 2010, by letter of demand dated the 3rd February 2015, Mr. & Mrs. Stack were called upon, pursuant to the aforementioned guarantees, to make good the sum of €3,016,995.

8. In his affidavit Mr. Regan exhibited the letter of loan offer of the 6th July 2010 ("CR1") and the separate guarantees allegedly signed by Mr. & Mrs. Stack which are both dated the 13th July 2010 ("CR2" and "CR3"). He also exhibited the letter of demand sent to the company's liquidator, Mr. Myles Kirby, ("CR4") and the letter of demand of the 3rd February 2015 sent to Mr. & Mrs. Stack ("CR5" and "CR6").

9. Mr. Stack swore an affidavit on the 17th June 2015 wherein he relied upon the following matters by way of proposed defence to the claim for summary judgment:-

(i) there was no proof that the company had accepted the terms set out in the letter of loan sanction;

(ii) the loan was not conditional on guarantees being provided by himself or his wife;

(iii) all monies had been drawn down by the company prior to the letter of loan sanction;

(iv) any loans made available to the company pre-dated the facility letter and the guarantees;

(v) their signatures, although bearing the same date, had been witnessed by different witnesses;

(vi) his wife had no involvement in the day to day running of the company and had never received any independent legal advice;

(vii) he had never received any legal advice. Further, he had signed the guarantee when there was no obligation on him to do so as the monies had already been drawn down;

(viii) there was no consideration for the guarantee.

10. Mrs. Stack swore an affidavit on the 17th June 2015. By way of proposed defence she asserted:

(i) the signature on the guarantee containing her name was a forgery. She did not recall signing such a document or having been requested to sign one;

(ii) she had received no legal advice concerning the signing of such a document;

(iii) she was never involved in the day to day running of the company.

11. In a supplemental affidavit sworn on behalf of the bank, Ms. Lynne Allan stated that, as a result of an error, an incomplete copy of the facility letter of the 6th July 2010 had been exhibited in Mr. Regan's grounding affidavit. She exhibited, what she described as, a complete copy of the letter of loan sanction of the 6th July 2010 and also a copy of the resolution signed by the company accepting the bank's offer of facilities amounting to €3,920,000. This resolution, dated the 9th July 2010, was signed by Mr. & Mrs. Stack as chairman and secretary respectively.

12. In her affidavit Ms. Allan refers to the third page of the letter of loan sanction of the 6th July 2010. Paragraph 2 of the said letter provides the company's obligations are supported by personal guarantees, to be furnished by Mr. & Mrs. Stack in the sum of €3.92m. She also refers to the bank's letter of the 7th July 2010 sent under separate cover to Mr. & Mrs. Stack enclosing copies of the proposed guarantees and advising them that they had been nominated by the company to provide such guarantees.

13. At paragraphs 11 to 14 of her affidavit, Ms. Allan refers to the underlying purpose of the loan facility of the 6th July 2010 whereby the bank sanctioned an additional €307,000 to fund the company's completion of certain works at a housing development at Loch Gowna, County Cavan. She explained that not all of the €307,000 was drawn down in full, but confirmed that €64,000 had been drawn down by the company on the 20th July 2010 and a further sum of €8,500 on the 11th August 2010. She detailed the earlier loan facility of €3,375,000 which had been made available to the company in 2009 and which had been secured by personal guarantees furnished by Mr. & Mrs. Stack.

14. Of some importance in the context of Ms. Allan's affidavit is her statement at paragraph 5 where she notes that Mr. Stack, in his replying affidavit, had not asserted that the company had not accepted the terms of the loan facility contained in the letter of the 6th July 2010 and that she presumed that this was because the company had by resolution passed on the 9th July 2010 resolved to accept the banks offer of facilities amounting to €3,920,000.

15. A further matter of note is the opening sentence of paragraph 6 of Ms. Allan's affidavit in which she states as follows:-

"In any event, I say that, in the circumstances, the Bank is prepared to limit its claim in these proceedings to a monies had and owing basis."

She goes on to state that following the removal of interest and making allowance for all due credits the bank was content to seek to recover the lesser sum of €2,253,590.84 on foot of the guarantees. Finally, Ms Allan denied the assertions made by both Mr. & Mrs. Stack to the effect that Mrs. Stack's signature on the guarantee bearing her name was a forgery.

16. In a supplemental affidavit sworn on the 5th November 2016 Mr. Stack did not contest many of the assertions made by Ms. Allan in her affidavit such as her statement that significant sums had been drawn down by the company on the 20th July 2010 and 11th August 2011. He did however state that he was putting the bank of proof of the validity of the guarantees. He also asserted that the bank's concession made at paragraph 6 of Ms. Allan's affidavit amounted to an admission that it was unable to prove that the terms of the loan offer of the 6th July 2010 had been accepted by the borrower including the terms relating to the guarantees. It is noteworthy that Mr. Stack chose not engage with the resolution of the company of the 9th July 2010, the prior borrowings of the company which were supported by personal guarantees, the draw down by the company of significant sums post the 6th July 2010 or the correspondence exhibited in the affidavits sworn on behalf of the bank.

Judgment of the High Court judge

17. The High Court judge delivered an *ex tempore* judgment following the hearing of the banks application for summary judgment on the 26th May 2017. He concluded that the defendants had not demonstrated the probability of a *bona fide* or credible defence and for that reason refused to refer the proceedings to plenary hearing. In so deciding, the High Court judge he stated that he had judged the evidence advanced by the defendants on the test identified in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 and *IBRC v. McCaughey* [2014] 1 I.R. 749.

18. According to the High Court judge, Mrs. Stack's claim that her signature was a forgery was no more than a bald assertion unsupported by any evidence and was inconsistent with other documentary evidence. He was also satisfied that there was clear evidence of consideration to support the personal guarantees in that sums had been drawn down by the company post the 6th July 2010. The High Court judge also concluded that it was mere speculation on the part of Mr. Stack as to why the bank had reduced its claim from the sum claimed in the summary summons to that mentioned in Ms. Allan's affidavit. He held that the bank did not have to explain why it had decided to pursue the lesser. Neither did it follow that just because the bank was prepared to accept a lesser sum than that initially claimed that it had accepted that it was not in a position to prove acceptance by the company of the terms set out in the letter of loan sanction.

Submissions on the appeal

19. By notice of expedited appeal Mr. & Mrs. Stack challenged the refusal of the High Court judge to refer the proceedings to plenary hearing. Some seven grounds of appeal are set out in the Notice of Appeal. On the hearing of the appeal, those grounds were reduced to two main points to which I will now refer.

Submissions of the appellants

20. Counsel submits that the bank, in its summons, had relied upon the acceptance by Carrignagour of the banking facilities offered by letter dated the 6th July 2010. It had pleaded that the terms and conditions therein had been accepted and *signed* by the defendants in their capacity as directors of the company on the 13th July 2010. Counsel submits that the bank did not provide evidence that the facility was accepted by the company, as the letter of loan sanction exhibited by Ms. Lynne Allan at "LA1" of her

affidavit did not include any signed acceptance on behalf of the company. This was to be contrasted with the earlier letter of loan sanction dated the 31st August 2009 exhibited at "LA5" in her affidavit. Counsel asserts that the onus was on the bank to satisfy the court as to the binding nature of the letter of loan sanction and it had not done so. He argues that the defendants might credibly defend the within proceedings on the basis that the facility letter does not show, by the presence of any signature appended on behalf of the company, that its terms were ever accepted by the company. If that were so the defendants could credibly argue that the bank was not entitled to seek to rely upon the guarantees as they existed solely to support the terms of the loan facility of the 6th July 2010.

21. Counsel submits that it is to be inferred from paragraph 6 of Ms. Allan's affidavit that the bank had resiled from its entitlement to rely upon the facility letter and instead was making its claim against the defendants based upon its entitlement to recover from the company the sum claimed on a monies "had and received" basis. A "monies had and received claim" was, according to counsel, a claim at common law and if that was the basis of the bank's entitlement to recover from the company it could not rely upon the guarantees which had been provided to secure the letter of the loan facility. If the loan facility could not be proved the guarantees could not be relied upon.

22. Counsel also submits that the affidavits filed by his clients were sufficient to establish a *bona fide* and credible defence on the part of Mrs. Stack. He refers to Mrs. Stack's bold statement that the signature which appears on the document purporting to be a guarantee in her name is a forgery and her further statement that she does not remember signing any such document. There was also evidence that the signatures of Mr. & Mrs. Stack had been witnessed by different individuals attached to different branches of Allied Irish Bank. According to counsel, Mrs. Stack had given as much primary evidence as she could.

Submissions of the respondent
23. Counsel submits that the bank has never altered the nature of its claim. Its claim against the defendants is on foot of the guarantees that support the facility provided to the company pursuant to the letter of loan offer of the 6th July 2010. The fact that the bank reduced the sum claimed, as deposed to by Ms. Allan in her affidavit, is not evidence that the bank had altered the nature of its claim. Neither could it be treated as an acceptance or a concession on the part of the bank that it could not prove the company's acceptance of the loan facility and its terms and conditions. The failure of the bank to produce a signed copy of the letter of loan offer of the 6th July 2010 could not deny the bank's entitlement to judgment in the sum claimed as it was clear from the evidence exhibited that the company had accepted the terms therein contained.

24. As to Mrs. Stack's averment that the signature on her guarantee is a forgery, counsel submits that this averment is simply not credible and is the type of bald, unsubstantiated averment that is insufficient to demonstrate the probability of a credible defence. Her statement was unsupported by any other evidence and the onus was on Mrs. Stack to corroborate her claim that her signature was forged. According to counsel she could have retained the services of a handwriting expert to support her claim or she might have introduced other material evidence to distance herself from the signature, such as where she was on the day when she was supposed to have signed the guarantee.

25. Counsel submits that having regard to all of the circumstances set out in the affidavits, the defendants had not demonstrated the probability of a credible defence. That being so the High Court judge had not erred in law in granting summary judgment against them.

The principles applicable on an application for summary judgment
26. It is clear from decisions such as that of Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 that before concluding that summary judgment should be granted to a plaintiff, the court must be satisfied that it is "very clear" that the defendant has no defence to the proceedings. Otherwise the claim should be adjourned for a plenary hearing.

27. It is also well established that the threshold of arguability which a defendant must exceed to achieve a plenary hearing is a low one. Nevertheless, it is a threshold that amounts to more than mere assertion or stateability. There must be substance to the proposed defence and it must be based on facts which if true and established would amount to a defence and it must also be credible.

28. It is clear from the decision of Clarke J. (as he then was) in *Irish Bank Resolution Corporation v. Gerard McCaughey* [2014] 1 I.R. 749 that if a defendant seeks to advance an issue of law or construction as a basis for providing him with an arguable defence then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide a defence.

29. The following is what Clarke J. stated concerning facts put before a court on an application for summary judgment at p. 759:-

> "[23] Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept the facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in *Aer Rianta*. It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."

30. Yet another judgment which is of significance in the context of the within procedures is that of Murphy J. in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75 wherein he described the test to be applied on an application for summary judgment in the following manner:-

> "In my view the test to be applied is that laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyds Law Rep. 21, which was referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank Plc v. Daniel* [1993] 1 W.L.R. 1453. The principle laid down in the *Banque de Paris* case is summarised in the headnote thereto in the following terms:-
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> > 'The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendant having a real or *bona fide* defence.'"

Decision

31. Insofar as Mr. & Mrs. Stack have maintained that that they have established a reasonable probability that they have a real or *bona fide* defence to make to these proceedings, based upon the failure on the part of the bank to establish that the letter of loan sanction of the 6th July 2010 was signed by the company, that is a submissions which I reject. As a matter of law, to succeed against the defendants on foot of their guarantees, the bank must prove that it entered into a contract with the company the terms whereof are those set out in the letter of loan offer of the 6th July 2010. That contract does not have to be proved by producing a copy of the agreement which is signed on behalf of the company acknowledging its acceptance. It was clearly open to the bank to prove that contract by relying upon other evidence about which there is no dispute. In this case that evidence included:-

> (i) the letter of loan offer exhibited at "LA1" to Ms. Allan's affidavit was furnished to the directors of the company on the 6th July 2010;
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> (ii) on the 9th July the company passed a resolution "That the Company do accept the offer of facilities amounting to €3,920,000.00 made by Allied Irish Banks, p.l.c. ("the Bank") to the Company subject to the terms and conditions referred to in the letter of sanction dated 06/07/10" (exhibit "LA2" to Ms. Allan's affidavit). Whether Mr. Stack, as authorised so to do ultimately signed the letter of loan sanction is irrelevant in circumstances where the company clearly accepted the bank's offer and later drew down sums that would otherwise have been unavailable to the company;
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> (iii) proof that the resolution was signed by Mr. Stack as chairman and Mrs. Stack as secretary of the company;
>
> (iv) the separate letters written by the bank to Mr & Mrs. Stack on the 7th July 2010 which referred to "loan facility €3,920,000.00" and advising them that they had been nominated by the company to guarantee its liability in respect of that facility ("LA4");
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> (v) proof of the execution by Mr. Stack of a guarantee in writing dated the 13th July 2010, a guarantee only required by reason of the acceptance of the company of the loan facility;
>
> (vi) the evidence that the liquidator of the company, when called upon to discharge the monies due on foot of the facility, did not assert that the company had never accepted the facility.

32. In light of the aforementioned evidence I am satisfied that the High Court judge was correct to conclude that the defendants had not established the existence of a *bona fide* or credible defence based upon the banks failure to produce a copy of the letter of loan offer signed on behalf of the company. The defendants did not demonstrate that they could credibly argue, having regard to all of the prevailing circumstances, that they might successfully defend the claims made against them on foot of the guarantee on the basis that the company never accepted the facility on the terms offered in the letter of the 6th July 2010. Every single piece of evidence was against that proposition. Further, and it is notable that nowhere in the affidavits sworn by Mr. & Mrs. Stack is there a statement by them that the letter of loan offer of the 6th July 2010 was not accepted by the company. This is hardly surprising in light of the resolution passed by the company on the 9th July 2010 which is signed by both of them in their respective capacities as chairman and secretary.

33. It cannot, in my view, be credibly inferred from the opening sentence of paragraph 6 of Ms Allan's affidavit that the bank was willing to abandon its claim against the defendants as guarantors of the liability of the company and was altering its claim to pursue Mr. & Mrs. Stack on foot of their guarantees, whilst conceding that it could only recover the monies claimed from the company on the basis of a claim for "monies had and received". That would have amounted to a complete abandonment by the bank of its claim against the defendants, as in the absence of the loan facility Mr. & Mrs. Stack could have no liability to the bank. Not only did the bank make no application to amend the basis of its claim as pleaded in the summary summons, but Ms. Allan does not make any statement to the effect that the bank is seeking to change the basis upon which it contends for a right to obtain judgment against Mr. & Mrs. Stack. To the contrary, Ms Allan's affidavit sets out to dispel the possibility of any defence based on the non acceptance by the company of the terms of the letter of loan sanction. Hence the exhibits to her affidavit which include (i) a complete copy of the letter of loan offer ("LA1"), (ii) the bank's letters of the 7th July 2010 ("LA4"), (iii) the resolution of the company ("LA5"), and (iv) the account showing the drawdown of funds postdating the company's resolution accepting the loan offer ("LA3").

34. As to the additional proposed grounds of defence argued on behalf of Mrs. Stack concerning her execution of the guarantee, once again I am satisfied that, looking at the circumstances as a whole, she has not demonstrated a fair or reasonable probability of a *bona fide* or credible defence based upon her alleged non execution of the guarantee bearing her name.

35. The first matter I would observe is that the evidence of Mrs. Stack concerning the execution of the guarantee is inconsistent. She makes a serious allegation that her signature was forged. That is a claim that the bank, for its own deceitful purposes, had attached her name to a document which she did not sign. That is a significantly different statement from her other averment to the effect that she does not recall signing such a document or having been requested to sign such a document. That statement clearly leaves open the possibility that she did sign the guarantee but simply has no recollection of doing so, a statement which is a far cry from a claim of deceit on the part of the bank.

36. For my part, I am not satisfied that Mrs. Stack had put before the High Court any credible basis for believing that evidence may be forthcoming to support the facts, as Mrs Stack asserts them to be, as is required under the decision in *IBRC v. McCaughey* . Her assertions concerning the signature on the guarantee bearing her name are inconsistent and unsupported by evidence, that she might have sought to advance having regard to the circumstances of this particular claim.

37. What counsel for Mrs. Stack maintains is that the best available evidence has been put forward concerning the execution of the guarantee. She had boldly stated she did not sign the guarantee and that her name, as appears on the guarantee, is a forgery. He also relied upon the fact, as was deposed to in Mr. Stack's affidavit, that the guarantees were witnessed by bank officials from different AIB branches. Counsel submits that this was sufficient to warrant that the proceedings be referred to a plenary hearing.

38. I do not accept the aforementioned submission. A bald averment by a defendant that their signature as appears on a contractual document is a forgery, depending on the circumstances of the case, may well be insufficient to establish the probability that they have a *bona fide* and credible defence to a claim premised on the validity of that signature. The court has to look at, as was stated in *Banque de Paris v. de Naray*, "the whole situation to see whether the defendant had satisfied the court that there was a fair or reasonable probability" of them having a real or *bona fide* defence.

39. In my view in the circumstances of the present case it was insufficient for Mrs. Stack to make a bald assertion that her signature was a forgery. She does not say why it is she believes the court should consider it possible that her signature is a forgery. After all, she does not deny that she signed the resolution of the company which accepted the terms contained in the letter of loan offer of

the 6th July 2010 and that these provided that she provide such a guarantee. Assuming, as the court must, that as a director of the company she read the terms of letter of loan sanction she knew the loan had to be supported by her own guarantee. That this was so was further made clear to her in the bank's letter of the 7th July 2010, which, *inter alia*, enclosed the proposed guarantee for her attention and recommended that she take legal advice. Yet, Mrs. Stack fails to explain why her signature on a guarantee, which is entirely consistent with the aforementioned documents, might be a forgery.

40. Neither does Mrs. Stack make any effort to adduce evidence to support her bald assertion that the signature on the guarantee is not hers. Instead she chooses to make a very damaging allegation of corruption against the bank. For example, Mrs. Stack does not state that she did not go to the bank on the 13th July 2010 and chooses to ignore the significance of the bank's letter of the 7th July 2010. She likewise chooses to ignore the affidavit of Ms. Allan who refers to the fact that Mrs. Stack guaranteed the earlier facility afforded to the company on the 31st August 2009 for the slightly lesser sum of €3,375,000 referred to at paragraph 15 of Ms. Allan's affidavit. Why would she expect the bank to make available an even larger sum to the company whilst disposing of the requirement that she provide a supporting guarantee to replace her earlier one?

41. The evidence before the High Court judge was, I am satisfied, insufficient to establish a *bona fide* and credible defence to these proceedings based upon the failure of Mrs. Stack to execute the guarantee in question. She was obliged, having regard to all of the circumstances of the case including the exhibits produced by the bank's witnesses, to take reasonable steps to support her assertion that her signature was a forgery by reference to other credible testimony. It is to be noted that Mrs. Stack didn't even go so far as to contend that the signature on the guarantee was in any way demonstrably different to her signature on any other document. She does not exhibit or refer to any other document containing her signature to support her forgery allegation. Neither does she seek to establish why, in light of the fact that she signed a guarantee in 2009, the bank would have forged her signature on the guarantee to support the facility of the 6th July 2010.

42. Having regard to the uncontested documentary evidence produced by the bank, this was a case in which Mrs. Stack was obliged to support her assertions with other credible evidence. She might have sought the assistance of a handwriting expert to support her otherwise bald assertion. Or she might have produced a sheep of other documents containing her signature to show that the signature on the guarantee was unlikely to be hers.

43. Relevant also to the circumstances of this proposed defense is the failure on the part of Mrs. Stack to explain why, when the bank by letter of the 3rd February 2015 called upon her to discharge the sum outstanding based upon the facility letter of the 6th July 2010 and the guarantee dated the 13th July 2010, she did not reply denying execution of any such guarantee.

Conclusion

44. For the reasons earlier advised I am not satisfied that the evidence before the High Court judge was such that he can be stated to have erred in law or in fact when he granted judgment in favour of the bank against Mr. & Mrs. Stack for the sum of €2,253,590.84 and costs, the same to be taxed and ascertained. The evidence advanced by the defendants did not reach the relevant threshold as advised in *Aer Rianta v. Ryanair*, *First National Commercial Bank v. Anglin* and *Irish Bank Resolution Corporation v. Gerard McCaughey*. They did not establish that they have a fair or reasonable probability of the existence of a *bona fide* and credible defence to the within claim. That being so, I would dismiss the appeal.