AN CHÚIRT UACHTARACH

THE SUPREME COURT

McKechnie J
Charleton J
McGovern J

Supreme Court appeal number: S:AP:IE:2012:0001212

[2020] IESC 000

Court of Appeal record number 2014/463

High Court record number 2010/900S

[2012] IEHC 121

BETWEEN

BANK OF SCOTLAND PLC

PLAINTIFF/RESPONDENT

- AND -

CHARLES FERGUS

APPLICANT/DEFENDANT

Judgment of Mr Justice Peter Charleton delivered Wednesday 18 December 2020

1. The answer to the plaintiff bank's claim for summary judgment cannot be that their case of indebtedness against the defendant Charles Fergus is not proven. This was a case which started out as an application for summary judgment. On that coming before the High Court, it was sent for plenary hearing. But as is the case with many such orders, in the result the issues were identified from the affidavits and cross-examination was allowed, the bank being required to prove their case by oral evidence. The matter then came back before another judge for the hearing of the plenary issue and the bank gave oral evidence but Charles Fergus did not. As of the date of the judgment entered on that trial being resolved in the High Court in favour of the bank, 20 April 2012, Charles Fergus was indebted to the bank in the sum of €9,211,764. On the analysis in this judgment, it does not emerge that a breach of the hearsay rule is engaged by a relationship between a bank and the customer of that bank, which is evidenced by the free exchange of records of their relationship, through bank statements and statutory notification of charges, and which involves the flow of correspondence, one to the other.

Claim

2. Central to this is that what are being admitted into evidence were statements of the parties to the action, their correspondence, their records in the case of the bank as notified to the other party who was the bank's customers. We are not dealing with statements of any third party. Charles Fergus gave no evidence. Instead, at this plenary hearing of the summary summons, only a witness statement by Mr Craythorne was adduced. Yet, the main point on which this judgment diverges from that of McKechnie J relates to the application of the hearsay rule. Gratefully adopted is the full analysis of McKechnie J as to procedural fairness, as to the Statute of Frauds 1695, and as to the

correct form of guarantee. Only some concurring observations are offered here on two of those points.

3. In the background of this claim, there are multiple sums advanced by the bank by various facility letters over a period from March 2003 to November 2007 to a company, with which Charles Fergus was involved, namely Fergus Haynes Developments Ltd. All of these sums were loaned for the purpose of developing various properties, many of which were in the Donegal and Leitrim areas. These were backed by guarantees; his guarantees and he is a party to this action. This is normal and ordinary banking procedure. By the time the bank called in the loan on 4 September 2008, when the indebtedness was €7,796,121.84, there had been multiple guarantees. To list these in a chart would show that as each sum of money was advanced by the bank to the company, a guarantee was required from Charles Fergus on the basis of a formula of words which required him to cover the continuing and future debts of the company. There is nothing in this formula of words which suggests that as each guarantee was subsequently entered into, it was intended to extinguish or ameliorate any prior guarantee.

Guarantees

4. The general tendency of the documents reveals that as each of the 20 or more facility letters was issued to the company, a guarantee was required from Charles Fergus. Furthermore, each of the loans was drawn down either immediately or over time by the company. The first such guarantee was signed on 30 March 2004. This was in respect of both the bond facility in favour of Donegal County Council, related to the building of 35 houses at Bundoran, and the loan itself, which was evidenced in two facility letters of May 2003 for €275,000 and June 2003 for €450,000. There is nothing in that guarantee to suggest that it was anything other than for past liabilities and future liabilities as they might arise in respect of the company's relationship to the bank. As the relationship between the parties, namely the bank, Charles Fergus and the company, continued, further loans were granted, for instance of €625,000 in May 2004, to build a further 14 houses up on Bundoran, and a loan in August 2004 of €200,000, in November 2004 of €820,000 for a site in County Leitrim, a loan of €750,000 in June 2005 to commence ground works in Bundoran, a loan of €2,300,000 in October 2005 to carry out site works in Bundoran and covering also €200,000 in interest rollup.

5. As these loans progressed, and were drawn down by the company immediately or in tranches, various guarantees were entered into by Charles Fergus. There is a definite claim that two of them, those dated 21 May 2004 and 20 August 2004, were forgeries. Despite that being asserted in the submissions before this Court, evidence was not given about that at the trial. Even so, Charles Fergus complains about the bank using its records for the purposes of proving the loans. The two loans which are important for the purposes of this appeal were loans which refinanced the existing indebtedness. The first was dated for April 2007 and was for €6,150,000 and covered the building costs at Bundoran generally and sundry matters which, on the papers before the Court, seem related. Then the bank gave the company an overdraft facility of €500,000 by letter dated 29 June 2007. This was followed by a further facility letter giving a loan of €1,012,000 for

the purpose of refinancing existing loans. Then a guarantee and indemnity was executed by Charles Fergus on 10 December 2007. There was a further such document executed on 29 May 2008. The calling in by the bank of the various loans in September 2008 was an unsurprising correlation with the collapse of the Irish property market from that month. This saw many development sites rendered only as valuable as the grazing of livestock might profit, and which split houses in Dublin to about a third of their value and with variable consequences on properties throughout the rest of Ireland. In increasing state of collapse, the economy crawled on until in October 2010 the European Central Bank, the International Monetary Fund and the European Union intervened.

6. The bank has submitted that it could rely on any one of the guarantees. It would seem that from the point of view of prudence it had asked for many guarantees, four of them being described in court as plenary guarantees. The one in respect of which judgment was given was that dated 1 June 2006 and was in a standard form whereby Charles Fergus promised to pay the existing and future debts of the company in the event of any default or if called on to do so. He was called on to do so but claimed that the mode of proof of the bank was defective. He did not say that the money was not drawn down by the company. He did not claim that the two guarantees in question were not entered into by him; the claim of forgery upon which, it may be assumed, the matter was sent to plenary hearing, was not repeated. In any event, that claim related to much earlier guarantees. After that so-called forgery he entered into several more guarantees with full knowledge of the indebtedness of the company and of the consequences. In fact, in his written submissions it is clear that all of the money was drawn down and that an amount was due in interest, which would have continued to grow up to this day.

7. If a guarantee is given by A, B and C, the argument on behalf of Charles Fergus goes, but later, A, B and D give another guarantee, then it would be accepted that the first guarantee remains together with the second guarantee. If on the other hand there is a second or third guarantee on behalf of exactly the same parties, the argument goes that it would be inferred that the first guarantee was extinguished by the second guarantee. That is not accepted. Fundamentally, this is a matter of statutory construction. As to the meaning of a contract, that is construed in accordance with the standard cannons of construction, and as to the intention of the parties that emerges from the document viewed as against the background of all the necessary circumstances which inform it. All the necessary circumstances which inform this series of events is that every time the bank issued a facility letter to the company, it required a guarantee. This was immediately afterwards furnished by Charles Fergus. Or else, on the chronology of events, that guaranteed happened later on. Later, as the loans were rolled up, there were proximate guarantees, in respect of which no claim of forgery was ever made, providing security for the then huge sums to the bank.

8. In other words, what was happening was that the bank was fulfilling a standard practice of ensuring that every loan was covered by a guarantee. If an officious bystander was asked as to whether either of these parties imagined that by giving a new loan and entering into a new guarantee for “all existing and future liabilities” any of the parties,

Charles Fergus, the bank or the company, the latter not privy to the guarantee contract, intended to extinguish existing guarantees or to create a web of legal difficulty so that the guarantee might not be enforced as between those privy to it, namely Charles Fergus the bank, the answer would be obvious.

Hearsay

9. Then, there is the invoking of the hearsay point. In the light of this Court's decision in this *Ulster Bank Ireland Ltd v O'Brien & Others* [2015] 2 IR 656, that point does not arise. At page 673 of the decision, Laffoy J explained that the Bankers' Books Evidence Act 1879 does not operate so as to constrict the kind of evidence that a bank may give. In no different position to any other creditor, a bank may give evidence as to what its books and records show as to loans afforded to another trading party or credit extended, on a 30 day or any other basis, to that party. The records of the company, or the trader, will be made in the ordinary course of business and will, for that reason, be inherently reliable. Furthermore, they are subject to dispute and to testing in any future plenary hearing by way of the debtor denying, for example, the receipt of goods or, in the case of a financial institution, dissenting from evidence that a loan was drawn down. As Laffoy J states in her judgment in that case, it would be more than odd, even from the perspective of 1879, when the Bankers' Books Evidence Act was passed, if banks were given some kind of exemption from the hearsay rule but ordinary commerce was excluded. According to the leading criminal law text current on independence in 1922, 26th edition of Archbold's *Pleading, Evidence and Practice in Criminal Cases* (London, 1922, Roome and Ross editors) at 19-20, at page 448, this legislation was passed as a reaction to what was then called the best evidence rule. An absurd example would be that a tombstone should be produced in court rather than evidence of what was carved thereon; assuming for the moment that what was inscribed on a tombstone could be anything other than hearsay, but might be a public record. The Act "was passed in order to obviate the inconvenience occasioned to bankers and their customers, by the removal of ledgers and other account books from banks for the purpose of production in legal proceedings, and in order to facilitate proof of transactions recorded in such ledgers and account books." Section 6, originally provided that a banker, in any case to which the bank was not a party, could not be compelled to produce such originals. That was amended so that whether the bank is a party or not, a bank cannot be compelled to produce the original ledgers. Section 3 provides that a copy of an entry suffices to "be received in evidence" and is *prima facie* proof "of the matters, transactions, and accounts therein recorded." Section 4 makes it conditional that this was done in the ordinary course of business. Section 5 requires the witness to have examined the original entry before a copy is received in court. The witness has to be an officer of the bank. It would be wrong if, simply because of retirement, a bank manager were forbidden to check entries as to the very client he or she had dealt with over years and to testify as to the interrelatedness of entries and of their business dealings.

10. It used to be the case that if original documents were not produced, a sufficient explanation for their not being proffered to the court had to be given before such copies were admissible in evidence. That rule applied generally, and not just to cases involving

banks. As was fully explained in *O'Brien*, issues can arise which are not hearsay and some records can be pure hearsay. These are cases, however, where multiple individuals in an organisation record data with no one having a personal relationship with an individual customer. What is absent from such cases, as well, is the interaction of the customer, as defendant or plaintiff, with the other side as defendant or plaintiff. Of course, letters that people write are admissions if directly addressing any such issue as to debt or the supply of goods. In this respect, the supply of money, loans, is not different to the supply of potatoes. As to records such as serial numbers on guns or car engines, where the customer who buys a gun or a car does not write as this data, that may be hearsay unless subject to an inherent reliability rule. The exclusion of such evidence was changed by s 30 of the Criminal Evidence Act 1992 which provides:

> (1) Where information contained in a document is admissible in evidence in criminal proceedings, the information may be given in evidence, whether or not the document is still in existence, by producing a copy of the document, or of the material part of it, authenticated in such manner as the court may approve.
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> (2) It is immaterial for the purposes of subsection (1) how many removes there are between the copy and the original, or by what means (which may include facsimile transmission) the copy produced or any intermediate copy was made.
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> (3) In subsection (1) "document" includes a film, sound recording or videorecording.

11. The purpose of the legislation to allow business records to be admissible in criminal trials against third parties, that is parties who were not the customers dealing with the goods, calling guns goods for this purpose, and who were not notified of the numbers therefore. That Act enlarges the scope of the exceptions to the rule against hearsay, while preserving all other exceptions. It does not change the existing law as to admissions. It does not affect privileges and nor does the legislation alter compellability. Simply because a document is being supplied, or a videotape or record of an examination of an article or dead body, does not exclude an attack being made on the credibility of the absent witness or the making of a comparison with a prior or subsequent inconsistent statement. In civil cases, the hearsay rule was never capable of being successfully raised in respect of the kind of transaction where people were not distant and data was being recorded as to serial numbers or non-personal transactions. Hence, there was not a need for a reform in civil law. It surely would have been sensible to make if it had applied to such things as people writing to each other as to the supply of potatoes or the loan of money. Such documents are evidence because those people are the parties to the later action for loan or for defective goods, for example. Were the 1879 legislation to be so applied, accepting the argument of Charles Fergus for this purpose only, altering the hearsay rule and providing that a retired official was not an officer of the bank on retirement, then a purposive interpretation would recast such a rule in a commercially viable way. But, it is not necessary to apply section 5 of the Interpretation Act 1995, which provides:

> In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—

(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.

12. But there is a further point in this case in relation to that kind of evidence. As the documents put before this Court on this appeal, and even the submissions lodged on behalf of Charles Fergus, demonstrate, these loans and these guarantees did not emerge out of nothing but were instead affected in consequence of an ongoing and close relationship between the company and the bank and Charles Fergus. As good banking practice now dictates, and as has been the expectation of bank customers over generations, periodic letters were sent to the company, with which Charles Fergus was involved, indicating the indebtedness of the company, the rate of interest applicable and the manner in which loans were being drawn down on an immediate or periodic basis together with any repayments. This vast bulk of correspondence shows a deep relationship between the parties of mutual trust whereby large sums of money were advanced on the basis of carefully drafted documentation, all of which is exhibited, and which preceded by the assent of the company and the willing entry into guarantee of the debts by Charles Fergus. Whether that relationship was wise, involving huge loans for property that can rise or fall dramatically in value, is another matter.

13. It is unnecessary, in those circumstances, to look for an exception to the rule against hearsay because all of these documents, in terms of their acceptance by the company, the involvement of Charles Fergus with that company, his entry into guarantees for the purpose of furthering the business enterprise of the company, and the periodic statements of the ongoing financial situation, together with the relevant letters of demand, constitute a course of dealing between the parties which in other circumstances would be called admissions. There is therefore no reason to have resort to any principle, of very limited application in any event, that an inference can be drawn from the failure of a person to answer a statement of fact in circumstances where a reasonable person who knew the opposite to be the case would issue a form of denial. In other words, admission by silence, through failure to deny, is not a necessary avenue for this case to take since there is nothing to suggest anything other than the parties' understanding is engaged by the multiplicity of documents exchanged between them as to the true state of affairs.

14. As MacMenamin J stated in O'Brien what has been made out here is a case which is sufficient to found a judgement and it is only if a defendant adduces any or any meaningful evidence to rebut it, could it be said that there is any defect in the proofs

adduced in behalf of a plaintiff. There is no different view to be taken of a bank that is to be taken of any other trader.

15. In any trading relationship of this kind, involving a major bank with many employees and a development company with several directors and administrators, people will come and go. The purpose of records is to show where matters stood at the particular time when a record was made. In communicating with each other as to the state of those records, these were made common as between the guarantor, the company and the bank. The plain reality of this case is that there was no denial of those records, so shared, at the time. Certainly, the records have to be proven whether the defendant is there or not. The point is that transactions to which a party was engaged are provable without resort to any legislation. A person defending a case, having claimed a defence and succeeded in obtaining a plenary hearing, has to engage with the evidence. Further, when it came to the hearing of this case in the High Court there was no evidence adduced that there were no such loans. Further there was no evidence that there were not several existing guarantees, conforming with the practice of backing up each loan by a further guarantee. There is an obligation to engage with the evidence and there is an obligation to put to witnesses any fact which undermines their testimony*; McDonagh v Sunday Newspapers Ltd* [2017] IESC 59. Suppose, for the moment, the bank had not followed the practice of backing up each loan, or each series of loans, with an individual guarantee, what then would have been the situation?

16. What might be said on behalf of Charles Fergus in those circumstances was that the first such guarantee, to take an example, from 30 March 2004, had nothing to do with the refinancing of the very large debt that culminated in the two facility letters of 4 April 2007 and 20 November 2007. Of course it is not an answer to contract that someone has forgotten the terms of the contract, or forgotten even that they have entered into a contract. But in terms of human fairness, and commercial fair dealing as between a large bank and a building company and the guarantor of that building company, it certainly looks like better practice as each loan is entered into to remind the person who may ultimately have to pay as guarantor of the obligations that he or she has entered into. That is what was done here and there is no basis for claiming invalidity.

Rules

17. It is claimed that the evidence of Bernard Raftery breached the Rules of the Superior Courts and that allowing Julian Moroney to give evidence at a late stage, where you had not been identified as a witness and had not then provided a witness statement, constituted a breach of Order 66A Rule 22(1). This provides that there should be a written statement in proceedings before the commercial list but Rule 5 thereof also provides that a judge of the commercial list may give directions and make orders, including for the fixing of time limits, in order to ensure that the conduct of proceedings “is just, expeditious and likely to minimise the course of those proceedings.” Further, it is a fundamental principle of the rules that time may be abridged or extended as the nature of the case requires, bearing in mind that the purpose of the rules of court is to assist in the

administration of justice and not to wrongfoot parties; Order 122, Rule 7. McKechnie J's analysis of this makes it clear that the dispensation of justice is the ultimate test.

18. There is nothing to suggest that the High Court in considering this matter did not properly apply relevant test or did not balance the requirements of justice as against the necessity the parties coming to court should abide by the rules of court. Instead, the principles are set out in *Mooreview Developments Ltd & Others v First Active plc & Others* [2009] 2 IR 788 were applied.

19. Very recently, this Court in *Bank of Ireland Mortgage v O'Malley* [2019] IESC 84, required banks to give sufficient particulars to enable an alleged debtor to know whether the debt should be paid or not on any endorsement of claim in a summary summons. Furthermore, Clarke CJ, in his judgement in that case, noted that for a claim in the liquidated amount to be denied required a defendant to engage with the facts and to demonstrate a defence. It was only if it was very clear that there was no defence that summary judgement should be entered. The requirement for particularity, on a summary summons is necessary because if no appearances entered to a liquidated claim, judgment may be marked in the Central Office of the High Court, or in the Circuit Court by the country registrar. When an affidavit explaining the nature of the debt is put in by a bank it is necessary for that bank to indicate clearly what sum is capital, arising from what loan, what sum is interest and charged on which account, if there are many, and how, if this arises, penalties are calculated by way of increased interest charges on overdue loans or overdraft facilities drawn in excess without permission.

20. The nature of these requirements is to put a debtor in a position where on an individualised basis he or she may see where perhaps a mistake has been made or where interest may have been overcharged or penalties may have been misapplied. Thus, not only is any proposed defendant in a claim for a liquidated sum required to engage with the evidence and to demonstrate a defence and to be denied a plenary hearing unless those steps are taken, but it is also required of a plaintiff financial institution to make it clear as to the precise basis that a sum of money is owed. When it comes to a plenary hearing, relevant questions should be asked. The application of the hearsay rule is required in instances where it applies. But letters written by a party, documents signed by a party as setting out that party's obligations, or admissions by a party as to the existence of a debt, do not engage the hearsay rule whether in banking or in commercial transactions where those exchanging information are plaintiff and defendant.

Result

21. There was no engagement by Charles Fergus as to the sums clearly delineated by the bank in this case as having been borrowed by the company of which he was the guarantor and in which he was involved. No evidence was called by him and instead several legal points were raised. There is nothing wrong with that approach in principle, but it is more than strange in terms of any expectation of proof in a case. The appellant was granted an adjournment by the High Court judge to examine the bank statements and to call an accountant to give evidence on his behalf. However he declined the opportunity either to challenge the statements himself or call evidence from his accountant for that purpose.

Defendants in civil cases should be aware that an inference can be drawn, unlike in a criminal case, from a failure to engage with the evidence, to test or to contradict it. Such an inference is not necessary to the analysis on this appeal. In these circumstances the High Court judgement should stand.