THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 211

Record Number: 2019/198

High Court Record Number: 2017/749S

The President
Costello J.
Collins J.

BETWEEN/

ALLIED IRISH BANK PLC

PLAINTIFF/
RESPONDENT

- AND -

SEAN CUDDY

DEFENDANT/
APPELLANT

JUDGMENT of Ms. Justice Costello delivered on the 30th day of July 2020

1. I have had the opportunity of considering in advance the judgment delivered by Collins J. on this appeal and I agree with the judgment. In particular I endorse the principles he outlines to be applied when determining whether or not a court should enter summary judgment and refuse a defendant leave to defend.

2. The difficulty in this case was the application of the principles to the evidence advanced by the defendant that there was a collateral contract between the respondent and the appellant which defence was based on oral representations or assurance said to have been given to him in November 2007 and to his agent, Mr. Comerford, in December 2007. In reaching my conclusion, I am particularly conscious of the need to exercise caution in considering whether to enter summary judgment and the fact that it must be very clear that the defendant does not have an arguable case.

3. In *IBRC (in special liquidation) v. McCaughey* [2014] 1 I.R. 749, Clarke J. emphasised, in the passage quoted by Collins J., that it is no function of the court on an application for summary judgment to form any general view as to the credibility of the evidence put forward by the defendant. In *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, McKechnie J. set out twelve principles applicable to applications for summary judgment, which have been followed and approved in numerous decisions since. Point (v) is *"[w]here however, there are issues of fact which in themselves are material to success or failure, then their resolution is unsuitable for this procedure [summary judgment]"*. The evidence in this case, if accepted by a court at trial, is capable of establishing that the collateral contract alleged was concluded. It is a matter of fact which requires to be resolved and cannot be

resolved in a summary procedure. The appellant advanced his case in the High Court on the basis of representations relating to the facility offered in December 2007 and accepted in March 2008, but he does not actually aver that he entered into the guarantee of 2008, which preceded the guarantee sued upon of September 2009, on the basis of those representations. This might be fatal to his application for leave to defend the claim at plenary hearing, however, the Supreme Court cautioned in *McCaughey* against treating affidavits filed in motions for summary judgment as if they were contractual documents and required to be finely analysed. Clarke J. held that it was not appropriate to engage in an excessive parsing and analysing of their contents at that stage. The issue is whether, in substance, facts had been disposed to which might arguably provide a defence.

4. In my judgment, if the sole evidence before the court was that of the appellant, the totality of the evidence in support of this defence would amount to "mere assertions" which would be incapable of satisfying the low threshold to be met in order that a case be remitted to plenary hearing. However, I am persuaded that the evidence of Mr. Comerford's affidavit, as set out in the judgment of Collins J., when taken with that of the appellant, just about satisfies the low threshold necessary to remit the proceedings to plenary hearing. I agree with the comment of Barniville J. in Promontoria (Arrow) Limited v. Burke [2018] IEHC 773 at para. 113 that *"[g]eneral assertions in relation to verbal assurances provided in the course of contractual negotiations will normally not be sufficient to support a defence of collateral contract…"*. In so holding, the court cannot rule out that there may be cases where oral testimony alone is available but that testimony, if accepted, could substantiate the defence put forward. In Bank of Ireland v Dunne [2018] IECA 271 Irvine J. held at para. 37:-

> *"Much like the approach of the court on an application by a defendant to dismiss a plaintiff's claim as bound to fail, where a judge must not strike out a weak or novel claim, it is not for the judge hearing a summary judgment application to reject what they perceive to be a weak case or one which they consider likely to be lost on the balance of probabilities, having regard to the evidence then available."*

5. Ultimately, the court must make an individual assessment in each case while refraining from forming a general view as to the credibility of the evidence of the defendant, save to the limited assessment of credibility referred to in *McCaughey* and reiterated by Collins J.

6. In *Burke*, Barniville J. held that the defendant's assertion that there was a joint venture arrangement between the lender and the defendant was entirely inconsistent with the documentation subsequently signed, and he concluded that the assertions on affidavit were mere assertions which were unsupported by, and inconsistent with, the contemporaneous documentation. In this case, in the contrast it is not so stark. The respondent sought additional security for the additional facility to be advanced to the company. The warehouse was to be provided as security for that additional facility. The issue is whether the security was to be limited to recourse to the warehouse, as maintained by the appellant, or whether the security was to be the guarantee in the sum of €1.5 million, supported by but not limited to a mortgage over the warehouse. While

the differences between the two positions are very significant, they are not contradictory, polar opposites as in *Burke*.

7. Ultimately, the court must apply point (xii) from *Harrisrange Limited* that the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be. While the scales are finely balanced in this case, I am prepared to conclude that they just tip in favour of leave to defend based on the facts in this case. For this reason, I agree with the decision of Collins J. that the defendant should be allowed to defend the proceedings on the limited recourse ground identified in his judgment, and I also would allow the appeal.