THE COURT OF APPEAL

Baker J.
Whelan J.
Collins J.

Neutral Citation Number [2020] IECA 87

Appeal Record No: 2019/189

BETWEEN

PROMONTORIA (ARAN) LIMITED

APPELLANT

AND

GERRY BURNS

DEFENDANT

Appeal Record No.: 2019/188

BETWEEN/

PROMONTORIA (ARAN) LIMITED

APPELLANT

AND

ANN BURNS

DEFENDANT

Judgment of Mr Justice Maurice Collins delivered on the 7th April, 2020

1. I agree with the judgment of Baker J and with the order she proposes. I agree that, for the reasons set out in that judgment, the High Court Judge (Noonan J) correctly concluded that the evidence adduced by Promontoria was insufficient to allow the Court to grant summary judgment here.

2. As is evident from the judgment of Baker J, and the authorities to which she refers, including the decision of the Supreme Court in *Ulster Bank (Ireland) Limited v O' Brien* [2015] 2 IR 656, and that Court's more recent decisions in *Bank of Scotland plc v Beades* [2019] IESC 61 and *Bank of Scotland plc v Fergus* [2019] IESC 91, the law in this area is in a most unsatisfactory state.

3. Within its proper parameters – as to which see, for instance, the helpful synthesis of the jurisprudence in *Harrisgrange Ltd v Duncan* [2003] 4 IR 1, at pages 7-8 – Order 37 of the Rules of the Superior Courts is intended to provide a relatively expeditious and inexpensive mechanism for recovering judgment for debts or liquidated demands which are clearly due and owing.

4. It is obviously in the public interest, as well as the interests of creditors, that there should be such a mechanism and that it should operate effectively. It is not in the public interest

– or in the interest of the parties – that straightforward claims for debt or liquidated demand should require to be determined by plenary hearing, with the additional delay and cost that such a hearing involves and the additional burden thereby placed on the resources of the justice system.

5. However, as is apparent from the case-law discussed by Baker J, even in the absence of any dispute as to whether the debt or demand is properly due – and here there is, as Baker J observes, nothing more than a formulaic denial that the debt claimed by Promontoria is indeed due from Mr & Mrs Burns - the requirements of Order 37 can present significant difficulties for at least some categories of plaintiff.

6. For plaintiffs suing on foot of an assignment of debt, particularly assignees that are not "*banks*" within the meaning of section 9 of the Bankers' Books Evidence Act 1879 (as amended), the route to Order 37 summary judgment is fraught with difficulty.

7. There are, of course, many such plaintiffs that appear frequently before the courts. Promontoria is one. It is not a bank and therefore cannot avail of the provisions of the Bankers' Books Evidence Act. Neither Promontoria nor the Servicer had any involvement in the transactions between Ulster Bank Ireland Limited and Mr & Mrs Burns which led to the Mr & Mrs Burns apparently entering into the guarantees referred to by Baker J. Equally, neither Promontoria nor the Servicer had any involvement in the decision to demand payment of the guarantee debts or to issue these proceedings when such demand remained unsatisfied because (on the facts here) those events pre-dated the assignment from Ulster Bank Ireland Limited to Promontoria. It would appear to follow that neither Promontoria nor the Servicer is in a position to "*swear positively*" to those matters insofar as that may be required in order to obtain summary judgment.

8. The courts have endeavoured to mitigate the strict application of the hearsay rule in this context, as Baker J explains. However, as the Supreme Court (per O' Donnell J) identified in *Bank of Scotland plc v Beades* (at para 28), the underlying difficulty is the absence in this jurisdiction of any statutory provision providing for the admissibility of business records in civil proceedings. Provision for the admission of such records has been made on the criminal side which gives rise to the curious position that the hearsay rule applies more strictly in an application for summary judgment than it does in a prosecution for a serious criminal offence. The continuing vitality of the hearsay rule in this context is, as O' Donnell J says, almost always unhelpful to the fair resolution of cases and, when circumstances permit, it clearly deserves the attention of the legislature.