February 2016

The Supreme Court provides welcome clarity on the Bankers' Books Evidence Acts

Ulster Bank Ireland Ltd. V Rory O'Brien, Danny O'Brien & Michael McDermott [2015] IESC 96

Introduction

The decision reached by the Supreme Court (Charleton J., Laffoy J. and McMenamin J.) on 16th December, 2015 in *Ulster Bank Ireland Ltd. v Rory O'Brien, Danny O'Brien & Michael McDermott* has provided some welcome clarity around questions related to the application of the rule against hearsay and the Bankers' Books Evidence Act 1879 (as amended) (the "Act") in enforcement proceedings arising out of default by a borrower on a bank loan.

Background

The issue in the case was whether the affidavit of Ms. Mary Murray, a senior relationship manager with Ulster Bank Ireland Limited ("UBIL"), grounding UBIL's application for summary judgment against the defendants in the amount of circa €890,000, was admissible, given that some of the evidence in her affidavit was hearsay, yet her affidavit did not meet the requirements of Sections 4 and 5 of the Act.

Sections 3, 4 and 5 of the Act created a statutory exception to the rule against hearsay, permitting a bank's records to be admitted as *prima facie* evidence of the transactions and accounts in those

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records. To avail of this exception to the hearsay rule, evidence must be given by an officer of the bank that the books relied upon are from the ordinary books of the bank, and that the entries were created in the usual course of the bank's business, and the books are in the bank's custody or control. Under Section 5, specific matters must be proven to show that the copy record presented to the court is an accurate copy of the original record.

The defendants did not deny the debt, but argued that Ms. Murray's affidavit did not comply with the requirements of the Act and that it therefore constituted hearsay evidence which was inadmissible.

The Master of the High Court found in favour of the defendants, dismissing UBIL's motion for liberty to enter final judgment. On appeal, the High Court (Hedigan J.) overturned the decision of the Master, finding in favour of UBIL. The defendant borrowers appealed the High Court decision to the Supreme Court.

The Supreme Court decision

The Supreme Court unanimously found in favour of UBIL. Written judgments were given by all three judges. Judgment was given by Charleton J, with whom the other two judges agreed. His reasoning was as follows:

1. the defendants had not replied to UBIL's letter of demand or responded to the affidavit of Ms. Murray in which it was contended that the monies were owed by the defendants. In some cases, the absence of a denial or contradiction can amount to an admission against interest, which is one of the primary exceptions to the rule against hearsay. This was one such case;

2. the content of, and the documents annexed to, Ms. Murray's affidavit were reliable as Ms. Murray was in a position of familiarity with the facts that were fundamental to UBIL's claim; and

3. due to the foregoing finding that Ms. Murray's affidavit was not inadmissible hearsay evidence, it was not necessary for UBIL to rely on the Act.

Laffoy J had regard to Order 37 Rule 1 of the Rules of the Superior Courts, under which UBIL had brought its motion for liberty to enter final judgment. This rule requires that the motion be supported by an affidavit sworn by a person who can swear positively to the facts showing that the plaintiff is entitled to the relief claimed. The judge noted Ms. Murray's senior position in UBIL, and her responsibility for daily management of the relevant loans (she had signed the letter of demand). The judge commented that it was difficult to envisage any person in a better position to swear the affidavit than Ms. Murray. Her uncontradicted averments about the loans, the demand, and the sums due showed that UBIL was entitled to recover from the defendants. The judge agreed that UBIL did not have to rely on the Act.

In his judgment, McMenamin J added that a defendant wishing to contest an application for summary judgment must do more than make a bald denial of indebtedness; the defendant's evidence must set out clearly why the sum claimed is said not to be owed. He also stated that if a plaintiff's deponent is the author of a letter of demand (as Ms. Murray was), there can be no question of hearsay, and if there is no response to the demand, a plaintiff's case is proved.

Conclusion

The decision of the Supreme Court is important, as there have been several recent High Court cases involving technical defences raised by borrowers, in which the judgments given have created confusion for parties seeking to exercise their contractual rights in enforcing their security and seeking judgment following borrower default. These cases included *Bank of Scotland v. Fergus, Bank of Scotland v. Stapleton, Governor and Company of Bank of Ireland v. Keehan, Ulster Bank Ireland Limited v. Dermody,* and *ACC Bank plc v Byrne*.

The decision is likely to be of particular interest to entities that have purchased loan portfolios in Ireland over the last number of years. As some such entities are not licensed by the Central Bank of Ireland, they are not "banks" as defined in the Act and cannot, therefore, avail of the exception under the Act to the rule against hearsay.

It is clear from this decision that the necessity for banks to comply with the Act, although not entirely displaced, does not arise where the bank's evidence of debt is uncontested and is given by a witness who is familiar with the relevant account. Borrowers must present a substantial defence to the evidence supporting the claim against them rather than merely having to "muddy the waters" when seeking to resist judgment.

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February 2016

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