Speedy Justice: Summary Judgement V Plenary Trial

June 2013

Introduction

Eye watering levels of debt continue to be a major feature of Ireland's troubled economy. Given the dramatic collapse in property values, security which was given for loans may well be insufficient to cover the liability. In this context, banks routinely find themselves having to pursue judgment for very substantial sums.

Although some borrowers, in these circumstances, are prepared to consent to judgment, others adopt an entirely different attitude. From the bank's perspective, their aim appears to be to frustrate and delay the claim as much as possible by raising what the bank regards as wholly unmeritorious arguments. This can be extremely frustrating for the bank concerned particularly where, from their perspective, the claim could hardly be more clear cut i.e. a failure by a borrower to repay money advanced to that borrower on agreed written terms which terms have been breached. These frustrations can be even more acute where, for example, the borrower has refused to engage in any dialogue with the bank about the possibility of an agreed approach to the debt, has unencumbered assets, is refusing to make full disclosure of their asset position and/or there are concerns that assets may be transferred to 3rd parties. In such circumstances obtaining judgment as speedily as possible can be a crucial objective.

A plaintiff in this position typically wants only to reduce delay, avoid unnecessary legal costs, minimize the demands on their staff (for whom involvement in a Court process is both time consuming and stressful) and avoid unnecessary demands on the Court's time. Such a plaintiff may find it difficult to accept that even where the facts very strongly suggest that a defaulting customer will not be successful in defending the bank's claim for judgment in relation to monies advanced or guaranteed, it cannot be assumed that judgment will necessarily be obtained quickly or without a full trial and all that involves in terms of time, cost and the demands placed on individual witnesses.

Against this background, the purpose of this article is to look at the issues facing a plaintiff wishing to pursue Judgement for a specific sum as quickly as possible and with the minimum expense. In doing so, the writer hopes to explain how the objective of speed, while a valid and important one, is not and cannot be the Court's central concern in deciding whether or not to grant judgment without a plenary trial (involving oral evidence from both sides). That objective exists alongside the constitutionally protected right of access to the Courts, whether to advance a claim as a plaintiff or to meet one as a defendant. Therefore, this article will try to explore how the Courts have approached the truly overriding objective of achieving a just result which, in some instances, but not in others, will involve granting "summary judgment" i.e. based on sworn Affidavit evidence alone and denying a defendant the right to meet the claim at a full trial following the exchange of pleadings.

''Summary" Proceedings – The Process

Where a plaintiff seeks to recover a debt or "liquidated" sum of money (i.e. an amount which has been

ascertained or is capable of being mathematically calculated), the proceedings can be commenced by what is known as a summary Summons . The summary Summons procedure is intended to deal with cases which are capable of being determined without pleadings being exchanged and without the need for oral evidence . Once a plaintiff has issued and served a summary summons, the defendant is obliged to file a formal "Appearance" in the High Court Central Office, normally within eight days.

As we know, an Appearance, whether lodged by a defendant or their Solicitor, merely confirms that the case will be defended. If no Appearance is filed, Order 13 provides that the plaintiff, after filing an affidavit of service of the summons, may enter final Judgement in the Central Office of the High Court. If the defendant does enter an Appearance, the plaintiff bank can still apply for Judgement without the need for a full hearing. Order 37, Rule 1 of the RSC permits the plaintiff to issue an application seeking liberty to enter final Judgement for the amount claimed in the summary summons together with interest (if any). That application in the form of a "motion" to Court must be grounded i.e. based on a sworn Affidavit. This document is sworn by or on behalf of the plaintiff and will need to set out why the plaintiff is entitled to Judgement and must state that, in the belief of the person swearing the Affidavit, there is no valid Defence to the action.
Having come before the Master of the High Court, Order 37, Rule 6 provides that "in contested cases, the Master shall transfer the case, when in order for hearing by the Court, to the Court list for hearing on the first opportunity…". The essence of the procedure is specified in Order 37, Rule 7 which provides as follows:-

"Upon the hearing of any such motion by the court, the court may give judgment for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the question and issue in the action as may seem just."

The overriding principle is expressed in the last phrase i.e. the Court is obliged to arrange for the determination of the issues in such manner as seems just. This is an extremely important principle for any plaintiff seeking summary judgment to appreciate. Doing justice to the case will sometimes involve granting summary judgment and refusing liberty to the defendant to defend the proceedings at a plenary hearing. However, because Order 37, Rule 7 explicitly provides alternatives to summary judgment, the plaintiff's entitlement has to appear to the court clear enough to render those alternatives unnecessary.

The Purpose of Summary Proceedings

The purpose of the summary Summons procedure is to allow a plaintiff to obtain Judgement quickly where the claim itself is quantifiable and there is no valid Defence. Lavery J. (Maguire J. concurring) put it as follows in Prendergast –v- Biddle :-
"The procedure by summary Summons was provided in order to enable speedy justice to be done in particular cases where there is either no issue to be tried or the issues involved are simple and capable of being easily determined. I consider it would be contrary to the spirit and the letter of the Rules to deny a plaintiff such relief."

In the foregoing case the claim was for a specific sum due by the defendant to the plaintiff for the training of the defendant's race horses. The defendant admitted the claim but sought to have the case sent for plenary hearing so that her counterclaim against the plaintiff could be raised and litigated. The counterclaim concerned an alleged breach of contract in the sale of a half share in another horse. In affirming the High Court's Order granting summary judgment and refusing to send the summary claim to plenary hearing Lavery J. stated:-

"In my opinion it would be a delaying of justice, if not a denying of it to refuse judgment forthwith. The defendant has shown no alertness in asserting her claim and there is no difficulty in her doing this now in an independent action."

We can see from the foregoing that, in appropriate circumstances, the Courts have not be slow to grant judgment in a summary manner i.e. at an early stage based on sworn documents alone and without a full oral hearing. Clearly, achieving this and avoiding the delay and cost of a plenary trial is the aim of every plaintiff with a liquidated claim.

The "tests" laid down by the Courts

There have been numerous decisions handed down by the High Court and Supreme Court in relation to the principles which apply to an application for summary judgement. Because this is an application brought by almost every plaintiff seeking to recover monies advanced or guaranteed, it is important to look in some detail at the tests laid down by the Courts to determine whether Judgement will be granted on Affidavit alone or whether a defendant will be given leave to defend the claim i.e. at a plenary hearing.
In the decision handed down by the Supreme Court in First National Commercial Bank plc –v- Anglin , Murphy J. stated as follows:-

"For the court to grant summary judgment to a plaintiff and to refuse leave to defend, it is not sufficient that the court should have reason to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine cause of action…

In my view, the test to be applied is that laid down in Banque de Paris –v- de Naray [1984] 1 Lloyd's Law Rep. 21, which was referred to in the judgement 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:-

"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 defendants having a real or bona fide defence."

In the National Westminster Bank case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:-

"I think it right to ask, using the words of Ackner L.J. in the Banque de Paris case, at p23, "Is there a fair or reasonable probability of the defendants having a real or bona fide defence?" The test posed by Lloyd L.J. in the Standard chartered Bank Case, Court of Appeal (Civil Division), Transcript No. 669 of 1990 "Is what the defendant says credible?", amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence"."

The Anglin case involved an appeal to the Supreme Court against an Order of the High Court refusing the defendant leave to defend and granting summary judgment. The plaintiff had issued proceedings on foot of a guarantee dated 1st February 1989 whereby the defendant had guaranteed monies due to the plaintiff by a particular company. The defendant, who was managing director and chairman of the company in question, claimed that the guarantee had been executed in September 1989 and was void as having been given for past consideration.

On the evidence before it, the three person Supreme Court (Hamilton C.J. and Denham J. agreeing with Judge Murphy's decision) found that there was no question whatever of the guarantee having been executed subsequent to the 1st February 1989 as the defendant alleged. In applying the principles to the relevant facts, Murphy J. stated; "In my view there is no credible evidence for the defence which the defendant seeks to assert." In those circumstances the Supreme Court dismissed the defendant's appeal and affirmed the High Court's decision to grant summary judgment.

Even where the court has reason to doubt the bona fides of the defendant, it will not necessarily refuse leave to defend by way of plenary hearing. In order for a plaintiff to have a better

understanding of the prospects of obtaining summary judgment, this is an important point to grasp. The foregoing decision was cited with approval by the Supreme Court in Aer Rianta –v- Ryanair Ltd .

Here, the plaintiff brought proceedings by summary summons seeking to recover monies which it claimed where due in respect of landing charges and passenger loading fees for using the plaintiff's airport facilities. The defendant argued that the scheme providing for the charge had been varied for the benefit of the defendant or that a collateral contract benefiting the defendant had come into existence as a result of discussions between the plaintiff's assistant chief executive of operations and the defendant's chief executive. The plaintiff denied that there was any such variation, saying that no variation could have been made without specific approval by the plaintiff's board. It argued that the evidence adduced on affidavit by the defendant was not credible and that there was no fair or reasonable probably of the defendant having a real or bona fide defence.

In the High Court, Mr. Justice Kelly concluded that the defendant had not satisfied the Court that there was a fair or reasonable probability of it having a real or bona fide defence and he granted summary judgment to the plaintiff. The case was appealed to the Supreme Court by the defendant which sought to have the proceedings remitted to plenary hearing. Having endorsed the approach taken by Murphy J. in Anglin, McGuinness J. went on to say the following:-

"Thus it is for this court to decide whether in the instant case the defence set out in the affidavits of Mr. O'Leary, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or bona fide defence. Since there had been no oral hearing and neither deponent has been cross-examined on his affidavit, it was not for the learned High Court Judge to weigh the affidavit evidence of Mr. O'Leary and Mr. Byrne or to attempt to resolve the factual contradictions contained in it. Still less is it for this court to attempt any such task….The court does not ask whether Mr. O'Leary's account of events is probable, or likely to be true; nor does it ask whether Mr. Byrne's account of events is more likely. The question is rather whether the proposed defence is so far fetched or so self contradictory as not to be credible."

In the same case, Mr. Justice Hardiman identified the applicable approach to a summary judgement application based on a older stream of jurisprudence regarding Order 14. Hardiman J. also cited the Anglin decision but looked to much earlier caselaw to identify the origins of the summary procedure in its modern form. According to Mr. Justice Hardiman, the criteria governing the application by the court of the summary procedure had been "…most clearly expressed in certain of the older cases. In Sheppards and Co. –v- Wilkinson and Jarvis (1889) 6 TLR 13, Lord Esher said:

"...The rule which had always been acted upon by this court in considering cases under Order 14 was that the summary jurisdiction conferred by that order must be used with great care. A defendant ought not to be shut out from defending unless it was very clear indeed that he had no case in the action under discussion. There might be either a defence to the claim which was plausible, or there might be a counterclaim pure and simple. To shut out such a counterclaim if there was any substance in it would be an autocratic and violent use of Order 14. The Court had not power to try such a counterclaim on such an application, but if they thought it so far plausible that it was not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded."

Hardiman J. went on to quote from an Irish case, almost contemporaneous with Sheppards, Crawford –v- Gillmore [1891] LRI 238, where Sir Peter O'Brien CJ said:-

"I think however that final judgment should not be given on a motion for final judgment in any case where any serious conflict as to matter of fact or any real difficulty as to matter of law arises."

That particular case involved an appeal from an Order of the Queen's Bench Division whereby the plaintiffs were empowered to mark final judgment against the defendant for the sum of £16 17s 10½d and costs in relation to arrears of rent. On affidavit the defendant stated that he had repudiated any estate in or liability in respect of the rent for the lands in question. In allowing the appeal, Lord Ashbourne, C. held;-

‘‘The rule allowing final judgment to be marked on motion was not intended to limit or preclude a defendant from raising fair legal topics on which he bona fide relies, or from having the facts of his case, when complicated or involving difficult questions, put in proper train for accurate investigation.” Having analysed the earlier jurisprudence, Hardiman J. had the following to say:-

‘‘In light of these authorities, I believe that the test for obtaining summary judgment has not changed since the early days of the procedure in the late 19th and early 20th centuries. The formulation used in Anglin and the cases cited in that judgment are useful and enlightening expressions of the test, but I do not believe that this formulation expresses an altered criterion which is more favourable to a plaintiff than that derived from the other cases cited. The “fair and reasonable probability of the defendants having a real or bona fide defence” is not the same thing as a defence which will probably succeed, or even a defence whose success is not improbable.”

The three person Supreme Court (Denham J, McGuinness J, and Hardiman J) in Aer Rianta unanimously decided that the High Court’s Order granting summary judgment should be set aside and the case remitted for plenary hearing. In her judgment, McGuinness J. (Denham J. concurring) applied the Anglin principles to the facts of the present case and, despite finding that there were “considerable weaknesses in the defence offered by Mr. O’Leary in his Affidavits” nevertheless found that “…the probability remains open, on the affidavit evidence now before the Court, that the defendant has a real or bona fide defence, or that what is put forward by the defendant is credible.” In his judgment, Hardiman J. commented on the very substantial conflict of fact apparent from the averments in the five affidavits before the Court amounting to 181 pages including exhibits. His Lordship found that;-

‘‘The length and time and volume of paper required by the plaintiff to seek to demonstrate that the case is a clear one in itself suggest that it is not sufficiently clear for summary judgment. Reading the affidavits and listening to the case argued with considerable intensity on both sides has led me to the view that one cannot be confident where the justice of the case lies without hearing oral evidence and cross-examination. To me, at least, it is not “very clear indeed” that the defendant has no case. It is clear in my view, that the issues are not “simple and capable of being easily determined”. In light of that view, and since it follows that the case should go to plenary hearing, it is not desirable for this court to enter further into the merits.”

In terms of guidance for practitioners and plaintiffs, the principles emerging from the Supreme Court’s decision in Aer Rianta appear in the headnote of the decision as follows:-

‘‘1. The test to be applied in deciding whether leave to defend should be granted is whether, looking at the whole situation, the defendant has satisfied the court that there is a fair and reasonable probability that he has a real and bona fide defence. It is not a sufficient basis for refusing leave to defend that the court has ground to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine cause of action. The question for the court is not whether the defendant’s version of events is probable or more likely to be true but, rather, whether the defence put forward is so far fetched or so self-contradictory as not to be credible.
2. The mere assertion on affidavit of a given situation which is the basis of the defence, will not of itself ground leave to defend.
3. The mere length of time occupied in the argument of the case may demonstrate that it is not suitable for summary disposition.
4. There were considerable weaknesses in the defence put forward by the defendant which was vague and lacked detail. Nevertheless, the possibility remained open, on the affidavit evidence before the court, that the defendant had a real or bona fide defence or that the defence put forward was credible. Therefore, the matters at issue between the parties required to be resolved by plenary hearing.”

Anglin and Aer Rianta were cited by Kelly J. in his ex tempore Judgement delivered on Wednesday 21st December 2005 in the case of Anglo Irish Bank Corporation plc –v- Brendan McGrath . That case involved the enforcement by the plaintiff of a guarantee executed by the defendant in respect of monies advanced by the plaintiff to a partnership. The purpose was to purchase and equip a fishing

vessel and an element of the agreement between the plaintiff bank and the partnership was that a company controlled by the defendant would manage the vessel in question. A management agreement giving effect to the foregoing was entered into but was subsequently terminated and, according to the defendant, resulted in him being ousted from participation in the transaction and fundamentally altered his circumstances. In giving his decision Mr. Justice Kelly said he could understand on a human level why the defendant would feel hard done by but; "I am unable to identify any legal basis for the argument advanced." Hence, summary judgment was granted.

In Harrisrange Limited –v- Duncan Mr. Justice McKechnie set out the following 12 principles in what is perhaps the fullest expression of the approach which the Courts will take to an application for summary judgment,:-

"(i) The power to grant summary judgment should be exercised with discernible caution;
(ii) In deciding upon this issue the Court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;
(iii) In so doing the Court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting Affidavit evidence;
(iv) Where truly, there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;
(v) Where however, there are issues of fact which in themselves are material to success or failure, then their resolution is unsuitable for this procedure;
(vi) Where there are issues of law, this summary process may be appropriate but only so, if it is clear that fuller argument and greater thought, is evidently not required for a better determination of such issues;
(vii) The test to be applied, as now formulated is whether the defendant has satisfied the Court that he has a fair or reasonable probability of having a real or bona fide defence; or as it sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result;
(viii) This test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;
(ix) Leave to defend should be granted unless it is very clear that there is no defence;
(x) Leave to defend should not be refused only because the Court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;
(xi) Leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;
(xii) 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."

The principles identified by McKechnie J. in Harrisrange were cited with approval in the judgement delivered by Ms. Justice Finlay Geoghegan on the 8th May 2009 in Bank of Ireland –v- Mervyn Walsh . Her Lordship cited in full the foregoing 12 principles at the start of her judgment and had the following to say in relation to applying the key test:-

"As appears from sub-paragraph (vii) above, the threshold is one of an arguable defence and is, in relative terms, a low threshold. However, in making that determination, the Court should have regard to whether what the defendant is saying is mere assertion and whether the proposed defence is credible in the sense explained by Hardiman J. in Aer Rianta c.p.t –v- Ryanair Ltd [2001] 4I.R.607."

The case concerned the plaintiff bank's application for summary judgment on foot of a guarantee executed by the defendant for €4million in respect of the liabilities of a company of which the defendant was a director. Having applied the principles to the facts, Finlay Geoghegan J. concluded that:-

"...the defendant has not met the low threshold established by the principles set out above of an arguable defence to the plaintiff's claim herein. I have concluded that this is a case in which the Court should exercise its jurisdiction to grant summary judgment. There is no dispute that the principal amount is €4million."

Anglo Irish Bank Corporation plc –v- Brendan McGrath saw that bank obtain summary judgment against the defendant. In McGrath v. Driscoll & Others , the same Mr. McGrath instituted summary summons proceedings against the partnership which purchased a fishing vessel with funds advanced by Anglo Irish Bank and guaranteed by Mr. McGrath. In the former proceedings Mr. Justice Kelly granted summary judgment against Mr. McGrath for €6,375,172.78 together with interest and costs. In the latter proceedings which came before Mr. Justice Clarke, the plaintiff claimed to be entitled to recovery the same amount together with his own costs of defending the Anglo Irish Bank proceedings from each of the defendants, on the basis that they were the primary debtors and were, therefore, obliged to indemnify him as a surety against whom judgment had been obtained by the principal debtor.

In his judgement, Clark J. drew the distinction between the mere assertion of a defence and the existence of factual evidence which would arguably give rise to a defence stating:-

"So far as factual issues are concerned it is clear, therefore, that a mere assertion of a defence is insufficient but any evidence of fact which would, if true, arguably give rise to a defence will, in the ordinary way, be sufficient to require that leave to defend be given so that that issue of fact can be resolved."

Mr. Justice Clark also commented on the Court's power to resolve questions of law in the context of a summary judgement application and the limits on the exercise of the power to resolve such questions in the context of doing justice. The following quote from his judgment is particularly instructive:-

"So far as questions of law or construction are concerned the court can, on a motion for summary judgement, resolve such questions (including, where appropriate, questions of the construction of documents) but should only do so where the issues which arise are relatively straight forward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgement."

Opposing the application for summary judgment, the members of the relevant partnership argued that the proceedings should not have been brought by summary summons and were premature in that the plaintiff had paid no money to Anglo Irish Bank on foot of the judgment against him. The defendants also submitted that they had a valid counterclaim against the plaintiff concerning alleged breaches of various agreements, arguing that no judgment should be entered or that if judgment was entered it should be stayed until a trial of the counterclaim.

In finding for the defendants, refusing summary judgment and directing a plenary trial, Clarke J. held that an unconditional order for the payment of a debt or liquidated sum can only be obtained by a guarantor against a principal debtor in circumstances where the guarantor had paid the debt or otherwise given value (which was not the case here) and that summary summons proceedings were inappropriate in the present circumstances. The Court also found that, in answering the question whether the defendants had established an arguable counterclaim such as would afford a defence to the plaintiff's claim, the principles applicable to granting leave to defend an application for summary judgment apply. The Anglin case in particular was considered. As to the significance of a counterclaim in the context of an application for summary judgment, Mr. Justice Clarke explained, with clarity, the approach to be adopted by the Court:-

"Two separate questions appear to arise. The first is as to whether the counterclaim can be said to amount to a defence. It is clear from Prendergast v. Biddle and also from Axel Johnson Petroleum AB v. Mineral Group [1992] 1 W.L.R 270, that where a counterclaim arises out of circumstances which are

sufficiently connected to a claim, a set off in equity arises because it would be inequitable to allow the plaintiff's claim without taking the defendants' cross claim into account. The first question which the Court has to ask is, therefore, as to whether the counterclaim amounts to a defence. If it does then liberty to defend should be given. That question turns on whether there is a sufficient connection between the circumstances giving rise to the claim, on the one hand, and the counterclaim on the other hand. If, however, the counterclaim would not give rise to a set off in equity then the Court has to exercise a wider discretion as to whether, in all the circumstances of the case, it is appropriate to grant judgment and, if judgment be granted, whether the judgment should be stayed pending the trial of the counterclaim".

On the facts, Clarke J. found that, even if the proceedings had been properly constituted, he would have made an order giving the defendants liberty to defend on the basis of the counterclaim contended for in their replying affidavits.

In Bank of Ireland –v- Educational Building Society Murphy J. stressed that it was in order to remit a matter for plenary hearing to determine an issue which was primarily one of law where a defendant identified issues of fact which required to be explored and clarified before the issues of law could be dealt with properly and had the following to say at page 231:-

"Even if the position was otherwise, once the learned High Court Judge was satisfied that the defendant had "a real or bona fide defence", whether based on fact or on law, he was bound to afford them an opportunity of having the issue tried in the appropriate manner."

In GE Capital Woodchester Limited and Anor. –v- Aktiv Kapital, Asset Investment Limited and Anor. , Judge Clark emphasised the distinction between the mere assertion of a defence and the existence of a credible basis for such an assertion. The former will not entitle a defendant to an oral hearing whereas the latter will. Clark J. also highlighted the fact that certain evidence will only become available as a result of pre-trial procedures in the context of a plenary hearing, while stressing that this does not entitle a defendant, faced with a summary judgement application, to make vague and generalised assertions to the effect that something useful may be found on discovery. The following passage (at 512) is of particular interest:-

"Likewise, there will always be cases where the true nature of a defendant's defence will rest in evidence (whether documentary or otherwise) which will only become available through procedural devices such as discovery, interrogatories or the like. That is not to say that it is open to a defendant, on a summary judgment application, to make a vague and generalized contention which would amount to nothing more than an assertion that something useful to his case might turn up on discovery or the like. However, it seems to me that where a defendant satisfies the court that there is a credible basis for asserting that a particular state of facts might exist which state of facts, if same were in truth to exist, could be established by appropriate discovery and/or interrogatories, then such defendant should be entitled to liberty to defend. It should, again, be emphasised that mere assertion is insufficient. A credible basis for the assertion needs to be put forward even if it is not, at the stage of the motion for summary judgment, possible to put before the court direct evidence of the assertion concerned."

In this case Clarke J. applied the test set out in Anglin and quoted the principles (i) to (xii) set out by McKechnie J. in Harrisrange. Applying the principles to the facts in the case he refused summary judgment and granted liberty to defend. This was on the basis, not of any direct evidence put forward on affidavit as to breaches of contract by the plaintiff. However the Court found that the defendants had put forward a credible basis for their suggestion to the effect that the plaintiff had breached the relevant agreement, holding:-

"The truth or otherwise of any such suggestion is a matter which will require analysis of evidence which is only available within (the plaintiff) and in respect of which (the defendants) will, undoubtedly, be entitled to explore by procedural devices such as discovery and interrogatories."

If the Court has been careful to emphasis that mere assertion of a particular situation, without a credible basis, will not be sufficient to avoid summary judgment, the Court has also made it clear that mere repetition of arguments would not be sufficient to guarantee liberty to defend at a plenary trial. We have seen from paragraph 3 of the head note in the Aer Rianta decision that the length of time occupied in the argument of a case "may demonstrate that it is not suitable for summary disposition". However, the mere repetition of arguments will not, of itself, entitle a defendant to a plenary hearing. In The Leopardstown Club Limited –v- Templeville Developments Limited and Philip Smyth O'Sullivan J. cited both Aer Rianta and Harrisrange but also noted the following:-

''Nor can it be the law, I think, that the mere multiplication of paperwork and reiteration of argument and grievance can of itself protect a tenant from a landlord's right to summary judgement for rent. If that were all that were contained in the defendant's lengthy affidavits and exhibits I would be justified I think in making an order for summary judgement. However I think there is more than that in the material advanced by the defendant...On the authorities final judgment should be exercised on an application such as the present one only with caution and only when the court is satisfied to rule out a fair or reasonable probability of the defence having a real or bona fide defence. I am not so satisfied. On the contrary to use the wording of Hardiman J. in Aer Rianta it is not, to me, very clear that the defendant has no case. Nor are the issues "simple and capable of being easily determined"."

The writer submits that there is no tension between Mr. Justice O'Sullivan's observations in the Leopardstown case and the third principle as developed by the Supreme Court in the Aer Rianta decision. The length of affidavits and the time occupied in the argument of a case may well indicate that a plenary hearing is more appropriate but, crucially, this will not of itself protect a defendant from summary judgment or guarantee a plenary trial.

In Consulnor Gestion SGHC SA –v- Optimal Multi Advisors Ireland plc , Mr. Justice Kelly referred to the principles outlined in the Anglin, Ryanair and Harrinsrange decisions, noting in his judgement that both parties accepted paragraphs (vii) and (viii) of the McKechnie J. principles as setting out the correct test. The Harrinsrange principles were also cited and applied in Anglo Irish Bank –v- Fanning and by Mr. Justice Kelly in Allied Irish Bank –v- Higgins and Others .

The former case involved a series of loans advanced to purchase shares in Smart Telecom PLC and to refinance the defendant's home. The Court held that there was no dispute in respect of the home-loan element of the borrowings, that there was default in relation to that element of the loan and the plaintiff was entitled to succeed. In the latter case, the defendants did not deny that the substantial sums, the subject of the proceedings, were received by them as loans from the Bank but contended that they had an arguable defence to the claim, relying on certain provision of the Consumer Credit Act 1995.

In particular, the defendants argued that they were "consumers" within the meaning of the Act, that Section 30 of the Act was applicable and failure by the plaintiff to comply with the Act's requirements rendered the loan unenforceable under Section 38. Applying the principles to the facts deposed to in the defendant's affidavits, the Court found that the defendants acted as partners in a partnership which borrowed money from the Bank with a view to investing in property and its development for profit. In so doing, they engaged in business and the 1995 Act had no application to them. Thus, Kelly J. found that "no arguable defence or triable issue has been identified by them on this topic and accordingly I enter judgment…".

Although there is consensus about the proper tests to be applied when deciding whether a defendant should be allowed to present their defence at a full plenary trial, issues can arise in relation to the implementation of the tests and, for example, the High Court's obligation, or otherwise, to resolve issues in the context of a summary application as opposed to permitting a plenary trial. In Danske Bank t/a National Irish Bank –v- Durcan New Homes & Ors , the High Court granted summary judgment to the Bank, making the relevant Order on the 17th July 2009. The judgment was granted jointly and severally against the defendants in relation to two loans (of over €29million and over €7million respectively, together with interest). The defendants appealed and, in a judgment delivered

on the 22nd April 2011, the Supreme Court allowed the appeal, remitting the matter back to the High Court for a plenary hearing.

The Supreme Court emphasised that the issue in this appeal was whether the appellants had satisfied the Court that they had an "arguable defence". In granting summary judgment, the High Court suggested that:-

"If the addition of evidence can assist in any material way in the construction of a document then, I agree, the matter should be put for plenary hearing. If, on the other hand, the question of law arising on affidavit evidence can be as well considered on a motion for summary judgment as at a plenary hearing, then I feel it is the obligation of the court to resolve it on hearing that motion." (emphasis added)
In overturning the High Court's decision, Denham J. (as she then was) emphasised:-

"While a court may resolve questions of law there is no obligation to do so. The test, as stated previously, is whether the appellants have established an arguable defence."

Her Lordship went on to quote Lord Justice Acker in Banque De Paris –v- De Naray [1984] Lloyd's REP, at page 23 of his judgment:
"It is of course trite law that O.14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, ipso facto, provide leave to defence; the Court must look at the whole situation and ask itself whether the defendant has satisfied the Court that there is a fair or reasonable probability of the defendants having a real or bona fide defence."
Having done so, she found that the appellants had an arguable defence on the construction of the loan documentation in question so that, as a matter of justice, the case should be heard at a plenary hearing.

For very understandable reasons, a plaintiff will be anxious to achieve a result as quickly as possible with the minimum of expense and, in respect of a liquidated sum, without a plenary hearing. It is worth recalling the quote by Lavery J. in Prendergast –v- Biddle to the effect that the summary summons procedure was provided in order to facilitate "speedy justice" to be done. However, the writer submits that in any situation where there is a tension between the objectives of speed and justice, Irish Courts will and must prioritise the latter even at the expense of the former. It is suggested that the Supreme Court's decision in Danske Bank t/a National Irish Bank –v- Durcan New Homes & Ors clearly illustrates that point.

Another recent case illustrates how the Courts will err on the side of the caution even where the Court perceives serious difficulties for a defendant in attempting to put forward a credible defence. In Anglo Irish Bank Corporation Limited –v- Michael Sherry , the plaintiff bank sought summary judgment against the defendants for in excess of €21million. The proceedings related to guarantees executed by the defendants in favour of the bank concerning the liabilities of two companies and two partnerships in which the defendants were involved. The defendants opposed the application for summary judgment and in their affidavits, each swore the following:-

"There was never a moment's doubt in my mind that the plaintiff would not seek to enforce the guarantees as aforesaid against me and I relied on this in executing the guarantee. If there was ever a question of my actually being exposed to the potential liability comprised in the guarantees, I simply would not have executed those sureties."

The defendants alleged that it was represented to them that the plaintiff would not enforce the guarantees against them and that these representations were made by a Mr. Daly who allegedly told the defendants that he received the relevant assurances from Mr. Sean Fitzpatrick, the former chief executive and chairman of the plaintiff and/or Mr. David Drumm, Mr. Fitzpatrick's successor. Nothing in the guarantees indicated that they would not be relied upon. There was no contemporaneous or any

note exhibited in relation to any meeting where the alleged representations were made. The defendants further alleged that the activities of the partnerships were being carried out in a fraudulent, unlawful or irregular manner. In separate proceedings, Mr. Daly was being sued by the same plaintiff and Mr. Justice Charleton had earlier refused an application for summary judgment against Mr. Daly in those proceedings. In his decision, Mr. Justice Kelly commented that;-

‘‘This is an unusual state of affairs and one which presents great difficulties for the defendants in attempting to put forward a credible case in support of their belief as to the non-enforceability of Anglo’s guarantees”.

Later in his judgment, his Lordship suggested that, were it not for the decision made by Charlton J. in the case brought against Mr. Daly, he would be “very inclined” to refuse leave to defend in these proceedings. However, “in the interests of justice”, Kelly J. refused to grant summary judgment in favour of the bank and adjourned the action for plenary hearing stating:-

‘‘If Mr. Daly in his case succeeds in persuading the court of trial that his version of events is correct and these defendants were deprived of the opportunity of having a trial on oral evidence touching upon much the same issues, I think there would be a risk of an injustice being perceived to have been done”.

In the recent case of Irish Bank Resolution Corporation Limited –v- Sean Quinn concerning applications for summary judgment against the defendant on foot of guarantees, Mr. Justice Kelly had the following to say in the course of his judgment:-

‘‘The test to be applied on an application for summary judgment is well established in the jurisprudence of the Supreme Court and this Court. The most recent enunciation of it is to be had in the decision of the Supreme Court in Danske Bank trading as National Irish Bank –v- Durkan New Homes & Ors [2010] IESC 22. The test can be distilled down to a simple question. The question is: Is it very clear that the defendant has no case? If a defendant can demonstrate an arguable defence then summary judgement should be refused and the action sent to plenary hearing.”

In the decision given by Mr. Justice Ryan on the 9th December 2011 in Danske Bank T/A National Irish Bank –v- Martin Feely & Leo Halpin his Lordship began his analysis of the relevant case law by stating:-

‘‘The fundamental principle is that a party should not be excluded from making any reasonably maintainable defence.”

Thereafter, Ryan J. referred to the principles and tests developed in the Aer Rianta, Anglin and Harrisrange cases, pointing out that:-
‘‘The Court’s task is not simply to examine the affidavits and exhibits to discover whether there is a conflict of fact on a decisive point. Neither is it to weigh conflicting depositions in the balance to decide which is more probable. The Court’s function is to apply the above credibility tests to the proposed defence.”

The case in question concerned a loan facility in respect of which the Bank was seeking summary judgment for €4.8million. The defendants argued for a plenary hearing raising three alleged defences. Firstly, it was argued that the loan was non recourse as against the defendants personally; secondly, that the Bank, by its conduct, led the defendants to believe that it would not demand repayment of the principal as long as interest payments were made and, thirdly, that the Bank collected excessive interest. In deciding the issue as to whether the defendants had made out sufficient grounds to defeat the plaintiff’s claim to summary judgment, and having applied the principles referred to, Mr. Justice Ryan held that the defendants had not made out a defence to the claim and he granted summary judgment.

In Zurich Bank –v- Jim McConnon Mr. Justice Birmingham considered an application for summary judgment by the plaintiff Bank for over €31million on foot of monies advanced to the defendant pursuant to a particular Facility Letter. It was not in dispute that the defendant had availed of the facility, drew down the funds and that the loan had not be repaid. The defendant identified four possible defences as a basis for refusing summary judgment namely an alleged condition applying to the contract, an estoppel point, the doctrine of frustration and the alleged applicability of the Financial Regulator's Consumer Protection Code. In his judgment Mr. Justice Birmingham cited the principles in Anglin, Aer Rianta, Danske Bank and McGrath. Having done so his Lordship emphasised:-

"...that while the jurisdiction to refuse leave to defend and proceed to summary judgment undoubtedly exists, it is a jurisdiction to be exercised very sparingly indeed."

Notwithstanding the above and having analysed each of the four alleged defences Birmingham J., concluded his judgment in the following terms:-

"The defendant decided to proceed and borrowed the money and I can see no arguable basis whatever for suggesting that he be absolved from liability to repay. Accordingly, I am satisfied that this is one of the rare cases where a plaintiff is entitled to summary judgment."

Conclusion

An analysis of the jurisprudence demonstrates that there is clarity in relation to the tests to be applied in order to decide whether to grant or refuse summary judgment. From the perspective of a defendant seeking liberty to defend the case at a plenary hearing, the threshold is a relatively low one. The writer might take issue with the suggestion in the Zurich case that summary judgment is granted only in "rare" cases.

However, it is absolutely the case that the jurisdiction to refuse leave to defend is exercised sparingly and, it is submitted, for very good reason. The approach of the courts is not to try and "weed out" cases where the bona fides of the defendant are questionable and/or where alleged defences appear to have limited chances of success or will probably fail.

It is respectfully submitted that this is an entirely appropriate approach, regardless of the understandable priority placed by a plaintiff on achieving a result with the minimum of delay and expense. It must be borne in mind that the phrase "speedy justice" encapsulates two distinct principles. Speed may be the first but the second and paramount objective must be to achieve a just result in the particular case. As we see from the above analysis, sometimes this will involve granting summary judgment and refusing liberty to defend. In other cases, doing justice to the case will require that an application for summary judgment is refused and the defendant has the opportunity to defend itself at a plenary hearing.

This article was written by Beauchamps Partner Mark J. Heslin and was published in the Irish Business Law Quarterly. To contact Mark, please click here.

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Beauchamps Solicitors
Riverside Two, Sir John Rogerson's Quay, Dublin 2,
Ireland.
t +353 1 418 0600
f +353 1 418 0699
e securemail@beauchamps.ie
follow us @beauchampssol

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