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Admissibility of Evidence In Enforcement Proceedings

Date: January 2015

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Who can give evidence on behalf of a financial institution?

A recent decision of the High Court has imposed a stricter burden of proof on financial institutions engaging in enforcement proceedings against debtors. This decision is likely to have significant practical implications for financial institutions, in particular for those who have outsourced their debt collection facilities.

As a result of the decision in Ulster Bank Ireland Limited v Dermody, [2014] IEHC 140, all matters requiring evidence in enforcement proceedings must be proved by an employee or officer of the relevant financial institution and not by an employee of a third party company. Failure to comply with the provisions of the Acts will result in significant difficulties being encountered by the financial institution in recovering the debt.

Background

In Dermody, Ulster Bank Ireland Limited (the "Bank") commenced summary proceedings against the Guarantor on foot of a number of guarantees provided by the Guarantor in respect of credit facilities given by the Bank to two companies. At the hearing of the motion for liberty to enter final judgment the Master of the High Court held that the affidavit grounding the Bank's claim was inadmissible as being hearsay, having regard to the provisions of the Bankers' Books Evidence Acts 1879 – 1959 ("the Acts").

The provisions of the Acts provide for the admissibility in legal proceeding of copies of entries from the books and records of a bank as evidence of their contents. It is further provided that a copy of an entry in a banker's book shall not be received in evidence unless it be first proved that the book was at the time of making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business and that the book is in the custody and control of the bank. Such proof may be given by a partner or officer of the bank, and may be given orally or by affidavit.

Where a financial institution fails to comply with the provisions of the Acts the evidence of the financial institution will be inadmissible in enforcing its claim against the debtor.

Appeal

The grounding affidavit had been sworn by an employee of the Bank's parent company, Ulster Bank Limited, rather than by an employee of the Bank. The Bank appealed the decision of the Master striking out the proceedings to the High Court with the central issue being whether the Bank was entitled to rely upon a grounding affidavit sworn by an employee of Ulster Bank Limited, a related company.

At the hearing of the appeal the Bank argued that compliance with the Acts was not a necessary proof in the Bank's claim. The Bank argued that the evidence in the case was not hearsay as the person who swore the affidavit was employed by Ulster Bank Limited and had deposed to facts which were within his knowledge from his own perusal of the file. The Bank also argued that the employee was authorised under a power of attorney to swear such an affidavit on behalf of the Bank.

Decision

The High Court found that the grounding affidavit was not admissible to prove the truth of the contents of the Bank's records unless it came within the provisions of the Acts. The Court accepted that for the purposes of the Acts an employee may be considered to be an officer of the Bank. However, the employee in question was not an employee of the Bank, but of a separate legal entity. The fact that

the two companies were closely related did not alter their separate legal existence. The Court therefore held that the evidence supporting the claim was hearsay and the appeal was dismissed.

In making this decision the High Court endorsed the decision in Bank of Scotland plc. v Stapleton [2012] IEHC 549, which held that an employee of Certus, a third party company engaged by the Bank to provide customer support and administration services, could not provide the evidence required under the Acts.

The Court in Stapleton held *"where a bank needs to prove by sworn testimony the amount it is due by a defendant customer, that evidence must be provided by an officer or partner of the bank itself, and not some person employed by some other company to whom the task of collecting the debt has been outsourced."*

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