Neutral Citation: [2016] IEHC 345

THE HIGH COURT

BANKRUPTCY

[2015 No. 1750 P]

[2015 No. 1749 P]

IN THE MATTER OF A PETITION BY ALLIED IRISH BANKS PLC FOR ADJUDICATION OF MARY HOARE, AS A BANKRUPT

AND

IN THE MATTER OF A PETITION BY ALLIED IRISH BANKS PLC FOR ADJUDICATION OF MICHAEL HOARE, AS A BANKRUPT

JUDGMENT of Ms. Justice Costello delivered on 20th day of June, 2016

1. Allied Irish Banks plc. ("the petitioner") presented two petitions for the adjudication of Mrs. Mary Hoare and Mr. Michael Hoare ("the debtors") as bankrupt on 19th August, 2015. It is accepted that the petitioner has satisfied the requirements of ss. 11 and 14 of the Bankruptcy Act 1988, as amended.

2. Section 11 provides as follows:-

> *"11.—(1) A creditor shall be entitled to present a petition for adjudication against a debtor if—*
>
> *(a) the debt owing by the debtor to the petitioning creditor (or, if two or more creditors join in presenting the petition, the aggregate amount of debts owing to them) amounts to more than €20,000,*
>
> *(b) the debt is a liquidated sum,*
>
> *(c) the act of bankruptcy on which the petition is founded has occurred within three months before the presentation of the petition, and*
>
> *(d) the debtor (whether a citizen or not) is domiciled in the State or, within 3 years before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in the State or has carried on business in the State personally or by means of an agent or manager, or is or within the said period has been a member of a partnership which has carried on business in the State by means of a partner, agent or manager.*
>
> *(2) If a creditor who presents or joins in presenting the petition is a secured creditor, he shall in his petition set out particulars of his security and shall either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudicated bankrupt or give an estimate of the value of his security. Where a secured creditor gives an estimate of the value of his security, he may be admitted as a petitioning creditor or joint petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same manner as if he were an unsecured creditor but he shall on application being made by the Official Assignee after the date of adjudication give up his security to the Official Assignee for the benefit of the creditors upon payment of such estimated value."*

3. Section 14 of the Bankruptcy Act 1988, as amended, provides as follows:-

> *"14.— (1) Subject to subsection (2), where the petition is presented by a creditor, the Court shall, if satisfied that the requirements of section 11(1) have been complied with, by order adjudicate the debtor bankrupt.*
>
> *(2) Before making an order under subsection (1), the Court shall consider the nature and value of the assets available to the debtor, the extent of his liabilities, and whether the debtor's inability to meet his engagements could, having regard to those matters and the contents of any statement of affairs of the debtor filed with the Court, be more appropriately dealt with by means of—*
>
> *(a) a Debt Settlement Arrangement, or*
>
> *(b) a Personal Insolvency Arrangement,*
>
> *and where the Court forms such an opinion the Court may adjourn the hearing of the petition to allow the debtor an opportunity to enter into such of those arrangements as is specified by the Court in adjourning the hearing.*
>
> *(3) A copy of the order shall be served on the debtor, either personally or by leaving it at his residence or place of business in the State.*
>
> *(4) For the purposes of subsection (2), the Court may order the bankrupt to attend and make full disclosure of his assets and liabilities to the Court by way of a statement of affairs filed with the Court."*

4. The debtors' debts exceed €3 million and therefore are not amenable to a personal insolvency arrangement unless the creditors agree. The petitioner has not agreed and therefore it is not possible to deal with their debts more appropriately by either a debt settlement arrangement or a personal insolvency arrangement.

5. The sole basis upon which the adjudication is opposed is on the grounds that the petitioner is said to be estopped from seeking to bankrupt the debtors.

Facts

6. The debtors entered into seven loan facilities with the petitioner dated 7th October, 2004, 4th December, 2006, 18th January, 2007, 15th November, 2007, 12th May, 2008, 30th October, 2008, and 10th June, 2010. This was for a business they ran which involved purchasing houses in Galway city, renovating them and letting them out to students and others. In addition to their personal business, Mr. Hoare ran a construction firm called Dangan Homes Ltd. which built houses in the environs of Galway. In 2004 it borrowed €1.4 million to develop houses at Moylough, €3 million in 2005 to develop a 29 acre site at Mountbellew and €1.256 million in 2006 to develop townhouses at 63/65 Upper Newcastle Road. The total of the personal borrowings was over €4.25 million. The debtors entered into personal guarantees in respect of the facilities granted to Dangan Homes Ltd.

7. On 28th November, 2012, in proceedings entitled Michael Hoare and Mary Hoare v. Allied Irish Banks plc. & James Luby ([2012 No. 8998 P][2012 No. 168 COM]), the petitioner obtained judgment against the debtors in the sum of €7,435,556.76. By order of the High Court dated 27th May, 2014, the judgment sum was reduced to €5,609,556.76. The order of the High Court was affirmed by the Supreme Court on 17th December, 2014.

8. The petitioner registered judgment mortgages against the lands comprising the family home of the debtors and their family farm on 5th June, 2014.

9. On 25th February, 2015, solicitors for the petitioner issued particulars of demand and notice requiring payment prior to the issue of a bankruptcy summons to each of the debtors in the sum of €5,579,287.76. This figure gave credit in respect of the net sales proceeds in the sum of €30,269 received by the petitioner in respect of one of the properties jointly owned by the debtors which had been applied in part reduction of the debt. The debt remained outstanding and two bankruptcy summonses issued on 11th May, 2015, and, the sum still remaining outstanding, the petitions herein issued on 19th August, 2015. The act of bankruptcy relied upon was the failure to pay the sums due on foot of the bankruptcy summonses.

10. The debtors say that the petitioner agreed that it would not have recourse to their family home or family farm in seeking to recover the sums lent pursuant to the various loan agreements and personal guarantees. They say that inherent in this promise is an undertaking not to seek to bankrupt them as the process of bankruptcy necessarily would involve them losing the family farm and quite possibly the family home. They say that by reasons of its actions, the petitioner is estopped from so proceeding.

11. The ingredients required to ground a claim of promissory estoppel were recently restated by Laffoy J. in *The Barge Inn Ltd. v. Quinn Hospitality Ireland Operations 3 Ltd.* [2013] IEHC 387. She accepted at para. 68 that the key ingredients were:

> i. There is a pre-existing legal relationship between the parties;
>
> ii. There is an unambiguous representation;
>
> iii. Reliance by the promisee (and possibly detriment);
>
> iv. Some element of unfairness and unconscionability;
>
> v. That the estoppel is being used not as a cause of action, but as a defence; and
>
> vi. That the remedy is a matter for the Court.

12. The *"unambiguous representation"* was described by Clarke J. in the Supreme Court in *Furey & Anor. v. Lurgan-ville Construction Company Ltd. & Ors.* [2012] IESC 38 at para. 5.3 as *"a clear unequivocal promise or representation".*

13. The onus is on the party seeking to establish a promissory estoppel to satisfy the court in the first place that there was a clear unequivocal promise or representation. The representation must predate the action of the promisee as it is necessary to establish that the promisee thereafter relied upon the representation in his subsequent conduct.

14. The evidence on behalf of the debtors in this regard was provided by the first debtor in her affidavit of 10th March, 2016, the affidavit of her solicitor, Mr. John Nash, sworn on 3rd June, 2016, and the affidavit of Mr. Sean McHugh, a former bank official with the petitioner, likewise sworn on 3rd June, 2016.

15. The first debtor averred in her affidavit that *"there was an assurance given by [the petitioner] in relation to not enforcing against our family home or farm".* The petition for bankruptcy *"constitutes and is a breach of promise repeatedly made by [the petitioner] to us and upon which we relied."* At paras. 16 and 17 of her affidavit she stated:-

> *"The promises and undertakings upon which we rely were given from time to time and reiterated at each time a new loan or refinance was made. It was expressly stated and repeated by [the petitioner] that it would never enforce against the home or farm and we relied upon this and acted accordingly.*
>
> *17. I say and believe that the promise given by [the petitioner] was a promise we relied upon and one that [the petitioner] knew and understood that we were relying upon. [The petitioner] further understood that a fundamental basis of all our agreements was that it would never seek to enforce against either our home or family farm. Put simply, [the petitioner] knew and understood we would never have agreed to borrow monies from [the petitioner] without an assurance that the farm and home were off the table – that is, that no steps would ever be taken to enforce against them."*

16. She referred to the letters of 4th March, 2016, from Mr. Sean McHugh, a former employee of the petitioner, and Mr. John Nash, the debtor's former solicitor, which she said confirms this.

17. In his affidavit Mr. John Nash confirmed the veracity of his letter of 4th March, 2016, and stated:-

> *"[the petitioner] promised the Hoares that they would never pursue them for their farm or home under any circumstances. This was a basis of the relationship and constituted a promise made by [the petitioner] upon which Michael and Mary Hoare relied."*

The letter of 4th March, 2016, stated:-

> **"TO WHOM IT MAY CONCERN**
>
> *I acted for Michael and Mary Hoare of Circular Road, Bushy Park, Galway for a long number of years. During those years there was numerous transactions in relation to the sale and purchase of various properties. The vast majority of these transactions were financed by [the petitioner].*
>
> *I was always instructed that it was a condition precedent of all loans taken out by the Hoare's [sic] with [the petitioner] that there [sic] private dwellinghouse and farm would not be available to [the petitioner] under any circumstances and [the petitioner] accepted and agreed to this. [The petitioner] promised the Hoare's [sic] that they would never pursue them for their farm or home under any circumstances."*

18. Mr. Sean McHugh in his affidavit confirmed the veracity of the contents of his letter of 4th March, 2016. He stated that:-

> *"it was a condition of the Hoares' loans with [the petitioner] that [the petitioner] would never enforce against their home or family farm. This was something stipulated by the Hoares at all times and something that [the petitioner] fully agreed to and accepted."*

His letter provided as follows:-

> *"Re AIB loans*
>
> *Dear Michael and Mary,*
>
> *…*
>
> *In 1989 I was an assistant manager at the AIB branch in Newcastle, Galway and recall you opening your first AIB account. Over the years and from time to time I was involved directly with your loans.*
>
> *I can say with certainty that in all my dealings with you and in particular from 2007 on it was a condition of your loans with [the petitioner] that [the petitioner] would never enforce against your home or your family farm. This was something stipulated by you at all times and something that [the petitioner] fully agreed to and accepted.*
>
> *I can confirm that I gave you assurances on this matter, which was in accordance with the confirmation I had received from [the petitioner], on a number of occasions in response to your queries on this matter.*
>
> *In addition I also provided written confirmation, under authority from Commercial Banking, that [the petitioner] had no interest in your family home or your family farm, neither of which was held as security."*

19. The facility letters pursuant to which the monies were advanced to the debtors were not exhibited. In submissions, counsel on behalf of the debtors accepted that there was no written term stating that the facilities were advanced on the basis that there would be no recourse by the petitioner to the debtors' family home or family farm. No letter or other written communication emanating from the petitioner to that effect or confirming any such oral agreement was exhibited.

20. There was one letter written by Mr. McHugh on behalf of the petitioner to Mr. Nash, solicitor for the debtors, dated 11th September, 2008, which stated:-

> *"Subject : Michael & Mary Hoare*
>
> *Dear Sirs,*
>
> *I refer to your letter dated 11th inst. & confirm that clients private dwellinghouse at Circular Road & their agricultural lands at Moylough are hereby specifically excluded from the personal guarantee."*

21. In addition Mrs. Hoare exhibited internal memoranda sent by Mr. McHugh to his colleague, Mr. Michael Lynn, dated 19th September, 2008, i.e. one week after Mr. McHugh wrote to Mr. Nash. Mr. McHugh said to Mr. Lynn:-

> *"Michael Hoare said on phone yesterday evening that they have no problem with signing the L/G for 6k [sic] but asked that their PDH be excluded & also his home family farm at Moylough (which we don't hold & also which has rights of residence etc. in favour of his brother who lives there).*
>
> *Mary said this was his home place & he was paranoid about protecting this. Recommend we acceded [sic] to his request -- he was genuinely concerned & sometimes we take for granted that customers will understand what we mean when we ask them to sign l/g's --PDH we've no interest in anyway & a family farm, which we don't hold and which has rights of residence etc. would be of no interest to us either particularly as we already hold good security from client."*

22. The reply from Mr. Lynn was:-

> *"Sean – no problem with that. We would not go after family home & agree to exclude family farm at Moylough also."*

23. The issue to be decided is whether or not this evidence is sufficient to satisfy the requirements of points 2 and 3 as set out by Laffoy J. in *The Barge Inn Ltd.*

24. It is important to emphasise that the application was the hearing of the petition. It was not some intermediate application pending a resolution of issues elsewhere. The evidence before the court is the evidence upon which the decision must be made. Secondly, the courts have always been slow to allow any term of a written contract to be overridden orally. The debtors' case is that the written terms of each of the facilities was varied by an oral assurance, upon which they relied, that, notwithstanding the terms of the written facility letters they accepted, the petitioner would not have recourse to their family home and family farm.

25. Mr. Mark Harris, on behalf of the petitioner, stated that the contemporaneous documentation referred to by the debtors referred to arrangements around the letter of guarantee. The documentation relating to their personal borrowings made no reference to

limitation of recourse in respect of their personal borrowings. He denied the debtors' assertions that promises and undertakings were given repeatedly. He said that this did not occur in respect of their personal borrowings and that there was no record of same. At para. 7 of his affidavit sworn on 25th April, 2016, he stated:-

> *"As a matter of practice any assurances in relation to limiting recourse on personal borrowings would be recorded in the Facility letter, or at a minimum a side letter. This did not occur. Furthermore, I confirm that it is correct that there are judgment mortgages registered against the family home and the Moylough Lands as there was no reason why [the petitioner] should not try to recover on foot of the judgment."*

It is accepted that Mr. Harris did not meet the debtors in relation to the granting of any of the facilities grounding the petitions and therefore he cannot and does not give evidence of his own knowledge of contemporary representations or the absence of such representations. His evidence is based upon the practice of the petitioner and its books and records.

26. This is the evidence upon which the debtors seek to establish as a matter of probability that there was a clear unequivocal promise or representation that the petitioner would not have recourse to the debtors' family home or family farm in respect of any of their borrowings.

27. The onus is on the debtors to establish the estoppel. They must do so by more than mere assertion. There is no documentary evidence available to corroborate their position. It was accepted by counsel during the hearing of the petition that the facility letters did not limit the recourse of the petitioner. This accords with the judgment of Denham C.J. in the debtors' proceedings refusing their appeal where she held:-

> *"Further, there was nothing to show that [the petitioner] had dealt with the Appellants on the basis of non-recourse lending. It did not appear to arise".*

28. The evidence of the first debtor, Mr. McHugh and Mr. Nash is extremely general and gives no details of the alleged assurances which the debtors must prove were given prior to the first facility in October, 2004 if it is to apply to the entirety of their personal borrowings as they assert. None of the deponents attempt to give any date or time for any alleged representation or promise or seek to relate any particular promise to any particular facility. No individual acting on behalf of the petitioner is identified save for Mr. McHugh. In relation to Mr. McHugh, his evidence extends to *"the facilities with which he was involved"*. However, he does not identify any of these facilities; much less identify the facilities which gave rise to the judgment which grounds the petition. Therefore, it cannot be said that his evidence establishes a clear unequivocal promise in relation to the facilities which are ultimately the subject matter of the petition.

29. Mr. Nash states that the condition precedent, as he phrases it, applied to all of the facilities granted by the petitioner to the debtors. Despite the fact that he was their solicitor in respect of these transactions, he does not identify any of the facilities and he exhibits no record recording any such promise. Furthermore, one would expect that a solicitor acting on behalf of clients borrowing millions of euro in respect of a property business where such condition precedent applied to each and every facility would ensure that this was recorded in at least one if not all of the facilities advanced by the petitioner. He does not explain why, if this were the case, it is not reflected in the documentation furnished by the petitioner and signed by the debtors.

30. It is significant that in September, 2008 the debtors negotiated a non recourse agreement with the petitioner as regards their family home and their family farm in respect of a personal guarantee yet, when they came to refinance their personal borrowings in 2010 the facility letter was not limited as to recourse (as is noted by Charlton J. in his judgment of 28th April, 2014). This surprising omission, to put it at its lowest, on the debtors' case, is nowhere addressed by any of the witnesses.

31. Following the refusal of the appeal of the debtors by the Supreme Court, the petitioner registered judgment mortgages against the interests of both debtors in both their family home and the lands comprising their family farm on 5th June, 2015. The debtors did not move to set aside these judgment mortgages which, on the case now advanced by the debtors, ought not to have been registered by the petitioner. The debtors appear not to have written to the petitioner or its solicitors objecting to the registration of the judgment mortgages on the grounds of a breach of the prior representation or promise not to have recourse to the family home and family farm. While the first debtor indicated in her affidavit of March, 2016 that they might bring separate proceedings to set aside the judgment mortgages to date they have not done so.

32. Likewise, when the particulars and notice requiring payment prior to the issue of a bankruptcy summons dated 25th February, 2015, was served, the debtors did not object that it was not open to the petitioner to seek to have them both adjudicated a bankrupt. The bankruptcy summonses issued on 11th May, 2015, and was served personally upon both debtors on 29th May, 2015. The debtors did not seek to have the bankruptcy summonses dismissed pursuant to s. 8(5) of the Bankruptcy Act 1988, as amended, despite the fact that subs. 6 states that the court shall dismiss a summons if satisfied that an issue would arise for trial.

33. The first time the debtors advanced the argument that the petitioner was estopped from petitioning for their bankruptcy was when their solicitor, Mr. Eugene Carley, swore an affidavit on their behalves on 26th November, 2015, opposing the petitions. He was not their solicitor at the time the facilities were taken out and the debtors did not swear an affidavit until 10th March, 2016.

34. None of these factors in and of themselves are evidence that no promises of the kind asserted by the debtors were made by the petitioner. However, when taken together they are suggestive of the fact that the facilities advanced by the petitioner were not limited recourse facilities and the debtors did not believe that they were limited recourse facilities at the time. The complete absence of any record held by anybody involved in any of these facilities in relation to such an important point for all parties concerned is very significant in my opinion. I therefore am not satisfied that the debtors have discharged the onus of proof in this case that there was a clear unambiguous promise by the petitioner that it would not seek to recover any sums outstanding in respect of these facilities from the debtors' family farm or family home. In the absence of any such representation there can of course be no grounds for holding that the petitioner is estopped from seeking their adjudication as bankrupts.

35. As the proofs required by ss. 11 and 14 of the Act of 1988, as amended, have been complied with by the petitioner in each case, it follows that the debtors must each be adjudicated bankrupt.