Neutral Citation: [2014] IEHC 441

THE HIGH COURT

[2009 No. 594 COS]

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012 AND IN THE MATTER OF RQB LIMITED (IN LIQUIDATION)

BETWEEN

GEORGE MALONEY

APPLICANT

AND

DANSKE BANK A/S

RESPONDENT

JUDGMENT of Mr. Justice Cregan delivered the 6th day of October, 2014

Introduction

1. This is an application by the official liquidator of RQB Limited (in liquidation) pursuant to s. 280 of the Companies Acts for directions to determine the legal status of a floating charge dated 10th September, 2008, entered into between RQB Limited (in liquidation) ("the company") and Danske Bank ("the Bank").

2. Although the notice of motion originally sought an order pursuant to O. 74, r. 126 of the Rules of the Superior Courts and s. 231(1) of the Companies Act 1963, this was amended on consent to an application seeking an order pursuant to s. 280 of the Companies Acts 1963 – 2012, at the commencement of the hearing.

3. The liquidator filed an affidavit of 24th September, 2013, (together with various exhibits) and a supplemental affidavit of 1st April, 2014. Michael Leonard on behalf of Danske Bank filed a replying affidavit with exhibits on 15th November, 2013. Both parties also filed written legal submissions on this issue.

4. The liquidator, in his affidavits and written submissions, has submitted that the floating charge is not valid or enforceable; the Bank for its part, has claimed that the floating charge is enforceable. I will address the substance of these submissions in greater detail in a later section of this judgment.

Factual Background to this Application

The 2005 facility

5. On 19th December, 2005, National Irish Bank, (the predecessor of Danske Bank,) provided RQB Limited with an overdraft facility of €12 million on agreed terms. This overdraft facility was stated to be repayable on demand but subject to review on 21st December, 2006. Clause 7 of the overdraft facility letter provided that the only security for the overdraft facility was a joint and several guarantee in the sum of €12 million from Patrick Kelly, Niall McFadden and Paul Pardy.

6. The personal guarantees were signed by the three guarantors on 23rd December, 2005. Mr. Leonard (for Danske Bank) states in his affidavit that in December 2006 there was an agreement between the Bank and the company to continue the 2005 overdraft facility on the understanding that it was repayable on demand.

The 2008 facility

7. In early 2008 the company requested a restructuring of the 2005 facility and discussions took place between the parties. The restructuring of the 2005 overdraft facility involved:-

(a) a new loan facility of €8 million; and

b) an additional overdraft facility of €2 million

8. On 4th September, 2008, the Bank wrote to the company offering a new loan facility of €8 million on the terms set out in that loan facility letter.

9. In addition, on 4th September, 2008, the Bank also offered an overdraft facility to the company in the amount of €2 million on similar terms.

10. This offer of a loan facility by the Bank was signed and accepted by the company on 10th September, 2008. (It appears to be accepted by all sides that the overdraft facility was also accepted and signed by the company on the same date.) Thus a contract between the parties came into being on that date (ie 10th September, 2008).

11. It is also agreed between the parties that these two agreements (i.e. the loan facility agreement of 4th – 10th September, 2008 and the overdraft facility agreement of 4th – 10th September, 2008), are to be construed together as they refer to each other. Indeed the relevant provisions of the loan agreement and the overdraft agreement are identical.

Security for the 2008 loan facility

12. Section 5 of the loan agreement (dated 4th September 2008 and signed on 10th September 2008) provided as follows:

The loan facility will be secured by:-

"(a) Joint and Several Guarantee in the amount of €8 million from Patrick (Paddy) Kelly, Niall McFadden and Paul Pardy

("The Guarantors";) (to be provided)

(b) First Fixed and Floating charge over assets and undertaking of the company (to be provided)." (Emphasis added).

13. On 10th September, 2008 personal guarantees were executed by Patrick Kelly, Niall McFadden and Paul Pardy.

14. On 10th September, 2008 the floating charge was also executed by the company.

Subsequent Developments

15. However the loan agreement quickly ran into difficulties and on 17th September, 2008 National Irish Bank sent an email to the company in relation to the loan facilities which stated *inter alia* as follows:

"Further to our discussions in relation to the new and restructured facilities to the above.

The file has been reviewed within the bank and a decision has been made that we cannot proceed with the new facilities until such time as all the security is in place, all preconditions attended to and all outstanding matters have been attended to. This decision has been made on foot of the recent and protracted guarantor problem and also due to the fact that the required personal asset statements are not in a satisfactory format."

16. It is an agreed fact that although the bank was provided with personal asset statements of the guarantors, these statements were not satisfactory to the bank. Thus the loan facility and overdraft facility were not advanced by the bank to the company.

17. It is also an agreed fact that after the 30th September, 2008 further discussions and negotiations took place between the company and the bank in respect of the facilities, the personal asset statements of the guarantors and the security.

18. On 22nd December, 2008 the bank wrote to the company referring to the bank's facility letter of 4th September, 2008 and suggesting that the security clause would be amended so that the loan facility should be secured by

(a) A joint and several guarantee from the three guarantors.

(b) A First Fixed and Floating charge over the assets and undertaking of the company.

(c) An assignment in a format acceptable to the Bank over the borrower's interest shareholding and/or investment in other properties in Florida.

(d) An assignment in a form acceptable to the Bank over the borrower's interest shareholding and/or investment in certain properties in London.

19. However, it is agreed between the parties that this letter of the 22nd December, 2008, was not signed either by the Bank or the company and is therefore of no legal effect.

20. As Mr. Leonard (for Danske Bank) has averred to in his affidavit, discussions in relation to the refinancing were ongoing between the parties between September 2008 and February 2009, but the additional facilities, as provided for under the 2008 facility agreements were never advanced and the envisaged restructuring was never completed.

21. As time went on the financial position of the company deteriorated and on 11th June, 2009, 22nd July, 2009 and 24th July, 2009, the Bank made formal demands for repayments of the amount outstanding under the 2005 facility.

22. On 11th June, 2009 the Bank issued a letter of demand for €8.5 million approximately in respect of the 2005 loan which it had advanced to the company. In this letter of demand the Bank stated *inter alia* as follows:

"Dear Sirs,

With reference to recent dialogue with the Bank and your request for variation of facilities, I confirm that the Bank is not in a position to grant the requested variation to facilities."

23. The letter went on to demand repayment of the existing loan of €8.5m and stated that the Bank would also seek to rely on its security (i.e. the joint and several guarantees of the three directors dated the 23rd December, 2005 and the floating charge dated the 10th September, 2008.)

24. By letter dated the 23rd June, 2009 the company replied to this letter and stated that the floating charge dated the 10th September, 2008 was only signed in the context of the loan agreement dated the 4th September, 2008 and was intended to satisfy the security requirements of that facility letter. It also stated that as the Bank never advanced the new loan facility and as the company never enjoyed the benefits of the new loan facility the Bank could not now seek to rely on the floating charge.

25. Subsequently, because the company failed to comply with the formal demands, the Bank issued proceedings on 30th July 2009 seeking judgment against the company and the guarantors.

26. On 12th August, 2009, judgment was entered against Patrick Kelly and Paul Pardy in the sum of €8,577,105.93, on foot of their personal guarantees.

27. On 23rd September, 2009, the Bank obtained judgment in the High Court against the company in the sum of €8,615,830.31.

28. On 24th September, 2009, Boundary Services Limited, a creditor of the company, presented a petition to wind up the company and by order of the High Court the company was wound up on 2nd November, 2009.

29. The Bank also brought proceedings against Mr. Niall McFadden on foot of his personal guarantees. These proceedings were defended by Mr. McFadden at the summary stage and on 16th October, 2009 the Bank's proceedings against Mr. McFadden were adjourned to plenary hearing. The plenary hearing in respect of this matter came on before the High Court in July 2010 and oral evidence was given on behalf of the Bank. At the conclusion of the case, the High Court (McGovern J.), in a reserved judgment, granted judgment in favour of the Bank against Mr. McFadden on foot of his personal guarantee. (See *Danske Bank T/A National Irish*

Bank v. RQB Limited (formerly known as Redquartz Boundary Limited) & Ors [2010] IEHC 347, 23rd July, 2010.)

30. On 18th November, 2010 McCann Fitzgerald acting on behalf of the Bank wrote to the liquidator, stating that the Bank had obtained judgment against the company in the sum of €8.6 million on 23rd September, 2009 and stating that the Bank had obtained the benefit of the floating charge executed by the company in its favour on 10th September, 2008. It also stated that, in its view, the charge was valid and secured the liabilities of the company to the Bank.

31. On 24th June, 2011 Whitney Moore Solicitors on behalf of the liquidator replied to this letter seeking further comments on the question of the enforceability of the floating charge.

32. Further correspondence then ensued between the parties until eventually in September, 2013 the liquidator issued a motion for directions seeking the directions of the High Court to determine the status of the floating charge.

The terms of the loan agreement of 4th September, 2008
33. In order to consider the issue of the enforceability of the floating charge, it is necessary to have regard to the architecture of the agreements between the parties and to review the main terms of each agreement.

34. The terms of the loan agreement entered into between the Bank and the Company are set out in the letter dated 4th September, 2008, signed on behalf of the company on 10th September, 2008. The key terms of this agreement are as follows:-

(i) Clause 1 states that the amount of the facility is €8 million.

(ii) Section 2 of the agreement provides that the purpose of the facilities is:-

> *"restructure of existing facilities to assist with the rationalisation of the business.*

(iii) Section 3 of the agreement is headed "Availability and Repayment" and sets out the repayment terms.

(iv) Section 4 of the agreement sets out the rate of interest.

(v) Section 5 of the agreement dealing with security provides as follows:-

> **Security**
>
> *"The loan facility will be secured by:*
>
> *(a) Joint and Several Guarantee in the amount of €8 million from Patrick (Paddy) Kelly, Niall McFadden and Paul Pardy ('the Guarantors') (to be provided);*
>
> *(b) First Fixed and Floating charge over assets and undertaking of the company (to be provided).*
>
> *Any security held now or at any future time shall be security for all the Borrower's liabilities to the Bank (actual or contingent) and whether as principal or surety. (Emphasis added).*
>
> (It should be noted that the agreement itself provides that it is the loan agreement itself which is to be secured by the personal guarantees and the floating charge.)

(vi) Section 7 headed "Special conditions" provides at s. 7(c):-

> *"This offer of facilities is contingent on acceptance by the Borrower of the facilities granted under the terms and conditions of the Bank's letter dated 4th September, 2008, in respect of overdraft facilities".*

(vii) Most importantly, Condition 8 of the agreement headed "*Conditions Precedent*" provides as follows:-

> *"Prior to utilisation of the facilities referred to at clause 1 above, the Bank is to be provided with Personal Asset Statements of the Guarantors. Such personal asset statements are to be satisfactory to the Bank. (Emphasis added)*

(viii) Paragraph 11 of the agreement provides:-

> *"The offer will remain open until 30th September, 2008 and will be subject to renegotiation if acceptance is not received by that date."*

(ix) Paragraph 12 of the agreement provides:-

> *"The facilities will be made available on completion of the security arrangements and on compliance with the provisions of clause 11 and will be subject to renegotiations if utilisation has not commenced by 30th September, 2008." (Emphasis added)*

(x) Paragraph 14 provides that:-

> *"This letter is supplemental to the Bank's letter dated 4th September, 2008, in respect of overdraft facilities."*

The terms of the overdraft facility letter of 4th September, 2008

35. The overdraft facility letter – at condition 11 - also contains a similar condition precedent to that contained in the loan agreement:-

36. Moreover Clause 7 of the overdraft facility letter refers to the fact that what is secured by the guarantee and the floating charge is the overdraft facility.

The terms of the floating charge dated 10th September, 2008
37. The floating charge, dated 10th September, 2008 was entered into between RQB Limited and Danske Bank A/S.

38. Paragraph 1 of the floating charge agreement provides as follows:-

> *"In consideration of the Bank from time to time making or continuing advances or otherwise giving credit or affording banking facilities or granting time for as long as the Bank may think fit to the company solely and/or to the company jointly with any other person, firm or company and/or to any other person, firm or company for the liabilities of which said person, firm or company the company may now be surety or hereafter become surety upon the terms that the Bank shall, be secured as hereinafter appearing the Company pursuant to every power and by force of every estate enabling it in this behalf HEREBY CHARGES in favour of the Bank, the undertaking of the company and all its property whatsoever and wheresoever both present and future, including its uncalled capital for the time being (hereinafter referred to as 'the assets') as a security for all monies the payment whereof is intended to be hereby secured such charge to be a floating security…[the clause then sets out certain restrictions]."*

39. Clause 11 of the floating charge also provides as follows:-

> *"This security shall be in addition to and shall not be in anywise prejudiced or affected by any collateral or other security now or hereafter held or judgment or order obtained by the Bank for all or any part of the monies hereby secured nor shall such collateral or other security judgment or order or any lien to which the Bank may be otherwise entitled (including any security charge or lien prior to the date of these presents on the assets or any part thereof) or the liability of any company or companies, person or persons not parties hereto for all or any part of the monies hereby secured be in anywise prejudiced or affected by this security."*

40. The judgment in *ICDL GCC Foundation v. European Computer Driving Licence Foundation Ltd* [2012] IESC 55 was accepted by counsel on both sides as representing the appropriate approach which this Court should take in the interpretation of these contracts. It was also agreed by both parties that the court should construe the 2008 loan facility letter and the 2008 overdraft facility letter together as they refer to each other.

Summary of arguments in relation to the enforceability of the floating charge
41. It is against that background that I now turn to consider the issue in this case i.e. whether the floating charge is enforceable or not. Counsel on behalf of the liquidator submits that the floating charge is not enforceable for the following reasons:

> 1. The 2008 loan agreement contains a condition precedent which was not fulfilled. As a result, the agreement of the 4th-10th September, 2008 lapsed on 30th September, 2008. Although further negotiations took place no loan facilities or overdraft facilities were ever advanced by the Bank to the company. As a result there was no obligation on the company to repay any loans. It follows therefore that the security provisions in the agreement including the guarantee and the floating charge are of no legal effect. They are unenforceable. They lapsed with the agreement on the 30th September, 2008.
>
> 2. In the alternative, it was an implied term of the floating charge that if no funds were advanced by the Bank then the floating charge came to an end.
>
> 3. In the alternative there was no consideration for the floating charge.
>
> 4. In the alternative even if no consideration was required because the contract was under seal, as a matter of law a contract under seal must be signed , sealed and "delivered" by the company and the floating charge in this case was not "delivered" in the legal sense.
>
> 5. That, having regard to the decision of McGovern J. in the guarantee case, a similar result should apply in relation to the floating charge in this case.

42. The Bank, in its submissions both in writing and to the Court, submitted as follows:

> (i) The floating charge was valid and enforceable. It was valid on its face; it was signed by both parties; it was not subject to the condition precedent and was, in effect, a stand alone security.
>
> (ii) There was no implied term in the floating charge that it could not come into effect if the facilities under the 2008 facility letter were not advanced.
>
> (iii) There was consideration for the floating charge in that the Bank continued to afford banking facilities to the company under the 2005 facility and it continued to grant time to the company until June, 2009 when the demand for repayments were ultimately made. This consideration in respect of loans already advanced and/or the Bank's continued forbearance was sufficient consideration to support the floating charge.
>
> (iv) Even if there was no consideration, the floating charge was made under seal and as such the floating charge did not need to be supported by consideration.
>
> (v) The floating charge had been registered in the Companies Registration Office and as such was valid in law.
>
> (vi) That the judgment in the guarantee proceedings before McGovern J. was not relevant in this case. The evidence given in that case could not be used as evidence in this case in aid of the liquidator's case. No question of issue estoppel arose and the doctrine of *res judicata* did not apply.

I will now consider each of these arguments in turn.

The Condition Precedent argument

The Nature of Conditions Precedent

43. The phrase "condition precedent" is itself a curious phrase. Lawyers are familiar with the word "precedent" used as a noun to mean previous judicial decisions which may serve as an authoritative rule in similar cases. However in the phrase "condition precedent" the word "precedent" is not used as a noun but as an adjective. The Oxford English Dictionary gives different definitions and descriptions of the word "precedent" depending on whether it is used as a noun or as an adjective. It observes that the use of the word "precedent" as an adjective is "now rare". It also notes that the adjective "precedent" has now been largely replaced by 'preceding' and that its origins are derived from the Latin verb "praecedere", to "precede". The adjective "precedent" means, according to the Oxford English Dictionary, "preceding in time; existing or occurring before something express or implied".

44. Indeed, if the phrase "condition precedent" were replaced by the phrase "preceding condition" it might clarify what is, in fact, meant by this phrase. It means that it is a condition which precedes other conditions. Therefore it must be fulfilled before other conditions are fulfilled. It also means that if this condition is not fulfilled then the other conditions fall away or become unenforceable.

45. The exact nature of a condition precedent has been the subject of some academic consideration. As is stated in Contract Law, McDermott, (p. 993):

> ***"Conditions Precedent***
>
> ***Preventing a Contract coming into Existence***
>
> *[19.48] A condition precedent may prevent the coming into being of a contract at all, rather than merely suspending its obligations . . .*
>
> *[19.52] 'The subject to contract' cases in real property transactions are the best examples of such a process, for until the contract is signed or exchanged, the majority of property sales do not have any force at all.*
>
> ***Suspending Obligations or Remedies***
>
> *[19.53] A condition precedent may not prevent the coming into existence of a contract but may merely suspend its obligations. The effect of such a condition precedent is thus to suspend, not the creation of a binding contract, but rather the enforceability of the parties' reciprocal primary obligations.*

46. A similar analysis is given in Furmston Law of Contract, (4th Ed. at p. 699). Thus, Furmston, at para. 330, states as follows:

> *Distinguishing the two*
>
> *"When there is no contract in existence prior to the fulfilment of the condition precedent, it might be referred to as the situation in which there is a 'condition precedent to the contract', whilst the situation in which the contract exists but obligations are suspended could be distinguished by referring to it as a 'condition precedent to the performance'. In whatever way the two categories are referred to, it has been said that there is not a "method by which it can readily be determined into which category a particular collection of words falls". However, it can be suggested that the question which should be focused on is whether the parties intended there to be any obligations prior to the fulfilment of the condition."*

47. However, in my view, the distinction between a condition precedent which prevents a contract coming into existence, and a condition precedent which suspends other contractual obligations is an illogical distinction. It is difficult, as a matter of logic, to understand the concept of a "condition precedent" as meaning a condition which may prevent the coming into being of a contract at all. There is either a contract in being or there is no contract. The very concept of a "condition precedent" means that the parties have agreed on a condition precedent. If they have agreed on a condition precedent then they have reached an agreement. Thus there is a contract in being. If that is so, the concept of a condition precedent which prevents a contract coming into existence is meaningless.

48. As part of that agreement the parties might agree that a certain condition must be fulfilled before the rest of the contractual conditions can be fulfilled or become enforceable. That condition could be called a "condition precedent". It is a condition which must be fulfilled before the rest of the contract can be performed. It is, in effect, a condition which precedes the other contractual obligations being performed or becoming enforceable.

49. The term "condition precedent" means, as a matter of logic, that the parties have agreed that the obligations in the contract must occur in a certain sequence over a certain period of time. Thus one condition precedes another and if the earlier condition is not fulfilled then the other conditions do not have to be fulfilled or are unenforceable.

50. This issue was also considered by the Supreme Court in *O'Connor v. Coady* [2004] 3 I.R. 271 in the context of the differences between conditions precedent and conditions subsequent.

51. In the course of his judgment, Geoghegan J. considered the distinction between conditions precedent and conditions subsequent and stated as follows (at p 282):

> *"On the hearing of the appeal before this court, counsel for the plaintiff and the defendant seemed to assume that the expression 'condition precedent' necessarily and exclusively refers to a condition the effect of non-compliance with which means that no contract of any kind comes into existence. They seemed to take the view that every other kind of a condition that might be said to render the contract 'conditional' was a condition subsequent. Gibbs C.J. in Perri v. Collangatta Investments Pty. Ltd. (1982) 129 C.L.R. 537 considered that the completion of the sale of the other property was a 'condition precedent to the performance of certain of the obligations of the parties under the contract including the obligation of the defendant to complete the sale'. He goes on to make the following observation at p. 541:-*
>
> > *'"It has sometimes proved difficult to decide whether a particular condition of a contract should be classified as a condition precedent or a condition subsequent, and as Professor Stoljar has pointed out in 'the Contractual Concept of Condition' Law Quarterly Review Volume 69 (1953) 485 at p. 506 if the words 'precedent' and 'subsequent' are to make sense they must be connected with a definite point of reference since they express a*

relationship in time, the question which must be asked is 'precedent to what? Subsequent to what?'. However, provided the effect of a condition is clearly understood, its classification may be merely a matter of words. The condition in the present case was not a condition precedent to the formation of a binding contract. It is clear that a binding contract came into existence immediately upon signature, and that the parties to it were from that moment subject to certain obligations.' (Emphasis added).

Later in his judgment Geoghegan J. stated:

> *"In my view the more helpful terminology is the distinction between a "conditional contract" and "unconditional contract". As we all know, by a strange quirk of the law, ordinary terms of an unconditional contract, if they are of sufficient importance, will themselves be described as "conditions" but that does not mean that the contract is conditional. Normally a conditional contract will not mean a contract which comes into existence only upon fulfilment of the condition but rather a contract which can be enforced only upon fulfilment of the condition. That is what this contract was"*

52. In my view, the essence of a condition precedent is that it is a condition which precedes other conditions or contractual obligations contained in the contract. By calling it a condition precedent the parties intend to mean that if this condition is not fulfilled then the other conditions of the contract are unenforceable.

Application to present case.
53. In order to consider the legal status of the floating charge it is necessary to consider not only the provisions of the floating charge itself but also of the loan agreement of the 4th-10th September, 2008 and the condition precedent in the loan agreement.

54. The essential terms in the loan agreement were

> (i) that the Bank agreed to advance a loan of €8 million to the company;
>
> (ii) that the company agreed to repay the money according to an agreed schedule and to pay interest on the said loan at an agreed rate;
>
> (iii) that the parties agreed that the security for this loan was to be the director's personal guarantees and the floating charge.

55. However the critical condition in this agreement is condition 8 headed "Conditions Precedent" which provides that

> *"Prior to utilisation of the facilities referred to at clause 1 above, the Bank is to be provided with Personal Assets Statements of the Guarantors. Such Personal Asset Statements are to be satisfactory to the Bank."*

56. It is an agreed fact that the personal assets statements which were provided to the Bank were not satisfactory to the Bank. Therefore the condition precedent was not fulfilled. Therefore the Bank did not advance the loan.

57. The failure of the Condition Precedent must also be considered in the light of clause 12 of the agreement. Clause 12 provides as follows:

> *"The facilities will be made available on completion of the security arrangements and on compliance with the provisions of clause 11 and will be subject to renegotiation if utilisation has not commenced by 30th September, 2008."*

58. Thus clause 12 provided that the agreement would be subject to renegotiation if the utilisation of the loan facilities had not commenced by 30th September, 2008. It is an agreed fact that the utilisation of the loan facility did not commence by 30th September, 2008 because of the fact that personal asset statements in a form which was satisfactory to the Bank were not received.

59. It is clear from clause 12 of the agreement that if utilisation had not commenced by 30th September, 2008, then the agreement would be subject to renegotiation. This means, in effect, that the parties agreed that if utilisation of the facility had not commenced by 30th September, 2008, then the agreements entered into between them on 4th-10th September, 2008 would come to an end. In effect, it lapsed because of the failure to provide satisfactory Personal Asset Statements.

60. However despite this, the Bank seeks to argue that although the loan was not advanced nevertheless the floating charge remains as a security in respect of all loans previously advanced to the company i.e. the 2005 loan.

61. In my view this argument is completely unsustainable. It is clear - both as a matter of logic and as a matter of common sense, - that if no loan has been advanced there is therefore no obligation on the company to repay a non- existent loan. It must also follow - again as a matter of logic and of common sense - that, if no loan has been advanced, there can be no enforceable security in respect of a non-existent loan.

62. Moreover, apart from considerations of logic and common sense, the wording of the loan agreement itself puts the matter beyond all doubt. The express terms of clause 5 of the loan agreement specifically provide that it is the "loan facility" which is secured by the floating charge.

63. It is clear therefore from the obvious meaning of these words that the loan which is to be secured by the floating charge is the loan facility of 4th-10th September, 2008 (and the corresponding overdraft facility of the same date). There is no express or implied language to the effect that the floating charge would be a charge for the 2005 loan facility.

64. Thus, by virtue of the failure to comply with the condition precedent, the agreement by the Bank to provide a loan lapsed, the agreement by the company to repay the loan also lapsed and the agreement between the parties in relation to the security also lapsed. Thus the floating charge signed on 10th September, 2008 lapsed. In the circumstances the floating charge of 10th September, 2008 is, in my view, unenforceable by the Bank against the company.

65. It was submitted by counsel for the Bank that the fixed charge was a stand alone security and/or in the alternative that it survived the lapsing of the loan agreement, because, on its face, it did not refer to the loan agreement and also because, on its face, it referred to all continuing advances by the Bank to the company.

66. In my view however, this argument cannot succeed for the following reasons:

> (i) The floating charge only came into existence because it was offered as security under the loan agreement of 4th – 10th September, 2008. It did not come into being for any independent reason.
>
> (ii) Clause 5 of the loan agreement (and the corresponding clause of the overdraft facility agreement) specifically provided that the loan facility "will be secured by" the floating charge. Thus it was expressly agreed between the parties that the floating charge would be a security for the loan facility. Thus, as a matter of construction of the contract, the floating charge was security for the loan facility of September, 2008 only and was not in any way intended to be a stand alone security.
>
> (iii) Whilst it is true that the floating charge on its face does not make any reference to the loan agreement (or the overdraft facility agreement) nevertheless the loan agreement makes reference to the floating charge. It stands therefore to be construed as one of the suite of agreements entered into by the parties at that time. The floating charge itself was signed by the company on 10th September, 2008 (i.e. on the same day that the company signed the loan agreement and the directors signed the personal guarantees.)

67. Counsel for the Bank also sought to lay considerable emphasis on the second paragraph of paragraph 5 of the loan agreement which provides that "*Any security held now or any future time shall be security for all the borrowers liabilities the Bank (actual or contingent) and whoever as principle or surety*. However that argument begs the question at issue in this case. The only security which the Bank could hold either "now or any future time" is a valid and enforceable security. In the present case the floating charge was valid at the time of its creation but it lapsed by virtue of the fact that it was subject to a condition precedent and that condition precedent was not fulfilled. Because the condition precedent was not fulfilled the remainder of the contract lapsed.

68. Counsel for the Bank also sought to rely on the wording of the floating charge itself (in particularly clause 1 thereof) to argue that the floating charge had an independent and stand-alone existence. He submitted that as the Bank had, in effect, continued to permit the advancement of facilities under the 2005 loan to the company (and the accumulation of interest thereon) and as the Bank had exercised forbearance in not making any demand on the company that that constituted consideration for the floating charge and proved that it had a stand alone existence.

69. However in my view this argument is also not sustainable. Firstly it strains the language of clause 1 of the floating charge to breaking point because it is clear that the parties intended to grant the floating charge as a security for the 2008 loan not as security for the 2005 loan; secondly it ignores the express language of the loan agreement that it was the "loan facility" (in 2008) which is to be secured by the floating charge (and not any previous loan); thirdly it is clear that the 2005 loan was only secured by the personal guarantees of the three directors; By contrast the 2008 loan was to be secured by the personal guarantees and the floating charge. Thus the Bank was seeking, and getting, an additional security for the 2008 loan.

70. Moreover there is no evidence whatsoever that the company ever agreed that the floating charge was to cover the 2005 loan or that it should be applied retrospectively. If the parties intended the floating charge to have retrospective effect, or to apply to the 2005 loan from 10th September, 2008 onwards there would have to be clear and unambiguous language in the agreement between the parties to that effect. There is no such language here.

71. For all the above reasons I am of the view that the Bank's submissions that the floating charge is enforceable cannot be sustained.

The implied term argument

72. It was also argued by the liquidator, in the alternative, that it was an implied term of the loan agreement that if the loans were not advanced then the security would not be maintained. The Bank, by contrast, deny that this is an implied term in the agreement.

73. It is clear that terms can be implied into a contract either by custom or by law or terms can be implied by fact. As is stated in McDermott on Contract Law (page 308).

> **Terms implied by fact**
> **The business efficacy test and the officious bystander test**
> *"In addition to the terms implied into contract as a matter of law, the courts may also imply in a term in order to repair what it perceives to be in "an intrinsic failure of expression" by the parties. The written document may have a clear purpose but may have omitted, through poor craftsmanship or mere inadvertence or "mischance", to cover an incidental contingency. This omission, unless remedied by the Court, may frustrate the purpose of the contract. If a judge adds a term to the contract in such circumstances he will say that he is doing it to give the contract "business efficacy". The aim of the process is to ascertain the presumed intention of both the parties to the contract, deduced from the words of the agreement and the surrounding circumstances. It must be emphasised that the aim of the Court in this process is not to "improve the contract which the parties have made for themselves, however desirable the improvement might be."*

74. The learned author then sets out the leading statement of the business efficacy test as set out in *The Moorcock* [1899] 14 PD 64, the leading statement of the officious bystander test in *Shirlaw v. Southern Foundries Ltd* [1939] 2 KB 206 and also the Irish cases *of Tradax (Ireland) Ltd v Irish Grain Board* [1984] IR 1 at 14 and also *Carna Foods Ltd v. Eagle Star Insurance* [1997] 2 ILRM 499.

75. However on the facts of this case there is, in my view, no need to imply a term into the contract. The contract is clear on its face and the issue can be decided as a matter of construction. This is because section 5 of the loan agreement specifically provides that it is the loan facility which is to be secured by the floating charge. Thus it follows that if the loan facility was not advanced then the floating charge has lapsed. Thus the clear wording of the contract is that the floating charge is only a security for the loan facility which was to be advanced in 2008. It follows inexorably therefore that if the loan facility was not advanced then the security itself also falls away.

76. It is, in fact, the Bank itself which would have to make an argument that it is an implied term of the contract that the floating charge applies to the 2005 loan. However such an argument would be wholly unsustainable on the evidence before the Court, and also based on the applicable legal principles.

The consideration argument

77. Counsel for the liquidator also submitted that the floating charge was unenforceable because there was no consideration given for it. In my view however that argument must fail. In this case the Bank agreed to advance a loan of €8 million and the company agreed to repay the loan with interest and also to provide security of personal guarantees and the floating charge. There was therefore clearly consideration provided for the loan agreement. The floating charge itself constituted part of the consideration for the loan agreement.

78. Conversely, the consideration for the creation of the floating charge on the part of the company was the agreement by the Bank to advance monies to the borrower.

79. Therefore it is clear that there was consideration for the floating charge and it could not be held to be unenforceable on that basis.

80. I am satisfied therefore that there was consideration for the floating charge and as such, it validly came into existence on 10th September, 2008. However its existence subsequently lapsed on 30th September, 2008 when the underlying loan agreement also lapsed because of the failure of the condition precedent.

81. Counsel for the Bank also contended in the alternative that there was no need for consideration as the agreement was given under the seal of the company. Counsel for the liquidator submitted in response that an agreement under seal had to signed sealed and "delivered" to be enforceable. He argued that in this case the floating charge had not been properly "delivered" and therefore was not enforceable.

82. The hearing was adjourned on two separate occasions to permit the company to investigate this issue further but in the event no further submissions were made on this point. In the circumstances, and given my findings above that there was valid consideration, I do not think it is necessary to consider this issue any further.

Registration in the Companies Registration Office
83. The Bank also submitted that because the charge was registered with the CRO under S.99 of the Companies Act, it was therefore a valid and enforceable charge. However this argument again assumes the very point at issue in these proceedings. The floating charge was, validly created. It was created pursuant to the loan agreement entered into between the parties on 4th – 10th September, 2008. It was therefore entirely reasonable to register the floating charge in the Companies Registration Office. However given that the agreement between the parties subsequently lapsed on 30th September, 2008 because the condition precedent was not fulfilled, I am of the view, for the reasons set out above, that the floating charge also lapsed at that time and therefore is not enforceable. Therefore the question of whether the charge was registered at the CRO is not relevant to the question of whether it is enforceable.

The judgement of the High Court (McGovern J.) in Danske Bank T/A National Irish Bank v. RQB Paddy Kelly, Niall McFadden and Paul Pardy
84. I have also considered the judgment of the High Court (McGovern J.) delivered on 23rd July, 2010 in respect of Danske Bank's claim against the third named defendant Niall McFadden in relation to his personal guarantee. The issue in those proceedings was whether the Bank could pursue Mr. McFadden pursuant to his guarantee dated 23rd December, 2005 or pursuant to the personal guarantee given by Mr. McFadden on 10th September, 2008. Mr. McFadden accepted that he executed both guarantees and the question was whether it was the 2005 guarantee or the 2008 guarantee which was applicable.

85. However having considered the judgment of McGovern J., I do not believe that it is appropriate for me to make any findings in this case either relying on what he stated in that case or by analogy from his findings in that case. That was a case in which the plaintiff gave oral evidence and was cross examined on that evidence. That is not the case here. Moreover that case involved the issue of personal guarantees and not the issue of the floating charge. It appears from the judgment that different considerations applied in relation to the wording and extent of the personal guarantees given in 2005 and 2008. In those circumstances it is not either necessary or appropriate for me to consider that judgment further.

Conclusion
86. I would therefore conclude that the floating charge is unenforceable for the reasons set out above.