Neutral Citation: [2011] IEHC 553

THE HIGH COURT

BANKRUPTCY

[No. 2330 AD]

[No. 2329 AD]

IN THE MATTER OF DOMINICK MULLEE AND OF SIOBHAN MULLEE ARRANGING DEBTORS, AND

IN THE MATTER OF CLAIMS IN THE ARRANGEMENTS BY ACC BANK

BETWEEN

ACC BANK

AND

DOMINICK MULLEE AND SIOBHAN MULLEE

JUDGMENT of Mr. Justice Gilligan delivered on the 14th day of December, 2011

1. This matter comes on for hearing to adjudicate on the claim of ACC as a creditor of the arranging debtors, Dominick Mullee and Siobhan Mullee, a dispute as to same having arisen during the private sittings.

2. The background circumstances are that the arranging debtors were directors of Mullee Property Limited ("the Company") and in 2005 they sought facilities to develop an eight acre site. Effectively what occurred was that they sought and obtained facilities in 2005 pursuant to a facility letter. They sought further facilities in 2006 pursuant to a further facility letter and they did likewise in 2007 and 2008, securing loans from the ACC Bank in excess of €6m.

3. Initially ACC Bank sought to prove in the arrangements, debts in excess of €3.5m, but, subsequently, this sum has been reduced.

4. The issue that arises before the court specifically relates to the facility letters of 2007 and 2008 and guarantees in respect of the sums advanced arising from those two facility letters to the development company.

5. The facility letter of the 11th June, 2007, was in respect of €2,429,000.00 and the monies were supposedly advanced on or about the 14th June, 2007, with both arranging debtors signing a guarantee in respect of this amount on the 28th June, 2007.

6. The 2008 facility letter was dated the 15th January, and was in the sum of €141,750.00. The monies were supposedly advanced thereafter with a guarantee being signed on the 24th January, 2008, by the arranging debtors. This guarantee bore a company stamp and, at the request of ACC Bank, a further guarantee was entered into by both arranging debtors on the 4th July, 2008.

7. ACC Bank now seeks to prove in the arrangements, a debt of €1,421,536.86 in the scheme of arrangement as proposed by the arranging debtors. The guarantees are unusual in that they are specific to each facility letter and are not "all monies" guarantees.

8. ACC Bank accept that there is a difficulty as regards the 2005 and 2006 facility letters, by which the arranging debtors were required to enter into guarantees of the company's liability in relation to the letters and the difficulty is that the bank cannot locate the guarantees allegedly executed by the arranging debtors, whereas the arranging debtors say that to the best of their knowledge and belief no guarantees were ever entered into in respect of these two facility letters.

9. In essence, in this regard it is difficult for the court to come to a conclusion as to whether or not personal guarantees were signed and entered into by the arranging debtors in respect of the 2005 and 2006 facility letters, and, in this regard, the onus of proof rests with the ACC Bank who are seeking to prove the relevant debt and, thus, the court is left in a situation insofar as it is relevant that the arranging debtors believe that they did not sign guarantees pursuant to the 2005 and 2006 facility letters.

10. The contractual terms are simplistic in respect of each of the facility letters in question in that at para. 8 thereof entitled "Security" it is stated that:-

> "The facility shall at all times be secured by the following security (the "Bank Security")
>
> …
>
> (c) Joint and severally guarantees and indemnity from the company directors."

11. The other relevant reference appears to be at para. 9 in respect of:-

> "Additional Conditions Precedent"
>
> …
>
> 9. Solicitor to confirm that the security and legal conditions of approval are in place and that they are satisfied that all

legal documentation is in order."

12. There is no dispute between the parties as regards the content of the actual guarantee and the case made out on the arranging debtors behalf is that, by the time they came to enter into the guarantees in respect of the 2007/2008 guarantees, the guarantee represented a past consideration and accordingly, is not enforceable.

13. The position of ACC Bank is that the guarantees were at all times envisaged by para. 8(c) of the 2007 and 2008 facility letters which expressly refer to and guarantee the facilities advanced. It is submitted that the parties to the loan facilities were aware that the arranging debtors were obliged to provide a guarantee in relation to the facilities provided to the company.

14. In essence, ACC Bank rely on the judgment of Murphy J. in the Supreme Court in *First National Commercial Bank Plc v. Anglin* [1996] 1 I.R. 75 at p. 81.

15. I accept that the views as expressed by Murphy J. at p. 81 of the judgment are *obiter dicta* wherein he states:-

> "Furthermore, it is in my view at least questionable whether the guarantee would have been invalidated if executed subsequent to the draw down of the funds lent by the plaintiff to the principal debtor. In the first place the loan was made expressly and unequivocally on terms that the guarantee would be given by Mr. Anglin in the sum of £950,000.00 as he recognises and, secondly, the guarantee in its terms extends to present as well as future indebtedness of the principal debtor."

16. Further, the bank relies on the judgment of Pigot C.B. in *Bradford v. Roulston* [1858] 8 I.C.L.R. at p. 468 wherein he states:-

> "Where there is past consideration consisting of a previous act done at the request of the defendant it will support a subsequent promise; the promise being treated as coupled with the previous request."

17. The bank submits that the guarantees are clearly inter-related with the 2007 and 2008 facility letters and that the letters allowed for loans unequivocally on terms that the guarantees would be given – in essence, a contractual undertaking to provide a guarantee which was entered into in fulfilment of the contractual undertaking as set out in the facility letters.

18. The arranging debtors contend that the bank is not entitled to prove the debt of €1,421,536.86 in the scheme of arrangement as proposed by the arranging debtors or any sum by virtue of the fact that the guarantees upon which the debt is alleged to arise are founded on a past consideration because the monies had already been advanced and accordingly, are not enforceable.

19. It is submitted on the arranging debtors behalf that the very fact that the guarantees in each case were entered into after the monies had been advanced is *prima facie* evidence of past consideration. It is further submitted that a review of the case law supporting the proposition that "if the consideration and the promise are substantially one transaction the exact order in which these events occur is not decisive", shows that for a past consideration to be valid this can occur either where the contract made between the bank and the principal debtor is expressly dependent on the granting of the personal guarantee, or that it was entered into at the guarantors request or that there was a forbearance on the part of the creditor.

20. Counsel for the arranging debtors seek to distinguish *First National* and *Anglin* on the basis that Murphy J. had no doubt that the guarantee was executed prior to the 1st February, 1988, and not September, 1989 as has been claimed, that the transaction and the first drawdown of funds was expressly and unequivocally on terms that the guarantee would be given by Mr. Anglin in the sum of €950,000.00 and further, that when Murphy J. looked at the reality of the transaction there was considerable to and fro between the bank's solicitors and the defendants solicitors all relating to a drawdown of a sum of €750,000.00.

21. Further, counsel submits that the situation that pertains in respect of the monies in issue between the parties hereto is that all were part of a series of transactions relating to the eight acre site and each of the four facility letters followed one on the other in respect of further facilities for the development site, and that, in neither of the earlier two instances, being the 2005 and 2006 facility letters, were any guarantees entered into and the monies were advanced nevertheless and this they submit is effectively the same situation running throughout, whereby in 2007 and 2008 the monies were advanced following the issuing of the facility letter and prior to the guarantees being entered into.

22. In essence, counsel submits that the loan to the company was not made expressly or unequivocally on the basis that a personal guarantee was necessary.

23. Counsel for the arranging debtors certainly makes out a credible argument on the basis that the guarantees as entered into represent a past consideration and are, therefore, not valid and enforceable.

24. I accept that in respect of each of the facility letters the clause set out as an additional condition precedent at subpara. 9 in respect of the solicitor confirming that the security and legal conditions of approval are in place and that they are satisfied that all legal documentation is in order, is ambiguous and, in accordance with the *contra proferentem* rule, has to be construed as against the person drafting the document, being in this case the bank, as the wording could apply equally to either the arranging debtors solicitors or the bank's solicitors.

25. It is further contended for the guarantees in question to be valid it has to be shown that the contract made between the bank and the principal debtor is expressly dependent on the granting of the personal guarantee, or that it was entered into at the guarantees request or that there was a forbearance on the part of the creditor. The principal contention on behalf of the arranging debtors is that, in this instance the arrangement was not expressly dependent on the granting of a personal guarantee by the arranging debtors.

26. Insofar as *First National Commercial Bank Plc v. Anglin* is relevant, it is pointed out that the guarantee in question was under seal and that in respect of that aspect of the judgment, which is relied on by the bank, Murphy J. used the words "the loan was made expressly and unequivocally on terms that the guarantee would be given…".

27. Counsel for the arranging debtors contends that effectively the loan was part of a series of transactions, all of which carried the same conditions and, in effect, the monies pursuant to each facility letter were advanced prior to the guarantees that were entered into in respect of the 2007 and 2008 situations. I note, however, from the arranging debtors submissions that in respect of the 2008 guarantee "it is not known whether any monies had been drawn down pursuant to this loan in the interim between the date of the facility letter and the date of the guarantee of the 4th April, 2008.

28. It is further contended that the onus of proving that consideration is valid is on the bank as they are seeking to enforce the guarantee and the arranging debtors contend that this proof cannot be met. Furthermore, and principally, the loan to the company was not made expressly or unequivocally on the basis that a personal guarantee be granted.

29. Unfortunately, at the conclusion of the various submissions and when a point arising from the decision of the Supreme Court in *First National Commercial Bank Plc v. Anglin* was being clarified, counsel for the bank brought to the attention of the court that, contrary to what had already been stated, the loan start dates in each instance, being the 2nd July, 2007, and the 6th May, 2008, both commenced after the guarantees which are under discussion were signed and entered into by the arranging debtors so that, in effect, the principal contention of the arranging debtors is undermined. The court has afforded the solicitors for the arranging debtors an opportunity to clarify this aspect, which has been done. It is agreed that the guarantees were entered into prior to the actual drawdown of the monies but, in any event, the court is of the overall view that effectively what occurred was that the principal debtor sought these two respective loans in its own right from the bank and each resulted in a letter of facility being offered, each contained a condition that joint and several guarantees and indemnity be forthcoming from the Company's directors and it is specifically stated that the facility being advanced was at all times to be secured by, *inter alia*, the security of the personal guarantees. The reality of the situation appears to be that there was then a time lag between the actual advancement of the monies and, during this period, both the arranging debtors did sign the guarantees which were forwarded in pursuance of the facility letter, and the issue of the guarantees being unenforceable for a past consideration, therefore, does not arise in these particular circumstances.

30. Counsel for the arranging debtors has prepared further supplemental submissions as handed into court on the 30th November, 2011. Counsel for the bank has had sight of the supplemental submissions and does not propose to reply thereto. Counsel for the arranging debtors again refers to distinguishing the facts of *First National Commercial Bank v. Anglin*, and, while I have accepted that the facts are distinguishable, I do not consider that this has any material effect on the particular passage from Murphy J. as set out and I accept that it is *obiter dicta*. Counsel raises the fact of the two documents each headed "Interim Statement of Loan Account" exhibited at EG1 of the affidavit of Eoghan Gavigan as dated 18th November, 2011, showing a loan start date in respect of both the 2007 and 2008 facility letters at a date subsequent to the date the respective guarantees were executed by the arranging debtors. It is now clarified beyond any doubt that the guarantees were entered into prior to the commencement of the actual drawdown of the monies concerned. Counsel raises a fresh issue in contending that the facility letters differ from the general terms and that, as such, the contract is at the very least ambiguous and should be construed against the bank. In my view the facility letters are clear in setting out that the security for the advancement of the monies is, *inter alia*, joint and required several guarantees and indemnity from the company directors. This condition may not have been a condition precedent or an additional condition precedent and may differ in terms from the other facility letters but nevertheless, throughout the various transactions and in particular relevant to the transactions that are now the subject matter of the issue before the court, it is clear that each transaction was covered by guarantees and indemnity from the company directors. I note the argument that is advanced in respect of the 2005 facility letter and the position relating to the furnishing of guarantees, but I do not consider that the position that pertained in 2005 is relevant to the guarantees that are now before the court. I do not consider that an ambiguity arises in respect of the issues before the court and accordingly, I do not consider it necessary that any aspect pertaining to the guarantees be construed against the bank in the particular circumstances.

31. The arranging debtors were simply complying with the terms and conditions by which the principal debtor, the company of which they were directors and sole shareholders were securing very substantial facilities from the bank.

32. In my view, the guarantees as entered into by the arranging debtors are valid and enforceable for whatever sums are correctly due and owing to the bank pursuant thereto.