Neutral Citation Number: [2011] IEHC 508

**THE HIGH COURT**

**2011 416 COS**

**IN THE MATTER OF THE COMPANIES ACT 1963 TO 2009 AND**

**IN THE MATTER OF O'CONNOR'S NENAGH SHOPPING CENTRE LIMITED (IN LIQUIDATION) (20476) AND**

**IN THE MATTER OF SECTION 286 OF THE COMPANIES ACT 1963 AS INSERTED BY SECTION 135 OF THE COMPANIES ACT 1990**

**BETWEEN**

**ANTHONY FITZPATRICK**

**LIQUIDATOR**

**AND**

**JOSEPH O'CONNOR, DONAL O'CONNOR, THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND AND KIERAN WALLACE**

**RESPONDENTS**

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

1. This case involves O'Connor's Nenagh Shopping Centre Limited ("the Company") which ceased trading on the 25th May, 2011. On the 13th June, 2011, the members of the Company passed a resolution to wind up the Company and appointed the applicant, Anthony Fitzpatrick, as liquidator.

2. By way of a notice of motion as dated the 15th July, 2011, the applicant herein sought a declaration that a mortgage entered into between the Company and the Governor and the Company of the Bank of Ireland ("the Bank") is void on the basis that it constituted a fraudulent preference within the meaning of s. 286 of the Companies Act 1963 as inserted by s. 135 of the Companies Act 1990.

3. Section 286 of the Companies Act 1963 as amended provides as follows:-

> "286 – (1) Subject to the provisions of this section, any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made o done by or against a Company which is unable to pay its debts as they become due in favour of any creditor, or of an person on trust for any creditor, with a view to giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if a winding-up of the Company commences within 6 months of the making or doing the same and the company pay its debts (taking into account the contingent and prospective liabilities), be deemed a fraudulent preference of its creditors and be invalid accordingly."

4. There is no dispute between the parties that, in March, 2008, at the time the mortgage was entered into, the Company, its directors and the bank all knew that the Company was insolvent. It is clear that the mortgage was entered into within 6 months of the Company going into liquidation. It is further accepted by all parties that the effect of the mortgage was to give the bank a preference on the Company going into liquidation over apparently a large number of unsecured creditors.

5. The only relevant issue to be decided by the court is as to whether or not the bank was given a fraudulent preference, and in this regard the liquidator herein in his capacity as applicant has the onus of proving that the dominant intention of the Company at the time it entered into the charge was to prefer the bank over the other creditors.

6. I have the benefit of the various submissions as made to the court on behalf of the various parties relevant to the affidavit evidence as presented before the court and in this regard, none of the parties has opted to have any of the deponents made available for cross examination and no application was made to the court for the introduction by any witness of oral evidence. Accordingly, the court is left to decide the issue that arises herein on the basis of the affidavit evidence, bearing in mind that the onus of proof rests with the applicant in his capacity as liquidator of the Company.

7. The background circumstances are that on the 22nd January, 2010, the Company accepted a facility letter from the Bank of Ireland refinancing the Company's existing loan in a sum in excess of €3M. The bank had agreed to reduce loan repayments to interest only payments for a twelve month period. The sum advanced was to be secured by the bank's existing charge over Folio No. 40298 County Tipperary, and additional security in the form of a charge over Folios 1390F and 30028F County Tipperary to which the Company directors agreed and this is the very subject matter of the disputed charge which was not executed until March, 2011 and was registered on the 28th March, 2011.

8. In his initial affidavit as sworn on the 11th July, 2011, the applicant, Mr. Fitzpatrick, sets out that it is his view that notwithstanding that the Company was insolvent in March, 2011, it entered into the mortgage with the bank with the intention of securitising and preferring the creditor bank over the other creditors of the Company.

9. In a further affidavit as sworn on the 14th July, 2011, Mr. Fitzpatrick avers that there was no legal obligation on the Company in March, 2011 to enter into a mortgage agreement with the bank.

10. In a further replying affidavit Mr. Fitzpatrick specifically relies on the content of a letter of James Kelly Solicitors, as dated the 14th July, 2011, acting on behalf of the directors of the Company and Mr. Fitzpatrick opines that the content of the letter is clearly indicative of the intention of the directors in signing up to the charge for the purpose of keeping the Company afloat to recoup their own funds, and this clearly was the dominant intention of the directors.

11. The letter from James J. Kelly & Sons Solicitors is exhibited to the further replying affidavit of Mr. Fitzpatrick and specifically sets

out that:-

> "The directors were anxious to maintain their relationship with the bank and keep them on board as the business was failing and could only survive if they could succeed with the restructuring plan."

This plan is outlined to their auditors, Mazars, in Rory O'Connor's email of the 9th March, 2011, to Simon Coyle of their office. Their objectives were that by so doing their substantial personal investment in the business would stand a very good chance of being saved. The directors had also discussed their strategy with Mazars and they replied by email on the 10th March, 2011, confirming their intention to assist them. Mazars had advised them that any valuation of the property of less than five million would show that the Company was insolvent. Prior to this the bank had been furnished with the management accounts to 31st December, 2010, showing accumulated losses of €249,962.00 and the directors advise that the Company's property was valued at circa €3.5M. This position is confirmed in the affidavit of Donal O'Connor a director of the Company as sworn on the 21st July, 2011, wherein he avers as follows:-

> "The bank were not putting myself nor my father under any real pressure. Trading had deteriorated from 2010 to 2011. The bank, the creditors and ourselves were involved in a difficult business in a recessionary economy so we knew the bank had to stay on board. I wanted to recover the family's investment in the Company.
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> From February, 2011 onwards both the bank and ourselves knew the Company was insolvent. As Mr. Larke says "the property market was continuing to soften". We needed to compromise the creditors and get the bank to restructure our debt to survive. In the event the bank did not participate and engage with our auditors Mazars in restructuring our debt. In May and April, 2011 Mazars and ourselves worked on the restructuring plan. We signed up to the bank's charge in March, 2011 to keep the Company afloat thereby saving our investment of €2.8M."

12. In a further supplemental affidavit sworn on the 28th November, 2011, Donal O'Connor avers as follows:-

> "I say I was under no pressure from Mr. Larke or anyone else in the bank to agree to allow the charge to be registered in favour of the bank. We knew the Company was unable to pay its way by the 28th March, 2011, and I believed and my co-directors believed that allowing the bank to register the charge was the only way to let the Company trade to recover some of our own money first which we had loaned to the Company and use any remaining funds to pay off the creditors. I beg to refer to a schedule from ourselves (i.e. loans by directors to the Company) which shows that very substantial loans were given by us to the Company. In this regard I beg to refer to a true copy of this schedule upon which and marked with the letters DOC1, I have signed my name prior to the swearing hereof. We only managed to get a small amount of our money back before the liquidation as we had believed the only way was to "register the charge" to enable us to hold on and continue to trade. Much to our dismay we did not succeed in achieving our objective to recover our monies as we were sadly overtaken by events and the Company was forced into liquidation due to cash flow difficulties despite our best efforts."

**The Law**

13. Carroll J. in *Station Motors Limited v. AIB Ltd* [1985] I.R. 756 at p. 760, very adroitly summarises the situation that arises herein:-

> "It is common case that the onus is on the liquidator to establish a dominant intention to prefer one creditor over another see: *Corran Construction Company Limited v. Bank of Ireland Finance Limited* (Unreported, High Court, McWilliam J., 8th September, 1976). Since this is a Company managed and run by Mr. Murphy, it is Mr. Murphy's intention which falls to be considered. There is no direct evidence here by Mr. Murphy as to what his intention was. Nevertheless the court is not precluded from drawing an inference of an intent to prefer. *Re M. Kushler Limited* [1943] 2 All E.R. 22 deals with the following points:—
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> 1. The phrase "with a view to giving such creditor a preference" means that the intention to prefer must be the dominant intention which actuates the payment (per Lord Greene M.R. at page 24).
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> 2. It is not enough to prove that there was actual preferment from which an intention to prefer can, with hindsight, be inferred. The liquidator must prove an intention to prefer at the time the payment is made (per Goddard L.J. at page 28).
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> 3. Where there is no direct evidence of intention, there is no rule of law which precludes a court from drawing an inference of an intention to prefer, in a case where some other possible explanation is open (per Lord Greene M.R. at page 26).
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> Also in relation to the absence of direct evidence as to intention, Lord Greene M.R. says at p. 27:— ". . . it does not seem to me that he (i.e. Lord Tomlin in *Peat v. Gresham Trust Limited* [1934] A.C. 252) could have meant that in every case where there is no direct evidence you are bound to say the onus is not discharged on the grounds that there may have been another explanation. Of course, there may have been other explanations. One can scarcely imagine a case of circumstantial evidence where it would not be possible to say that there might be another explanation of the fact."
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> 4. The method of ascertaining the state of mind of the payer is the ordinary method of evidence and inference, to be dealt with on the same principles which are commonly employed in drawing inferences of fact (per Lord Greene M.R. at page 26). He goes on to say that the inference to be drawn in a case of fraudulent preference is an inference of something which has about it, at the very least, the taint of dishonesty, and, in extreme cases, very much more than a mere taint of dishonesty, and that being so, the court, on ordinary principles, is not in the habit of drawing inferences which involve dishonesty or something approaching dishonesty, unless there are solid grounds for drawing them.

As to the question of whether the taint of dishonesty is necessarily involved in a case of fraudulent preference, Maugham J. in Re Patrick and Lyon Limited [1933] 1 Ch. 786 at p. 790 expressed the view that a fraudulent preference within the meaning of the Companies Act, 1929, or the Bankruptcy Act, 1914, whether in the case of a Company or of an individual possibly may not involve moral blame at all.

However, in the *Kushler* case, the same point was dealt with by Goddard L.J. at p. 28:-

> "... the matter stands as it does in any matter relating to a state of mind where any criminal or civil court, if the person upon whom the onus lies, proves no more than a state of facts which is equally consistent with guilt or innocence (using the expression 'guilt' for convenience, because, in bankruptcy, there is no question of crime or criminal intent). In such a case, the court is not entitled to draw the one unfavourable inference and find the payment was a guilty rather than an innocent preference, and, if any court is left in doubt as to the inference, then the trustee has not proved his case.""

14. In the earlier case of *Corran Construction Company v. Bank of Ireland Finance Ltd* [1976-7] ILRM 175, McWilliam J. in refusing the plaintiffs claim held as per the head note:-

> (1) In order to establish a fraudulent preference a liquidator must prove that the dominant intention of the Company was to prefer the creditor in question.
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> (2) On the evidence the intention of the Company in creating the charge appeared to be that of keeping the Company going for as long as possible. This intention falls short of an intention to prefer the defendant over other creditors.

15. It is clear from the relevant legal authority that in order to prove that a transaction is a preference it is not sufficient to show that the effect of the transaction was to give a preference, as is the situation in this case. The transaction has to be entered into with the dominant intention to prefer, and that intention must have existed at the time of the transaction. Where there is no direct evidence of intention the court can draw an inference of an intention to prefer in a case where some other possible explanation is open. That is not the situation in this case because repeatedly the directors of the Company state that they were not under pressure from the bank and they believed that allowing the bank to register the charge was the only way to enable the Company to hold on and continue to trade, and it was much to their dismay that they did not succeed in achieving this objective.

16. Effectively, the facts of the present case before this court bear much the same rationale as the facts before McWilliam J. in *Corran* where the intention of the Company in creating the charge was that of keeping the Company going for as long as possible.

17. Essentially the liquidator on the one hand is alleging a fraudulent preference, and on the other, relying on the content of a letter from the solicitors for the directors wherein it is specifically stated that the directors were anxious to maintain the relationship with the bank and keep them on board as the business was failing and could only survive if they could succeed with their restructuring plan.

18. In my view there is direct evidence of intention which I accept that the charge, the subject matter of this application, was entered into by the directors of the Company in order to keep the business going and hopefully succeed with a restructuring plan.

19. I do not consider that there was any taint of dishonesty on the part of the directors and there is no evidence that their dominant intention in signing up to the charge which they had previously in any event agreed to do, was for the purpose of giving a preference to the Bank of Ireland.

20. In these circumstances the court declines to grant the declaration as sought.