Neutral Citation Number: [2011] IEHC 273

**THE HIGH COURT**

**2001 17962 P**

**BETWEEN:**

**DEIRDRE LYNCH**

**PLAINTIFF**

**AND**

**DARLINGTON PROPERTIES LIMITED AND WOODGREEN BUILDERS LIMITED**

**AND**

**NATIONAL HOUSE BUILDING GUARANTEE COMPANY LIMITED**

**DEFENDANTS**

**Judgment of Mr Justice Michael Peart delivered on the 6th day of July 2011:**

On 20 April 2010 the plaintiff recovered judgment against the first defendant (Darlington) and second defendant (Woodgreen) in the sum of €64,404.86, together with costs of the action when taxed and ascertained.

On the 7th May 2010 a Receiver was appointed by Ulster Bank Ltd to Darlington and Woodgreen pursuant to the terms of a Mortgage Debenture dated 30th December 1998.

This judgment remains unsatisfied, and while the defendants have been served on the 10th March 2011 with a copy of the order granting such judgment by the plaintiff's solicitors, no execution has been levied against the defendants.

The plaintiff ascertained that on 8th March 2011 in proceedings entitled *Darlington Properties Ltd v. Meath County Council*, Record Number 2010 No. 2720 P, Darlington obtained Judgment against Meath County Council in the sum of €4 million.

On 14th March 2011 the plaintiff applied for and obtained a conditional Order of Garnishee over so much of monies due by Meath County Council to Darlington Properties Ltd as will satisfy the plaintiff's said judgment obtained against the first and second named defendants herein, and her costs when taxed and ascertained. That order was made returnable to 4th April 2011, on notice to Meath County Council and Darlington, so that cause might be shown as to why Meath County Council should not pay to the plaintiff an amount sufficient to satisfy the said judgment and costs from the amount due by it to Darlington.

By order dated 16th March 2011 the said order dated 14th March 2011 was varied so as to permit Meath County Council to pay a sum of €2.2 million to Darlington. By the said order dated 16th March 2011, this Court directed that a sum of €150,000 from the amount due by Meath County Council to Darlington be placed on joint deposit in the names of the plaintiff's solicitor and the Receiver.

The Receiver has stated that Darlington as principal is indebted in the sum of €142,534.16 to Ulster Bank Ltd, and further that the company, as guarantor, is liable to Ulster Bank Ltd under the terms of a Guarantee dated 5th November 2008 for the entire balance due to Ulster Bank by Woodgreen and another company Ravenslane Properties Limited amounting to a sum of €22,883,915, and further that these sums are secured under the terms of the said Mortgage Debenture dated 20th December 1998, which created a fixed and floating charge over all the undertaking, property rights and assets of Darlington both present and future as security for the repayment of all sums due or to be become due by that company.

Paragraph 2 of the said Guarantee, as exhibited by the Receiver provides:

> "In consideration of the Bank making or continuing advances or otherwise giving credit or affording banking facilities to the Customer, for as long as the Bank may think fit, the Guarantors agree to pay to the Bank **on demand** all sums of money ... which are now or shall at any time be going or remain unpaid to the Bank anywhere ...". (emphasis added)

It is in those circumstances that the Receiver submits that Ulster Bank Ltd is a secured creditor and, as such, is entitled to the entire of the amount due to Darlington by Meath County Council in priority to the plaintiff's unsecured debt, and it is submitted that in those circumstances the application for a final order of Garnishee should be dismissed.

The plaintiff on the other hand submits that since there is no evidence that any demand has been made by the Bank to the Guarantors, no sum is therefore yet due on foot of the said Guarantee, and that any liability which may arise on foot of the Guarantee is simply a potential liability, and cannot therefore rank in priority to the plaintiff's judgment already obtained.

It is submitted that where a contract of guarantee requires a demand, such demand (in addition to the issue of proceedings) is a strict requirement and that, as in the case of a sum of money payable under a collateral agreement, no cause of action arises until that demand is made and the guarantor's liability to pay an outstanding debt is crystallised only by the service of the demand. In this regard, the plaintiff has referred to *JC Phillips, The Modern Contract of Guarantee* (Sweet & Maxwell) (2nd edition 2010, para. 10-101- 10-102) where in relation to conditions precedent to a guarantor's liability and the requirement for strict compliance, the learned author states:

> "Such terms may be drafted as conditions precedent to liability but in the context of the creditor's enforcement of the guarantee, the most relevant express conditions precedent are likely to be a requirement to serve notices of default or demand upon the principal or to submit disputes arising under the principal contract to arbitration.
>
> Although the matter has been discussed in detail elsewhere, it should be emphasised that the dominant view is that

conditions precedent to liability require strict compliance." (emphasis added)

This passage is submitted by the plaintiff to support her contention that before Darlington, and by extension the Receiver, can be said to be liable to pay monies on foot of the guarantee in respect of the liability of Woodgreen and Ravenslane Properties Limited, the Bank must first have made a demand of the guarantor in respect of the sums in question, and that in the absence of such demand having been made the company/Receiver is under no liability, and accordingly that such sums should not be seen as ranking in priority to the plaintiff's judgment debt.

A number of authorities have been referred to by the plaintiff in support of her submission, the most recent of which is *Stimpson v. Smith* [1999] Ch 340, being a case referred to by JC Phillips in his work already cited above, though, it has to be said, in a later passage to that quoted above, namely at para 10-118, and as authority for the statement by the author that "there is no necessity for the creditor to make demand upon the guarantor before enforcing the guarantee, unless the terms of the guarantee so require", and the plaintiff refers to the fact that the guarantee in the present case does contain such a requirement.

I should say at this stage that I believe that the plaintiff by her submission is conflating or indeed confusing the concept of enforcement of a guarantee by a creditor and the concept of the guarantor's liability under the guarantee. The passages from Phillips above are stated in the context of the enforcement of the guarantee, and do not speak to the liability of the guarantor under the guarantee before it is sought to be enforced.

That distinction becomes clear when one considers what was actually decided in *Stimpson v. Smith*. From the head-note in the reported judgment, it appears that the plaintiff and the defendant, who were shareholders and directors of the company (Test) entered into a guarantee with the company's bank in return for the banks grant of loan facilities to the company. By the guarantee the plaintiff and defendant jointly and severally guaranteed payment to the bank on demand of all liabilities of the company to the bank up to a maximum of £25,000. The terms of the guarantee provided that a demand had to be in writing and duly signed. In due course, following a down-turn in the fortunes of Test the company's overdraft limit with the bank was £100,000 by the end of December 1991, and the bank, threatening the company with receivership, told the plaintiff and the company that it required a reduction of £20,000 in the overdraft facility. The plaintiff agreed with the bank that he would pay £20,000 in reduction of the overdraft, and in return for that, the bank agreed to release him and the defendant for any further liability under their guarantee. In the proceedings which the plaintiff instituted, he claimed a sum of £10,000 from the defendant, his co-guarantor, being his shirt under the guarantee of the sum paid to the bank by the plaintiff. The defendant by way of defence denied liability for any contribution in the absence of a written demand for payment made by the bank to the company and the guarantors. A number of issues fell to be decided by the court, one of which was whether in the absence of a written demand by the bank any liability arose under the guarantee.

At first instance the trial judge found that in 1991 but the plaintiff and the defendant were well aware that the company was in a difficult trading position and could have been wound up by the bank, and also that there was at all times a legal liability on both the plaintiff and defendant to the bank under the guarantee. The trial judge also concluded that if the plaintiff had not paid the money to the bank it was likely that the bank would have taken steps against the company and the guarantors, and that accordingly the plaintiff's payment to the bank of £20,000 was in response to a requirement made of him by the bank and so was not made voluntarily and that the bank could have demanded payment from both or either of the guarantors at any time, even though a written demand was required before liability arose under the guarantee.

The defendant appealed and the Court of Appeal upheld the first instance decision.

While, according to the reported decision it was argued by Counsel for the defendant that read the terms of the guarantee require payment on demand, the demand is therefore a pre-requisite to liability, and a number of authorities were cited in support of such an argument, this argument was rejected by Gibson L.J. 348 of his judgment he states:

> "Is the service of a demand in writing in accordance with the guarantee a precondition of liability under the guarantee? It would be surprising if an evidentiary or procedural requirement of service of a written demand in the guarantee was a precondition. Under clause 5 of the guarantee, the bank had the right to set off the liability of the co-guarantor to 8 against any credit balance in any account of the co-guarantors (or either of them: clause 10) with the bank as well before as after demand under the guarantee. If a set of could be operated without a demand, why should it have been intended that in other circumstances a demand was a condition of liability? Further, provisions in a guarantee that there should be a demand made by the creditor on the guarantor are clearly for the benefit of the guarantor alone….. …. As such they can be waived by the guarantor, who was not bound to wait for a demand before paying."

Lord Justice Gibson referred also to a passage from Andrews and Millett, *Law of Guarantees*, 2nd ed (1995), p. 360 as follows: --

> "It is submitted that strictly speaking there is no restriction upon the time at which a surety can apply for relief against his co-sureties provided that the account between the principal and creditor is closed and there is an immediate liability due and payable under the guarantee such that the amount of the contribution can be precisely ascertained. It is immaterial that the creditor has not yet demanded payment, or even that the creditor is obliged under the terms of the guarantee to make a demand before the surety is liable. It is enough that the creditor could enforce the guarantee, either forthwith or after making a demand, for more than the surety's rateable share ……".

In the present case, even though no specific demand has been served upon Darlington by the bank for the amount for which Darlington is liable to the bank under its guarantee, it is clear that Darlington has a liability for that amount, and it is also clear that the amount in question is ascertained. It may well be argued that in order to issue proceedings and recovered judgment against Darlington the bank would first have to show that it complied with the requirements of clause 2 of the guarantee by making a demand for payment, but that is a requirement that arises in the context of enforcement, and does not mandate a conclusion that Darlington is not liable for that amount under its guarantee prior to a demand being made.

The plaintiff is also submitted that the conditional order of Garnishee dated 14th March 2011 (and as subsequently varied) creates a charge in respect of the amounts due to the plaintiff on foot of her judgment against Darlington and Woodgreen, and that such a charge must rank in priority to what the plaintiff describes as "the contingent liability of Darlington Properties Ltd to the bank". In view of my conclusion that the liability is not contingent on a demand being made, it seems to me to be clear that this submission is incorrect and that the said order dated 14th March 2011 does not give priority to the plaintiff ahead of the floating charge created by the Debenture dated 30th December 1998.

This floating charge clearly crystallised upon the appointment of the receiver by the bank on 7th May 2010. While the plaintiff obtained judgment on 20 April 2010, she was nevertheless an unsecured creditor, and remains an unsecured creditor. It is also the case that prior to crystallisation of the floating charge, the plaintiff had not executed on foot of her judgment. Counsel for the Receiver has referred to a passage from Keane - *Company Law* [Butterworths] 3rd ed. at paragraph 20. 50 where the learned author states :

> "Where an unsecured creditor recovers judgment against the company but has not executed the judgment, the floating charge will have priority. Where, however, the creditor completely executes the judgment by a seizure or sale of the company's property before the charge crystallises, the floating charge loses its priority."

Counsel also referred to Fuller – *Corporate Borrowing: Law and Practice* [Jordans] 3rd ed. where at paragraph 6. 90 the learned author states:

> "The general rule is that a duly registered floating charge will rank after all prior and subsequent charges and other interests (legal or equitable) arising before crystallisation …"

and goes on at paragraph 6. 91:

> "Certain unsecured creditors also have priority over a floating charge. An execution Creditor has priority if the execution is completed, or payment is made to avoid execution, before crystallisation, but not otherwise."

In view of the fact that the order of Garnishee dated 14th March 2011 post-dates the crystallisation of the bank's charge, it is insufficient to give her any priority over funds which the Receiver is entitled to receive on foot of Darlington's judgment against Meath County Council.

I have the utmost sympathy for the plaintiff but in my view the law is against her and I must refuse her application for an absolute order of Garnishee over the fund in question.