Neutral Citation Number: [2011] IEHC 345

THE HIGH COURT

2009 429 S

BETWEEN

RESPONSE ENGINEERING LIMITED

PLAINTIFF

AND

CAHERCONLISH TREATMENT PLANT LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 6th day of September, 2011

1. The issue in these proceedings is whether a solicitor's undertaking regarding future payments to be made to his client company constitutes a charge over the book debts of his client's company within the meaning of s. 99(2)(e) of the Companies Act 1963 ("the 1963 Act"). It is common case that the undertaking in question was not registered by the bank as a charge for this purpose. It will be seen immediately that this case raises a difficult question of company law and the interpretation of s. 99 of the 1963 Act.

2. The background to this application arises as follows. On 1st February, 2010, the plaintiff company ("Response") was granted judgment against the defendant ("Caherconlish") in the sum of €225,351.00 together with an order for costs by the late Lavan J.. It is not in dispute but that Caherconlish is owed the sum of approximately €220,000 by Limerick County Council ("the Council") in respect of works which it performed in relation to the construction of a water treatment plant. Unfortunately, however, Caherconlish has no assets amenable to execution by the plaintiff other than what amounts to this chose in action against Limerick County Council in respect of the sum of €220,000. The Council is presently holding this sum for payment pending the outcome of the determination of the priority issue and it has indicated that it will abide the order of the court on this question.

3. A few weeks later on 1st March, 2010, Response obtained a conditional order of garnishee in respect of the said sum of €220,000 pursuant to Ord. 45, r.1 RSC. When Response applied to have the conditional order made absolute, the bank in question, AIB plc, appeared before the court and contended that it had acquired an interest in the sum held by the Council by way of charge and that this equitable charge took priority over any claim made by Response.

4. In that regard AIB relied upon a letter of undertaking written by the solicitor for Caherconlish, Mark Potter, on the 13th November, 2006. The letter is, in material part, in the following terms:-

> "Caherconlish Treatment Plant Limited and Limerick County Council have entered into an agreement whereby the company will construct a treatment plant at Caherconlish. The Council will make a contribution towards the costs of same in the amount of €370,000.00 on an agreed stage payment basis. The Council has to date paid the sum of €65,657.48 and a cheque in the sum of €82,342.52 is payable in the week ending the 17th November, 2006. The treatment plant is now constructed and "practical completion" will be certified in the next week. At that stage the Council will make the final payment in the sum of €220,000.00 . . . my client, Caherconlish Treatment Plant Limited, require an overdraft facility in the amount of €305,000.00 and the same will be discharged in two payments namely, €82,342.52 and €222,000.00 as soon as the said payments come in from Limerick County Council. I confirm that I have irrevocable instructions to lodge the said cheques to Caherconlish Treatment Plant's account with AIB and I hereby undertake to do so."

5. As this undertaking precedes the garnishee application made by Response, it is clear that subject to the registration issue, it would otherwise have priority over the claim now made by that plaintiff. Putting this another way, unless this undertaking constitutes a security over book debts which requires to be registered for the purposes of s. 99(2)(3) of the 1963 Act, AIB is entitled to priority over the claim from Response. Accordingly, the entire case turns on whether the undertaking in question constitutes a registerable charge in the meaning of s. 99.

6. In the first instance, two questions immediately fall to be determined. First, what is the meaning of the phrase "book debts" in s. 99(2)(e) and does the payment from the Council amount to a "book debt" for this purpose. Second, in the event that the sum in question comes within the definition of this phrase, does the solicitor's undertaking amount to a security on the company's property? Before considering these questions it is necessary first to set out the relevant provisions of s.99 itself.

Section 99 of the Companies Act 1963

7. The relevant provisions of s. 99 are as follows:-

> "(1) Subject to the provisions of this Part, every charge created after the fixed date by a company, and being a charge to which this section applies, shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, verified in the prescribed manner, are delivered to or received by the Registrar of Companies for registration in manner required by this Act within 21 days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section, the money secured thereby shall immediately become payable.
>
> (2) This section applies to the following charges:
>
> …
>
> (e) a charge on book debts of the company."

Does the sum owed by the Council constitute a "book debt" for the purposes of s. 99(2)(e)?
8. There is no doubt but that the phrase "book debts" has, to the modern ear, something of a musty feel to it. The phrase conjures up images of Victorian bookkeeping and ledger entries, the tales in relation to which form many a sub-plot of the great novels of Dickens and Trollope. Yet the term refers to no more than future income which will accrue to the company by reason of the provision of goods and services to third parties by that company in the course of its trade or business.

9. In *Farrell v. Equity Bank Ltd.* [1990] 2 I.R. 549, 553-554, Lynch J. quoted with approval the following definition of "book debts" contained in Halsbury's *Laws of England* (4th Ed.), Vol. 3 at para. 525:-

> "'Book debts' mean all such debts accruing in the ordinary course of a man's trade as are usually entered in trade books, but to constitute a book debt it is not necessary that the debt should be entered in a book."

10. In *Farrell* Lynch J. held that the return of insurance premia to a bank pursuant to a letter of undertaking did not involve the creation of a book debt, since, as he put it ([1990] 2 I.R. 549 at 554):-

> "The mere possibility that future refunds of premiums might become payable in amounts which were wholly unascertained and might never arise at the date of the creation of the charge does not make that transaction a book debt which must be registered pursuant to s. 99 of the Act of 1963."

11. This conclusion was scarcely surprising since it would hard ever to contend that the (essentially fortuitous) refund of insurance premia constituted a book debt in the sense which I have indicated, not least since such a payment would not have constituted part of the trading income of the company.

12. A similar view was taken by McWilliam J. in *Byrne v. Allied Irish Banks Ltd*. [1978] I.R. 446, a case where a restaurant company with trading difficulties contracted to sell its business premises. In consideration of the provision by the defendant bank of extra credit facilities to enable it continue trading pending the completion of the sale, the company's solicitors agreed to hold the documents of title in trust for the bank and to redeem the loan out of the proceeds of sale. McWilliam J. first held that the letter created an equitable charge and proceeded to find (admittedly somewhat tersely) that the proceeds of sale did not constitute book debts of the company. Again, given that the proceeds of sale involved the sale of a capital asset as distinct from, for example, a charge over the future receipt of trading income from the restaurant, this conclusion is again an unsurprising one.

13. The position here is a very different one. Here Caherconlish had provided goods and services to a third party - Limerick County Council - by constructing a water treatment plant and it was awaiting payment by the Council at some future date. Such a payment classically amounts to a book debt within the meaning of this sub-section.

Did the undertaking create a security interest in the book debt?
14. In the present case, the fundamental question is whether, adopting the very language of the sub-section, the undertaking creates a security interest in the company's property or undertaking or whether in reality it amounts to an assignment of debt. That, in reality, is what emerges from a consideration of the case-law, starting with the well known decision of Wynn Parry J. in *Re Kent and Sussex Sawmills* [1947] Ch. 177.

15. In that case the company gave a direction to its creditor, the UK Ministry of Fuel and Power, that all payments in respect of the supply of logs were to be paid by the Ministry to its bank. The instructions were held to be irrevocable "unless the said bank should consent to their cancellation." Wynn Parry J. held that on its true construction the letter of instructions was in the nature of a security. He posed the following question ([1947] Ch. 177 at 182):-

> "…if the company's account had come into credit the company would then have been entitled, in the true view of this letter, to require the bank to give the necessary instructions to the Ministry. The Ministry is in no way concerned with the position as between the bank and the company and as between those two parties I can see no ground either at law or in equity, on which the bank could have resisted a request or a requirement by the company to cancel the instructions. That at once shows that there is discoverable in this latter paragraph a true equity of redemption."

16. The judge ultimately held that the letters in question amounted to assignments of the books debts by way of security for the overdraft and, in the absence of registration, such security assignments were void as against the liquidator. At the risk of stating the obvious, as a judgment of the English High Court, this decision of course in no way binds me. It is nevertheless a decision of a highly respected Chancery judge and it is a decision which has been applied with approval in this jurisdiction: see, e.g., *Re Interview Ltd*. [1975] I.R. 382 at 396, per Kenny J.

17. In other cases the courts have held that the instruments in question involved an assignment of the debt. This was the conclusion of Slade J. in *Re Siebe Gorman Ltd*. [1979] 2 Lloyd's Reports 142 at 161-163 (a decision to which I shall shortly revert) where a creditor of the company had assigned to that bills of exchange as "security" for the debt. The company then also sent a letter to the company's bankers directing it to pay the proceeds of the bills of exchange directly to Siebe Gorman and this letter was expressed to be an irrevocable instruction. Slade J. held that, in view of the terms of relevant deed it constituted an effective assignment of the debt and was not a security interest.

18. This was also the view taken by His Honour Judge Paul Baker QC in *Re Marwalt Ltd*. [1992] BCC 32. In that case another company, BSC, had agreed to supply tinplate to a Chilean company. This, however, was a high risk market and BSC needed to sell the tinplate through a third party which had export credit guarantee insurance. Marwalt was such a company and BSC engaged it to sell on the tinplate to the Chilean company, Corpora, on a commission basis. Any funds payable by the Chilean company were to be paid directly to BSC. BSC was effectively an undisclosed principal so far as these transactions were concerned.

19. Judge Baker held that these arrangements involved an assignment of debt to BSC. Unlike the situation in *Kent and Sussex Sawmills* – "where there was no correlation between the amount to be paid by the debtor to the creditor…and the amount to due to the bank which took the form of a fluctuating overdraft" - in the present case there was:-

> "an exact correlation between the moneys which are to come in from Corpora and the moneys which are due to go out to BSC. Those moneys are not to secure an indebtedness as between Marwalt and BSC; they go out as part of BSC's own moneys and not as moneys belonging to Marwalt."

20. *Marwalt* may, of course, be explained on the basis that there was an exact co-relation between the moneys which came in from the purchaser of the tinplate and the sums which were due to the supplier, BSC. But there is, I think, another explanation for this

decision which serves to put the entire matter in context, namely, that Marwalt were acting purely as commission agents for BSC. They never intended to make any profit (commission aside) on these dealings vis-à-vis the moneys received or receivable from Corpora. Those moneys were effectively held by Marwalt as bare trustees and, applying the test of Wynn Parry J., it could never have been said that Marwalt had any equity of redemption in those moneys. It is thus scarcely surprising that Judge Baker held that the moneys had been assigned by way of charge and not by way of debt security.

21. In these cases, of course, the context is highly material. Here the context is that of a banking relationship. Unlike the situation which prevailed in *Re Marwalt,* here one would normally expect the customer to enjoy an equity of redemption in respect of the debt unless the debt itself had been sold or otherwise assigned, a point recognised by Slade J. in *Re Siebe Gorman* [1979] 2 Lloyds' Law Reports 142 at 161. In that case Slade J. held, following a very careful examination of the relevant deed as between Siebe Gorman and its creditor, RH McDonald Ltd., that it effected "an outright assignment of the benefit of the relevant bills" in favour of Siebe Gorman in consideration for an extension of the appropriate credit facilities by the latter company to its trade creditor.

22. It is true that in the present case the undertaking was given in consideration of the provision of additional credit facilities and to that extent the present case roughly parallels the decision in *Siebe Gorman*, albeit that - and this is not an unimportant consideration in view of a working presumption which I will shortly mention - the assignment in the latter case was to a trading company and not to a bank. The real question, however, is whether the Council's debt had been effectively sold to AIB by way of assignment via the solicitor's undertaking or, alternatively, whether Caherconlish retained an equity of redemption in these moneys in (admittedly unlikely) event that the AIB debt were to be discharged, in whole or in part. I use the term "effectively sold" advisedly, because in deference to the views expressed by Slade J. in *Siebe Gorman* ([1979] 2 Lloyds's Law Reports 142 at 161), I would regard an assignment of debt for consideration (i.e., the provision of credit facilities by either a trade creditor or a bank) as being tantamount to a sale, even if no formal purchase price is stipulated.

23. Given the presumption which must obtain in the ordinary banker/client relationship that the client enjoys the equity of redemption, absent a clear indication to the contrary, in my view, unlike the situation which was found to prevail on the facts in Siebe Gorman, that working presumption has not been displaced in the present case. It is true that Mr. Potter's undertaking stated that he had "irrevocable instructions to lodge the said cheques to Caherconlish Treatment Plant's account with AIB". But this is in itself is not inconsistent with an equity of redemption. Nor do these words in themselves imply that the debt has actually been effectively sold by way of assignment in consideration of the extension of the overdraft facilities.

24. Again, if we test this proposition in the same manner as in *Kent Sawmills* and we must then ask ourselves what the situation would have been, if - *mirabile dictu* - the Caherconclish account had otherwise come into surplus. That question effectively answers itself Even if Mr. Potter's undertaking still applied in those unlikely but happy circumstances, all it meant was that the payment cheque from the Council had to be lodged in the company's account. It did not mean that these monies had thereby somehow become the property of the bank by way of windfall since there had, in fact, been no effective sale or assignment or the Council's payment to bank in return for the credit facilities. Putting this another way, the evidence coerces me to the view that the bank wanted security for its debt and it was not, in this instance at least, in the business of effectively purchasing the debt by providing additional overdraft facilities to Caherconlish.

25. For these reasons, I am of the view that the solicitor's undertaking was by way of security and not assignment. I will accordingly declare that the undertaking is void as against any creditor of the company for want of the registration of the security over the book debts of the company in the manner required by s. 99(2)(e) of the 1963 Act.

Whether a garnishee order is a discretionary remedy

26. There remains for consideration an entirely separate argument advanced by Mr. Rutherdale for AIB to the effect that the making of a garnishee order under Ord. 45 is a discretionary order. He contends that as his client advanced the moneys to Caherconlish and as those moneys were dispersed by Caherconlish in its dealings with Response, it would be unfair and inequitable that Response should also be able to obtain the advantage of moneys from the Council which the Bank had sought as security for the debt.

27. While it is true that the making of an order under O. 45 remains in the discretion of the court, it would generally require special circumstances before the court would decline on discretionary grounds to make an order in favour of a judgment creditor who had otherwise satisfied the necessary proofs. It is probably fair to say that the approach of the court in relation to such orders is more direct and somewhat less nuanced than might obtain in the cases, for example, of an application for an injunction or an application for judicial review.

28. It is also true that there is authority for the proposition which suggests that the court would not make an order of garnishee where the effect of that order would be to direct a bank "to pay the money to an execution creditor when that payment would leave them still liable to an action to recover the same debt brought in a competent court at the foreign place where the parties reside": *Martin v. Nadel* [1906] 2 K.B. 26 at 30, per Vaughan Williams L.J.

29. But I cannot think that this principle can serve to justify me refusing to make absolute the order of garnishee. In the first place, the bank could have protected its position by registering the solicitor's undertaking as a charge. It was different in *Martin v. Nadel* where, through no fault of the bank in question, it remained liable to be sued for the debt in both England and Germany.

30. Secondly, while mindful of the fact that AIB's advances were vital to enable Caherconlish to continue trading and while this clearly benefited Response, there was no contractual or quasi-contractual nexus between the parties such as would make it inherently inequitable for Response to apply for a garnishee order in respect of these moneys.

Conclusions

31. In conclusion, therefore, I will make absolute the order of garnishee sought by Response.