

Neutral citation No: [2013] NIMaster 20

Ref:

Judgment: approved by the Court for handing down (subject to editorial corrections)

Delivered: 14 January 2013

2012/53130

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

AIB GROUP (UK) PLC

Plaintiff;

and

ADRIAN McGOVERN

Defendant.

MASTER ELLISON

[1] This is an application by originating summons by the plaintiff bank for an order for a declaration, sale and possession, the declaration sought being that monies comprised in various business banking accounts, stated in the grounding affidavit to total £336,002.24 for both principal and interest as at 14 May 2012, are well charged on the property 103 Windmill Heights, Enniskillen (“Windmill”), pursuant to a solicitor’s undertaking by letter dated 30 August 2007 in the following terms :-

“ First Trust Bank
Central Securities Branch
4 Queens Square
Belfast BT1 3DJ

1623/JB/EM

30 August 2007

Dear Sirs

**RE: OUR CLIENT: ADRIAN McGOVERN
PREMISES: 103 WINDMILL HEIGHTS, ENNISKILLEN**

If you provide facilities to our clients Adrian McGovern for or towards the purchase of the new property

We undertake:

1. To pay you the net proceeds of the sale of the property at 103 Windmill Heights, Enniskillen, Co. Fermanagh as and when received. (The sale price contemplated is £150,000.00. The net proceeds after such sale after deduction of the necessary legal costs and outlays in connection with the transaction should not be less than £148,500.00).
2. Pending completion of such sale to hold the Title Deeds/Land Certificate(s) relating to the property in trust for you and your order, upon the discharge of such Mortgage/Charge (if any) as is specified hereunder.

Signed: _____
John Burke, Solicitor
O'Hare Solicitors "

Windmill is a dwellinghouse acquired for investment purposes and in the registered ownership of the defendant in a Land Registry freehold folio. The sale referred to in the above undertaking has never been completed.

[2] At the hearing of this matter Mr Wilson of King and Gowdy Solicitors appeared for the plaintiff and Mr O'Hare of O'Hare Solicitors for the defendant. I am obliged for their submissions.

[3] I am in no doubt that the letter of undertaking, which contained an undertaking not merely to pay to the plaintiff net proceeds of sale, but also (crucially) to hold the relevant land certificate for Windmill in trust for the plaintiff and to its order, created an equitable charge not merely over any net proceeds of sale arising in the event of sale, but also on the defendant's interest in Windmill. I refer to my judgment in Northern Bank v Allen [2012] NI Master 5, delivered on 4 May 2012, insofar as it relates to a solicitor's undertaking which did not include an undertaking to hold the deeds of the property in sale to the plaintiff's order (and therefore did not create an equitable charge over the premises). I relied in Allen on the following extracts from Finlay Geoghegan J's judgment in Murray v Wilkin dated 31 July 2003 in the High Court of Ireland :-

“This is an application for:

‘A declaration that the equitable charge by way of solicitor's undertaking dated 23 May, 2001 on behalf of the defendants relating to the lands and premises situate at No 9 Rockfield, Ardee, Co Louth and given in order to secure repayment of the sum of IR£65,000 or Euro 82,532.98c, stands well charged on the aforesaid lands and premises’.

and for normal consequential order of sale.

The Plaintiff also seeks in the alternative, judgment for the sum of Euro 82,532.98c together with interest thereon, pursuant to the Courts Act 1981.

Facts

The grounding affidavit is sworn by the solicitor for the Plaintiff who states that, by reason of a transaction relating to motor vehicles, the Plaintiff paid to the Defendant on 21 December 2000 IR £65,000, upon the terms of which certain motor vehicles were to be delivered no later than 31 March 2001, and in default of delivery the IR £65,000 was to be refunded to the Plaintiff. It is alleged that the first-named Defendant failed to deliver the vehicles and refused to deliver the IR £65,000. Further, that as a response to a threat of proceedings for the return of the money, the Plaintiff's

solicitors contacted the then solicitors of the Defendants, Messrs EP Daly & Company, who “indicated that they were instructed by the Defendants to give an undertaking to discharge the sum of IR £65,000 to the Plaintiff out of the proceeds of the sale of the property [the subject matter of these proceedings]”. An undertaking was given in writing in the terms set out below in consideration of which the Plaintiff forbore to sue for the IR £65,000:

‘Dear Sirs,

We refer to the above matter and we confirm that we act on behalf of Jurgen & Mary Wilken who are in the process (sic) selling 9 Rockfield, Ardee, County Louth.

We understand that you act on behalf of Mr John Murray. We hereby undertake on our clients’ instructions to discharge the sum of £65,000 owing to your client out of the proceeds of sale of the above property when same are to hand.

Please note that this undertaking is being given strictly on the basis that there is absolutely no contact between your client and our clients pending the completion of the sale of our client’s property and discharge of the sum owing to him.

We look forward to hearing from you in relation to this matter.

Yours faithfully,’

On 22 October 2002 EP Daly & Company wrote saying that the Defendants “are not selling the property at Ardee, Co Louth, and we are in the process of returning their title deeds to the lending institution”. They also requested the Plaintiff’s solicitor to cancel the undertaking given. This was refused.

...

The primary claim

The primary claim is based upon the assertion that the undertaking of EP Daly & Company of 23 May 2001 creates an equitable charge over the property of the Defendants at 9

Rockfield Close, Ardee, Co Louth. Counsel for the Plaintiff relies upon the description of a charge given by Millett J in Re Chargecard Services Ltd [1986] 3 All ER 289, where at p 309, having reviewed certain earlier decisions as to the requirements for an equitable charge, he stated:

“Thus the essence of an equitable charge is that, without any conveyance or assignment to the chargee, specific property of the chargor is expressly or constructively appropriated to or made answerable for payment of a debt, and the chargee is given the right to resort to the property for the purpose of having it realised and applied on or towards payment of the debt. The availability of equitable remedies has the effect of giving the chargee a proprietary interest by way of security in the property charged.”

I have no difficulty in accepting that this is an appropriate definition of an equitable charge for the purposes of Irish Law. An undertaking given by a solicitor to hold the title deeds of a client’s property for the benefit of another person has long been recognised as the creation of an equitable charge.”

(Emphasis added.)

[4] I am also required to determine the extent of the liabilities or liability secured by the equitable charge. In the present case the undertaking given on 30 August 2007 is expressly given for stated consideration, Mr Burke’s letter opening with “If you provide facilities to our clients (sic) Adrian McGovern for or towards the purchase of the new property”. The plaintiff’s evidence in Mr Stephen Gowdy’s grounding affidavit is more specific in stating that the consideration was an increase in the trading overdraft facility from a limit of £150,000 to a limit of £200,000 until the end of September 2007.

[5] However, somewhat unusually for a banking transaction, the plaintiff relies on a facility letter dated 6 January 2005 (over 2½ years before the letter of undertaking) – which can only be regarded as accepted, if at all, in a very qualified manner by the defendant – to

identify the indebtedness secured by the undertaking over the land certificate of Windmill.

I quote the following extract from the facility letter :-

- “AMOUNT**
- (i) The overdraft limit - £100,000
To include interest and fees
 - (ii) The Buy to Let Loan - £75,000
To include interest
 - (iii) The Buy to Let Loan - £60,000
To include interest
 - (iv) Contract Bond - £43,000
- PURPOSE**
- (i) Renewal of working capital facilities
 - (ii) New Loan re: purchase of investment property at Killyveagh Glebe, Monea
 - (iii) New Loan re: equity release on investment property at Windmill Heights, Enniskillen
 - (iv) Renewal of Contract Bond Facilities
- DRAWDOWN**
- (i) The loans will be available on a revolving basis
 - (ii)-(iii) The loans will be drawn down in due course.
Drawdown will be subject to the Conditions Precedent, if any, detailed hereunder.”

[6] The relevant preconditions are stated at the foot of the sections shoulder-headed “SECURITY” and “CONDITION(S) PRECEDENT” and read as follows :-

“SECURITY The security detailed is required in order to reduce the overall risk to the Bank and this is reflected in the margin charged.

The security which will extend to cover your present and future obligations to the Bank, will comprise the undernoted. Such legal costs and outlay which may arise in connection with the taking and perfection of the security to the Bank’s satisfaction will be debited from your account as they arise.

Held

Legal Charge over Land Certificate Folio No11830 Co Fermanagh.

Title documents relating to Land Certificate Folio No 7357 Co Fermanagh

Assignment over Ark Life Policy No C12101K

Assignment over Ark Life Policy No C19253C

Offered

Legal Charge over property at 15 Killyveagh Glebe, Monea

Legal Charge over property at Windmill Heights, Enniskillen

Legal Charge over 20 acres at Newtown, Derrygonnelly

No drawdown will be permitted until the security requirements have been fulfilled to the Bank's satisfaction.

...

CONDITION(S) Prior to any drawdown under these facilities the Bank will require
PRECEDENT the following:

Perfection of security items detailed above as "Offered".

Professional Valuation in respect of property at Windmill Heights."

[7] The next paragraph of the facility letter is shoulder-headed "ACCEPTANCE" and reads as follows :-

"ACCEPTANCE For acceptance purposes, this Facility Letter is furnished to you in duplicate. If the terms and conditions of the facility, as outlined above, are acceptable to you, we should be obliged if you would so indicate by duly completing the Acceptance below, returning an accepted copy of the complete Facility Letter as soon as possible. The Bank reserves the right to withdraw or modify these terms if the offer is not accepted within one month of the offer date."

[8] Beneath that, and the emboldened recommendation to take "independent" (but not "independent legal") advice before accepting the facility, the Assistant Manager signs and

there was attached to the letter and its duplicate a pro forma acceptance form reading as follows :-

“I accept the above on the terms and conditions set out and agree to carry out and perform all obligations therein.

Where the security package comprises a Letter of Guarantee supported by a charge over property, I/We consent to the release of a copy of this facility letter and any supporting documentation or documents and any further information to any guarantor of this facility and his/her solicitor.”

However, underneath the defendant’s signature and the date 13 January 2005, thus far signifying acceptance, he qualifies it away, signifying in manuscript only a “willingness” (my word) to accept the offer of a buy-to-let loan of £75,000 relating presumably to the Monea property, with the words “Signed in respect of item (11) Buy to Let loan of £75,000” and adding, crucially: “Need to look at the other items and fees being charged and (sic) discussed further”. He closes by signing his Christian name alongside that note.

[9] It is an established principle of interpretation that in the event of any genuine doubt about the meaning of a document in a standardised form such as this facility letter it is generally to be interpreted against the party which prepares it, albeit in the present case this also involves consideration of the defendant’s handwritten postscript. However that may be, it seems plain enough to me that the “other items and fees” referred to by the defendant and to which he clearly did not agree would have included the offer of a buy-to-let loan in respect of Windmill and would have presumably included the legal fees entailed in complying with the “Conditions Precedent” about providing the “Offered” security over properties (other than, arguably, the security over the Monea property).

[10] I find myself bound to conclude that the proposals contained, including new mortgages, in the facility letter were rejected entirely by the defendant so far as they

pertained to Windmill. Accordingly the facility letter cannot be regarded for the purpose of these proceedings as either a note or memorandum of agreement under the Statute of Frauds (Ireland) 1695 or a binding document in accordance with the principles in L'Estrange v Graucob [1934] 2 KB 394 both of which were relied on by Mr Wilson at hearing on behalf of the plaintiff.

[11] As I have indicated, the consideration for the letter of undertaking over the net proceeds of sale and deeds of Windmill appears to have been an increase in the limit of the defendant's current account "trading overdraft facility", upon which it also appears from Mr Gowdy's affidavit that there was a balance as at date of swearing, 14 May 2012, of £24,313.30 for principal and £3,243.62 for interest, making a total of £27,556.92 down to that date. On the material before me I am unable to ascertain any other indebtedness which could reasonably be said to be secured by reason of the letter of undertaking.

[12] Accordingly my Order will declare that these monies with continuing interest on the principal and allowed costs are charged by the equitable charge on the defendant's interest in Windmill and will direct sale if those monies are not discharged within 3 calendar months from service and that possession be thereupon given up for the purpose of sale. The Order will contain the usual provisions about approval of sale price and parties to join in the transfer and will include a note that nothing in the Order is to prejudice any rights against the plaintiff of an authorised tenant (if any) in the property. The plaintiff will be entitled in the same priority as its incumbrance to so much of the costs of these proceedings as relate to its claim in respect of the monies found to be actually secured, when such costs are taxed or agreed. The costs of the remainder of the plaintiff's claim will be disallowed and the Order will require the plaintiff to pay so much of the defendant's costs as arise by reason of its claim

that other monies were secured by the equitable charge, such costs also to be taxed if not agreed.