Neutral Citation No. [2010] NICh 8 | *Ref:* **HAR7853**

Judgment: approved by the Court for handing down | *Delivered:* **20/5/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (BANKRUPTCY)

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RE: RICHARD ANDREW McVEIGH (BANKRUPT)

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BETWEEN:

THE OFFICIAL RECEIVER FOR NORTHERN IRELAND

Applicant;

-and-

SAMUEL DAVID STRANAGHAN

Respondent.

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HART J

[1] This is an appeal by Mr Stranaghan from the decision of Master Kelly that a mortgage executed by Richard Andrew McVeigh (a bankrupt) in favour of Mr Stranaghan in respect of premises at 6 Grannard Park, Belfast was void because it was a transaction at an undervalue within Article 312(3)(c) of The Insolvency (NI) Order 1989, and as a result the Official Receiver was entitled to the net proceeds of the sale of the premises after deduction of a mortgage in favour of the Bank of Scotland.

[2] Mr Stranaghan is the uncle of the bankrupt, and on 22 November 2000 he advanced the sum of £75,000 to his nephew to enable him to purchase the premises, and they were purchased by an assignment dated 24 January 2001.

[3] In November 2003 McVeigh offered to re-mortgage the premises and to repay his uncle £80,000, being the loan of £75,000 together with a further £5,000 of interest on the amount advanced. However, nothing came of this.

[4] In paragraph 6 of his affidavit Mr Stranaghan described how he contacted his solicitor on 17 December 2003 "indicating that I would like to

protect myself financially with respect to the loan I had made to the bankrupt". As a result the mortgage was executed on 16 April 2004.

[5] McVeigh was adjudicated bankrupt on 9 August 2006, and when the premises were sold in June 2007 Mr Stranaghan was paid the balance secured by the mortgage net of fees. No claim was made by the Insolvency Service until 18 April 2007, although it raised concerns about the validity of the mortgage in a letter to Mr Stranaghan's solicitors of 22 August 2006.

[6] The Official Receiver argues that because the loan secured by the mortgage had been made some three years prior to the mortgage it was past consideration for the mortgage, and because past consideration is not good consideration no good or valuable consideration moved from Mr Stranaghan to his nephew for the mortgage, and as a result the mortgage was a transaction at an undervalue and contravenes Article 312(3)(c). Article 312(3)(c) states that an individual enters into a transaction with a person at an undervalue if:

> "(c) he enters into a transaction with that person for consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual."

[7] In support of the application Mr Gowdy (who appears on behalf of the Official Receiver) relied principally upon the decision of the Court of Appeal in Hill v Spread Trustee Company [2007] 1 All ER 1106, and in particular the observations of Arden LJ at paragraphs [93], [96] and [98]. The facts of Hill are complex, but I consider the following principles can be extracted from those paragraphs.

(i) A grant of security can amount to a transaction for no consideration.

(ii) Whether consideration is given is an objective test.

(iii) If forbearance by the creditor is relied upon to constitute consideration there has to be evidence that the creditor was pressing for repayment.

Mr Gowdy argues that when the evidence is analysed it was clear that there was no such pressure on the part of Mr Stranaghan, and therefore that there was no forbearance.

[8] Apart from Hill v Spread Trustee Company, there is authority that the prior existence of a debt from A to B is not sufficient valuable consideration for the giving of a security from A to B to secure that debt. In Wigan v

English and Scottish Law Life Assurance Association [1909] 1 Ch. Parker J explained the position at page 297.

> "It appears to me to be reasonably clear that the mere existence of a debt from A to B is not sufficient valuable consideration for the giving of a security form A to B to secure that debt. If such a security is given, it may be course be given upon some express agreement to give time for the payment of the debt, or to give consideration for the security in some other way, or, if there be no express agreement, the law may very readily imply an agreement to give time. It may not be a definite time, but to forbear for some indefinite time in consideration of the security being given. And further than that, if there is no express agreement, and no agreement can be implied at the time and under the circumstances at and under which the indenture giving the further security is executed, yet if that security be communicated to a person who could otherwise sue on the debt, and on the strength of that security he does in fact forbear to sue on the debt, he does give that time with the object of securing which the security is presumably given, and then I think it appears on the cases that there is sufficient consideration, though in a sense it is an ex post facto consideration, for the security which is given."

[9] As may be seen from Parker J's remarks in the above passage forbearance may be constituted by an express agreement, or the court may infer from the circumstances that the creditor does in fact forbear to sue on the debt, and in either case the forbearance constitutes what Parker J referred to as being in a sense "ex post facto consideration". In the present case Mr Gowdy pointed to the absence of any indication in Mr Stranaghan's affidavit that he had taken any other steps at the time the mortgage was executed, or in or about that time, to press his nephew to repay the loan. He pointed to the absence of any reference to such steps in the mortgage itself, which states:

> "WHEREAS the Mortgagor [McVeigh] is indebted to the Mortgagee [Mr Stranaghan] in the sum of £80,000 and has offered the Mortgagee the security of a Charge on the premises hereinafter described which he has agreed to accept upon having such security for the repayment of the same sum as hereinafter appears."

[10] In paragraph 12 of his affidavit Mr Stranaghan deals with the question of forbearance in the following terms.

> "I am further advised by my solicitor that with respect to consideration I would have had the option to sue the bankrupt for the debt. I forbore from taking such course of action and chose rather to seek security. I am advised that such forbearance to sue will constitute consideration on its own. This notwithstanding I am further advised that since the security was executed by way of a document under seal the question of the existence of consideration, past or otherwise, is not relevant and that there is clear evidence of consideration for the taking of security by me against the Bankrupt."

Mr Stranaghan states that he "would have had the option to sue the bankrupt for the debt", but he does not say that at the time the mortgage was executed he contemplated such a step, let alone demonstrated that he wanted the loan to be repaid then or in the foreseeable future. I consider that the entirety of that paragraph more readily bears the construction of an afterthought by him than what was in his mind at the time he executed the mortgage.

[11] I accept that Hill v Spread Trustee and Wigan v English and Scottish Law Life Assurance Association constitute clear authority that there must exist circumstances which show that at the time the security was given there was express forbearance on the part of the creditor, or that there are circumstances, objectively considered, from which the court could infer that there was forbearance. I am satisfied that there is no evidence of an objective nature to indicate that at the time he executed the mortgage Mr Stranaghan contemplated taking any proceedings against his nephew in relation to the loan; there is nothing to show that there was actual forbearance on his part, or that the circumstances are such that it can be properly inferred that there was such forbearance on his part.

[12] On behalf of Mr Stranaghan Mr Coyle sought to argue that the mortgage was good consideration because it was a document under seal. I do not accept that this is the case, there is no authority for this proposition, and it is contrary to the rationale of Hill and Wigan because those decisions are based upon the premise that, inter alia, more is required to amount to consideration than the security be under seal.

[13] He also submitted that there was fresh consideration for the security in the form of the promise by McVeigh to pay an additional £5,000 to represent interest. If, as Mr Coyle argued, the additional £5,000 represented a variation

of the original contract, that variation was not supported by consideration, because consideration must move from the creditor to the debtor, and, as Mr Gowdy pointed out, the consideration in this instance was moving from the debtor to the creditor insofar as the additional £5,000 was concerned. *Chitty on Contracts*, *General Principles,* 30th Edition at 22-035 emphasises that the agreement which varies the term of an existing contract must itself be supported by consideration. It is there stated that:

> "A mere forbearance or concession afforded by one party to the other for the latter's convenience and at his request does not constitute a variation, although it may be effective as a waiver or in equity."

[14] Finally Mr Coyle argued that it would represent unjust enrichment on the part of the Official Receiver were Mr Stranaghan required to repay the original loan of £75,000 and the interest thereon at £5,000 which has been paid to him out of the proceeds of the sale of the premises, adding that the transaction in this case was not one which should be regarded as void. However, he did not elaborate upon, or press the argument of unjust enrichment, and I do not propose to consider it further. As Mr Gowdy pointed out, Mr Stranaghan can still claim for the debt against the bankrupt.

[15] I am satisfied that the mortgage entered into by Mr Stranaghan with his nephew was not supported by consideration because the loan which it was intended to secure represented past consideration. The transaction was therefore void insofar as it contravened Article 312(3)(c) because past consideration is no consideration and therefore the transaction was at an undervalue. The steps taken by Mr Stranaghan to protect his loan did not amount to forbearance because they were not accompanied, by or preceded by, any step by or on his behalf which show that he was pressing, or intended to press, for repayment of the loan. That being the case, I consider that the decision of the Master was correct, I affirm the order and dismiss the appeal.