Neutral Citation No: [2011] NICh 7 | *Ref:* **DEE8110**

Judgment: approved by the Court for handing down | *Delivered:* **15/04/11**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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MARCUS WARD LIMITED

-v-

ANGLO IRISH BANK CORPORATION LIMITED

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DEENY J

[1] Marcus Ward Limited seek an injunction pursuant to Order 29 of the Rules of the Court of Judicature restraining the defendant, Anglo Irish Bank Corporation Limited, from presenting, filing or advertising a winding up petition against the plaintiff company. When the matter came before the court initially on 16 September 2010 the defendant undertook to take no further action on foot of the statutory demand in question pending the hearing of the injunction proceedings. The matter was reviewed on several occasions, on one occasion extensively and came on for hearing on 25 February 2011.

[2] The statutory demand in question is dated 24 August 2010. In it the bank as creditor claims the sum of £10,381,983.04 plus accrued interest of £16,488.19 totalling £10,398,471.23 as due and owing to the bank pursuant to a Guarantee and Indemnity dated 7 September 2006 made between the plaintiff and others and the bank.

[3] The facts of the guarantee are not disputed. The case put forward by the plaintiff is that there is a genuine and substantial dispute as to whether the debt which has been guaranteed is in fact due and owing to the bank. The debt in question is that of Sheridan Millennium Company which is a related company to Marcus Ward Limited. Sheridan Millennium Company has a long lease of the Odyssey Pavilion, Belfast. Within those premises Marcus Ward Limited have a lease of units 6 and 7. As the bank are pursuing Marcus Ward Limited it appears to be not controversial that they consider that that constitutes an asset of value they might recover on a compulsory winding up of the plaintiff company.

[4] I have had helpful written and oral submissions from Mr Richard Shields on behalf of the applicant and Mr Nicholas Hanna QC and Mr Adrian Colmer for the bank. The leading case on the approach to be adopted by the court in a situation such as this is Mann v. Goldstein [1968] 2 All ER 769. Ungoed–Thomas J considered the authorities in this case which were of long standing. He quoted with approval the dictum of Sir George Jessel MR in Niger Merchants Co. v. Capper [1877] 18 Ch D 557 at 559 to this effect –

> "When a company is solvent the right course is to bring an action for the debt . . ."

As Ungoed-Thomas said –

> "To pursue a winding up petition in such circumstances is an abuse of the process of the court."

He went on to consider what was the position when the company was insolvent i.e. unable to pay its debts as they fell due. At page 774 he said –

> "The Companies Court, however, in accordance with the practice which I have mentioned does dismiss a petition founded on a substantially disputed debt whose validity it cannot conveniently decide even though the company be insolvent."

It seems likely that the position here is that if the applicant company were liable for the guarantee which the bank seeks to enforce it may render it insolvent but that otherwise there is not before the court evidence of insolvency. It argues that the debt here is disputed on substantial grounds.

[5] By virtue of Rule 6.005 of the Insolvency Rules (NI) 1991, as amended, a debtor may apply to set aside a statutory demand against him personally and the court may grant such an application if, inter alia, "the debt is disputed on grounds which appear to be substantial". It is clear on the authorities that a debt cannot be substantially disputed unless it is genuinely disputed. It is further clear that that analogous provision applies in the context of the present application brought by Marcus Ward Limited. See Allen v. Burke Construction Limited [2010] NI Ch 9; Spanboard Products Limited v. Elias and Others [2003] NI Ch 3; and Re A Company [1997] 1 DCLC 639. As Mr Hanna accepts the plaintiff does not at this stage have to prove it's case on the balance of probabilities; that is for the trial, if it shows now that there is a triable issue i.e. one that is neither spurious nor bound to fail but on which it may succeed at trial.

Sheridan Millennium Limited ["SML"]

[6] SML in early 2009 owed circa £80 million to the bank. The value of their leasehold interest has varied considerably but may have been worth about £43m according to a valuation in early 2009. Peter Curistan was the principal shareholder in SML and the Chief Executive was Peter Holmes. They wanted a buyer for their interests so that they could concentrate on other matters. The bank too had an interest in getting a suitable buyer. Buyer in this context turned out to mean somebody who was prepared to take on the debts as nobody was doing other than taking on the debts of SML from Anglo Irish.

[7] Mr Shields' case was initially that the bank controlled and dictated the process of sale but that case has not been made out. Mr Ciaran McAreavey in an affidavit on behalf of the bank at paragraph 43 expressly avers as follows:

> "Please see the correspondence at pages 18 to 42 which in my view clearly demonstrates that Messrs Curistan and Holmes were fully involved and the decision to whom to sell the Odyssey Pavilion rested with them".

[8] I accept that that is a proper interpretation of the correspondence although it proves a somewhat double edged sword for the bank in this case.

[9] The plaintiff has not made out the case that the letters of 13 January 2009 and later were legally binding contracts which bound the Bank. They were marked without prejudice and subject to contract. The language of the opening paragraphs makes it clear they were not intended to be binding legal contracts. Mr Curistan did sign them as "heads of agreement" but even that language is not indicative of a binding legal contract. Furthermore the bank argues persuasively that he is in breach of the conditions of the heads of agreement in any event.

[10] At the hearing the plaintiff's case came down to this. They contend that the bank was under a duty to them as agent or quasi agent. They tended to put this forward as a duty of care. I am inclined to think of it as more of a fiduciary duty. The extent of that duty is dependent to a degree on the facts as ultimately found and cannot be precisely defined at this time. I refer to a passage from the judgment of Lord Wilberforce in Branwhite v. Worcester Works Finance Limited [1969] 1 AC 552 at 587. His Lordship quotes from an earlier dictum of Lord Pearson and goes on as follows:

> "The significant words, for the present purpose, are "if they have agreed to what amounts in law to such a relationship." These I understand as pointing to the fact that, while agency must ultimately derive from consent, the consent need not necessarily be to the relationship of principal and agent itself (indeed the existence of it may be denied) but may be to a state of fact upon which the law imposes the consequences which result from agency. It is consensual, not contractual. So interpreted, this formulation allows the establishment of an agency relationship in such cases as the present."
>
> (The facts there arose out of the dealings between a hire purchase company and a car dealer.)

[11] Mr Shields also relies on passages in Bowstead and Reynolds on Agency, 19th Edition, at 6-033ff relating to the fiduciary duties of an agent or a quasi agent. The defendants by their solicitor's letter of 11 June 2010 admitted that the bank offered to and did introduce potential purchases to SML from their "customer base". I find that there is at least an arguable case that the bank was under a fiduciary duty or other duty of care to SML thereafter as agent or quasi agent.

[12] The bank's" preferred bidder" was PBN, a company owned by a Mr Kearney and a Mr Adair. They were the bank's preferred bidder but there was another serious bid from 'Confidential Five' who have a holding or parent company which is a European multi national operation. As can be gathered by the name their identity was not disclosed but was covered by their own confidentiality agreement with the bank. Relevant discovery was redacted. They showed persistent interest in coming into the Pavilion even after they were initially told that they were unsuccessful. At one point they were offering slightly more that PBN. Certainly they were offering that not all the loan to them would be non recourse but rather, ultimately, they were offering that £15m of the loan could be recovered against them and not just against the Odyssey Pavilion, in contrast to the bid of PBN which was entirely non-recourse. Nevertheless, encouraged by the bank Messrs Curistan and Holmes opted for PBN.

[13] However in November 2009 the bank decided to "pull the plug" on that deal and asked SML to so inform PBN which they did.

[14] It is a matter of dispute between the parties as to whether this was because PBN was asking for too much or, as evidenced by an internal bank email of 23 December 2009, that the bank did not want to make a non resource loan to PBN and Mr Kearney because in the interval it had been disclosed that

he was one of ten clients of the bank who had been given non recourse loans totalling €451m to allow them to buy shares in Anglo Irish Bank – a prima facie improper and unlawful proceeding. There is a clearly arguable case that this was the real reason for the deal falling through. In the event no other buyer stepped forward thereafter and subsequently SML went into administration.

[15] Mr Shields' case is as follows:

(1) The bank owed a duty to SML.
(2) They were in breach of that duty by not disclosing that Mr Kearney was a party to this improper arrangement and that as a result he already had a large non-recourse loan from the bank.

(3) It is arguable that if Messrs Curistan and Holmes had known this they would have opted for Confidential Five and not PBN.

(4) It is at least arguable that the bank would have lent the money to Confidential Five. It is incorrect of Mr McAreavey to say in his affidavit that Confidential Five were "ruled out". On the documents it is clear that PBN were preferred by the bank but I find for these purposes that it was at least possible that they would have lent to Confidential Five if SML had preferred them. The bank cannot have it both ways. Either the decision really was for SML as Mr McAreavey avers or it was not.

(5) If Confidential Five had been the bidder then the deal would not have fallen through in December 2009 and SML would have been left only with the debt of £1.5m to the bank.

[16] As part of the proposed agreement that sum netted down from the sum of £10m and after a payment of £1.05m from a sale of a property in England was to be by way of 3 year loan and therefore it is not a debt due and owning now, submits Mr Shields. That seems to deal with the residual loss point. The bank accepts that SML did pay in £1.05m from the sale of property in Bournemouth leaving £450,000 of a debt. The SML's claim that the bank owe them £500,000 in excess interest has not been shown to be of substance. However, as indicated, Mr Shields' better point is that a 3 year loan from late 2009 would not now be due and owing.

[17] I take into account the cogent submissions of Mr Hanna but I conclude that that there is here a genuine and substantial dispute. I grant the Plaintiff an injunction restraining presentation of or further action on foot of the winding up petition.