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RE WELDING PLANT LIMITED (IN LIQUIDATION)

HUGH COONEY

v.

JOHN DARGAN, PATRICK DARGAN

AND

ALLIED IRISH BANKS LIMITED



Judgment of Mr. Justice McWilliam delivered on the  
27th day of June, 1984.

Welding Plant Limited (hereinafter called the Company) was incorporated on 8th April, 1976, and carried on business at premises at Green Lane, Carlow, until September, 1981, when it ceased to trade. John and Patrick Dargan and Seamus Doorley were the directors but Seamus Doorley seems to have taken no part in the running of the Company and is not concerned with these proceedings. In September, 1981, the Company was indebted to Allied Irish Banks Limited (hereinafter called the Bank) in the sum of £23,000.

As security for the money due by the Company, the Bank held an instrument of guarantee limited to the sum of £30,000 executed by John and Patrick Dargan on 22nd September, 1980, and undertakings by two letters from a solicitor for the Company dated 14th July, 1977, and 21st November, 1977, to lodge the documents of title to the premises at Green Lane when the registration of the title to the premises should have been completed. These undertakings were not registered as a charge or charges in the Companies Office and no documents of title have been lodged with the Bank. The first letter related to a leasehold interest in the property and the second related to the fee simple.

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In September, 1980, the Company had an overdraft of £30,000 and it may be assumed that this was the reason why the guarantee by the Dargans was given for that sum. At the same time the permitted overdraft of the Company was reduced to £10,000 and the balance of £20,000 was altered to a term loan for five years. It appears that the Company's auditor was pressing the directors for accounts from August, 1979, until August, 1981, but that these accounts were not presented although, in or about August, 1981, the directors asked for a statement of affairs to be prepared by the auditor. The auditor commenced to prepare such a statement and soon realised that the situation of the Company was very serious, but he was unable to prepare more than a preliminary draft owing to the failure of the directors to provide the necessary information. The last audited accounts had been presented in August, 1979, and these showed that the Company was then financially sound but that problems were arising, such as a high number of debtors and considerable liabilities, including arrears of Value Added Tax.

The Bank was, at this time, writing regularly for audited accounts and for the documents of title to the Green Lane premises. Although the manager of the Carlow branch of the Bank stated that he had no reason to believe, at the end of November, 1981, that the Company was going down, the sequence of events suggests that he must have been getting worried at this stage, particularly having regard to the absence of any title deeds. Whatever about the appreciation of the situation by the Bank, there can be no doubt but that the cessation of trading, the requests for information from the auditor and the draft statement of affairs could have

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left the Dargans under no illusion as to the insolvency of the Company. Subsequently the Company went into liquidation and on the 31st March, 1982, Hugh Cooney (hereinafter called the Liquidator) was appointed liquidator.

The transaction which is challenged in these proceedings was entered into on or about 30th November, 1981 at a meeting between the Dargans and the Carlow Manager of the Bank. This consisted of an arrangement whereby the Bank advanced sums of £10,500 to each of the Dargans personally to enable the Dargans to purchase the Green Lane premises from the Company. The total sum of £21,000 was then lodged by the Bank to the credit of the Company's account in discharge of part of the indebtedness of the Company to the Bank. I am satisfied that the Dargans assumed that this transaction enabled them to take the Green Lane property free from the undertakings to lodge the title deeds which the manager considered created a lien over the premises in favour of the Bank.

The issues which have been set down for this hearing are:-

- (a) Whether the payment of £21,000 was a fraudulent preference in favour of either the Dargans or the Bank, and
- (b) If so, whether they are liable to pay the sum of £21,000 to the Liquidator.

Section 286 of the Companies Act, 1963, provides, at sub-section (1) that "any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a Company within 6 months before the commencement of its winding up which, had it been made or done by or against an individual within 6 months before

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the presentation of a bankruptcy petition on which he is adjudicated a bankrupt, would be deemed in his bankruptcy a fraudulent preference, shall in the event of the Company being wound up be deemed a fraudulent preference of its Creditors and be invalid accordingly."

Section 53 of the Bankruptcy (Ireland) Amendment Act, 1872, as substituted by section 399 and the 11th Schedule of the Companies Act, 1963, provides as follows:-

"Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor or of any person in trust for any creditor, with a view to giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged a bankrupt on a bankruptcy petition or a petition for arrangement, presented within 6 months after the date of making, taking, paying or suffering the same be deemed fraudulent and void against the assignees or trustees of such bankrupt; but this section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt."

On behalf of the Liquidator it is accepted that the onus is on him to show that the payment to the Bank was made in order to prefer either the Dargans or the Bank but it is submitted that this has been established by the evidence and that the proper order for the Court to make is to direct

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the Bank to repay the sum of £21,000 to the Liquidator with interest from the date of the liquidation. I was referred to Buckley on Companies, Ed. 14, p. 746; Re TW. Cutts (a bankrupt) (1956) 2 All E.R. 537; Re F.P. & C.H. Matthews Ltd. (1982) 1 All E.R. 338.

On behalf of both the Bank and the Dargans it was argued that the Liquidator must establish a dominant intention to prefer and that this had not been done. I was referred to Peat .v. Gresham Trust Ltd. (1934) A.C. 252; Re F.L.E. Holdings Ltd. (1967) 3 All E.R. 553; and to my own unreported decision in Corran Construction Co. Ltd. .v. Bank of Ireland Finance Ltd., dated 8th September, 1976.

No arguments were presented as to the effect of this unusual transaction but, to arrive at any conclusion on the issues before me, it seems to me to be necessary to consider what was accomplished by it. What the statutes provide is that every payment made by any person unable to pay his debts as they become due from his own moneys with a view to giving any creditor or any surety or guarantor for the debt due to such creditor a preference over the other creditors, etc., shall be invalid.

I am satisfied that the Bank was aware that the Company was getting into difficulties. Patrick Dargan, who did not give evidence before me, stated at paragraph 7 of his affidavit that the Bank offered to lend £21,000 on condition that he and his brother purchased the property from the Company and executed a mortgage over it for this sum in favour of the Bank and that the £21,000 would be credited against the Company's indebtedness to the Bank. While John Dargan agreed with this statement in an affidavit sworn by him,

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in evidence before me he stated variously that he understood that the Bank owned the premises, that the Bank held the deeds and could sell and that the premises were being bought from the Bank. Paragraph 7 of Patrick Dargan's affidavit corresponds in the main with the evidence of the Carlow Manager of the Bank, although the Manager stated that the meeting was held at the instigation of the Dargans.

Whatever was said at the meeting, I have come to the conclusion that an agreement was reached whereby the Dargans would take loans in their own names from the Bank and with the money lent pay off the major part of the debt owed by the Company to the Bank, the Dargans would buy the premises at Green Lane from the Company for the amount of the loan given to them by the Bank and would then mortgage these premises to the Bank as security for their loans. I am satisfied that the Dargans believed that the letters of undertaking on behalf of the Company would then be released by the Bank so that they would hold the property free from any liabilities by the Company to the Bank although subject to the mortgage by them to secure the loans made to them by the Bank.

Whatever agreement was reached, the only steps taken on foot of it were that the Bank lent the Dargans £21,000 which was appropriated to the discharge of the greater part of the debt due by the Company to the Bank and the Dargans got their solicitor to draft an agreement for the sale of the premises by the Company to them. This draft agreement is dated 2nd December, 1981, with the closing date given as the same day and the purchase price expressed to be £21,000. John Dargan stated in evidence that this agreement

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was not executed and the photocopy exhibited in the affidavit of the Liquidator is of an unexecuted agreement. I conclude that it was not executed either by the Company or by the Dargans and that the Dargans have no agreement in writing to purchase the property from the Company. The Bank retained the letters of undertaking given by solicitor for the Company in 1977 and, by letter of 6th May, 1982, to the Liquidator, stated that the Bank would hold the letters of undertaking until a similar undertaking was given by the solicitor for the Dargans although the solicitor for the Company had, by letter dated 16th April, 1982, informed the solicitors for the Liquidator that "On the 2nd December, 1981, the Company disposed of its interest in the property to John and Patrick Dargan for £21,000 and my undertaking was discharged."

The result seems to be that the Company still owns the premises at Green Lane although the Dargans have been using them for their own businesses and may be liable for an occupation rent. The Dargans as guarantors have paid the Company's debt to the Bank to the extent of £21,000, having been advanced money by the Bank for that purpose. It has not been suggested that the Dargans, as guarantors, were not liable to pay the amount due to the Bank by the Company. Nor has it been suggested that the Liquidator and the creditors of the Company, other than the Bank, could have any claim against the Dargans as guarantors of the debt due to the Bank. The question of any possible right of the Liquidator to require the Bank to rely on the guarantee given by the Dargans before claiming in the liquidation does not arise on this proceeding.

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In my opinion, this transaction was entered into by the Dargans at a time when the Company was insolvent and, as John Dargan stated in evidence, they had been thinking of putting the Company into liquidation, and it was entered into by them with a view to obtaining the property at Green Lane to the prejudice of the creditors of the Company. Had a conveyance of the property to them been executed and a mortgage of it given by them to the Bank there would have been grounds for seeking to have the transactions set aside. That is not the position. The Company still owns the property and has paid nothing to the Bank or anybody else. The Bank still claims some sort of a lien over the property for any money due to the Bank. The Bank has reduced the amount of the debt due to it by the Company by means of a loan to the Dargans who now owe £21,000 to the Bank and it is a matter between the Dargans and the Bank as to the validity of the loan to them for the discharge of the Company's debt.

Under these circumstances, the transaction does not appear to have accomplished any preference of the Bank or the Dargans over the creditors, either fraudulent or otherwise, whatever the intention of the Dargans may have been.

As it is unsatisfactory to decide an issue on grounds which have not been argued the matter will be re-entered for argument on the matters which I have raised.

*Herbert R. Williams.*

11.2.25.