EUROTRAVEL
~~DEMPSEY~~

268 ✓

Henchy J.
Hederman J.
McCarthy J.

THE SUPREME COURT

IN THE MATTER OF EUROTRAVEL LIMITED
(IN VOLUNTARY LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACT, 1963

ROBERT DEMPSEY

v.

BANK OF IRELAND

JUDGMENT delivered on the 6th day of December 1985 by

McCARTHY J.

I have read the judgment of Henchy J. and I agree with the order he proposes. Were it not that we are disagreeing with the conclusion following the careful judgment of the learned trial Judge, I would be content merely to state my agreement.

At p. 12, the learned trial Judge says:-

> "In my view that decision[1] fully supports the approach adopted by the Bank in the present case, that is to say, the assertion made on behalf of the Bank that they are not claiming a lien (or indeed a charge of any form) but merely the ordinary traditional right granted

[1] In re Morris: Coneys and Morris (1922) 1 I.R. 136

> by law (subject to any special contract between the parties and any special factors affecting the accounts) to set-off what is due by the client to the Bank against any sum which may be due by the Bank to its client. This particular right of set-off is sometimes described as the right to combine accounts or as in the Irish case aforesaid the right to adjust accounts."

Whilst the bank claims a right granted by law to set-off, it appears to me not merely to claim but to have established a special right of set-off contained in the second document of the 31st March 1983. As the learned Judge pointed out, the principal authority cited - In re Fenton[2] was relied upon by both parties. I share the view of Henchy J. that neither Fenton's case nor Re a Debtor[3] are directly in point. I note that in Fenton's case Lord Hanworth M.R. (109) said:-

> The words of the section (s. 31 of the Bankruptcy Act, 1914) seem clearly to connote an account capable of ascertainment on either side if not immediately, yet based upon authority or liability definitely undertaken. I find it difficult to construe those words or adapt that system to dealings in which there was a debt on one side due to the other,

[2](1931) C.A. 85
[3]1956 3 A.E.R. 225

> and per contra there was not a debt or a certain liability, but one in respect of which there was a right of protection, and no more; a liability which could not be turned into a direct contra money claim, unless and until the debt had been paid by the surety, who then, and not till then, would become entitled to give a discharge for the sum paid to him. This he had not done at the date of the liquidation when his rights became determined."

In the instant case, there was a liability definitely undertaken; there was a liability to pay once demand made in the circumstances that had arisen and were contemplated by the guarantee. The fact that the bank delayed payment until the 18th April did not alter the situation that the bank was liable to pay as of the date of receipt of notification from the solicitors acting for the trustees of the Irish Travel Agents Association, whose letter was dated the 29th March 1983. If damage had flowed from the failure to pay during the interval, such damage would have been to the Association and not otherwise. If, having received the demand, the bank had issued proceedings claiming a declaration of entitlement to a set-off and succeeded in having such proceedings heard before what is called the critical date, the 11th April, would such a declaration

be defeated by the company going into voluntary liquidation? I do not think so. In my view, the reliance on Fenton's case was misplaced because the bank is not seeking to prove its debt in the liquidation, but asserting its contractual right.

I would allow the appeal and give the following directions as to the matters raised in the special endorsement of claim:-

> " 5. The Governor and Company of the Bank of Ireland are entitled to set-off the sum of £75,000 paid by them to the trustees of the Irish Travel Agents Association on 19th April 1983 against monies held by them on any account in the name of the Company."

R.J. Finnegan.
16.12.85.

~~DEMPSEY~~ EUROTRAVEL

/272

Henchy J.
Hederman J.
McCarthy J.

THE SUPREME COURT

1983 No. 353 Sp.

Re Eurotravel Ltd

ROBERT DEMPSEY

v.

BANK OF IRELAND

Judgment of Henchy J.
delivered the 6th December 1985

Hederman J. concs.

Eurotravel Limited ("Eurotravel") was a company which carried on the business of travel agents. As its name would suggest, it arranged holidays abroad for its customers. It is apparently a risky business, for a number of such companies have collapsed in recent years. When that happens, there is a danger that financial loss and inconvenience will be suffered by customers of the company, through not being able to get the holidays they have paid for, or through finding themselves stranded at a holiday resort abroad. In an effort to alleviate or avoid such misfortunes, the Irish Travel Agents Association ("the Association") requires that its membe firms shall be bonded, that is to say, have an enforceable guarantee by a financial institution that in the event of the insolvency of the firm the guarantor will pay a specified sum of

money to the trustees of the Association, who will use the money for the relief of the customers of the firm.

Eurotravel was a member of the Association and accordingly had to be bonded. It arranged to get the necessary guarantee from the Bank of Ireland ("the Bank"), who were its bankers. The guarantee was effected by means of two documents which were executed on the 31 December 1982. The first was an agreement between Eurotravel, the trustees of the Association, and the Bank, and was expressed to be effective until the 31 March 1983. It provided that Eurotravel would pay £75,000 to the trustees if during the period of the agreement it became (amongst other eventualities) unable to pay its debts and thereby unable to fulfil its obligations to its customers. The Bank guaranteed the payment of that sum. The agreement provided that the money payable to the trustees under the guarantee would be used by them for the relief of Eurotravel's customers - for example, in repatriating holiday-makers stranded abroad and in repaying money paid by customers for holidays not yet provided.

The second document was one executed by Eurotravel only and it was addressed to the Bank. It provided that, in consideration

of the Bank joining in the first document as guarantor, Eurotravel would indemnify the Bank against its liability under the guarantee; the Bank was authorised to pay immediately any moneys demanded under the guarantee, without requiring proof that the amounts demanded were due; and Eurotravel agreed that the Bank could debit any account in its name with any sums payable by the Bank under the guarantee.

As far as the Bank was concerned, the joint effect of the two documents (the validity of which has not been seriously questioned) was clear: if within the three-month period up to the 31 March 1983 the trustees of the Association called on it to pay £75,000, it would be bound to do so, but it could recover the amount paid by debiting Eurotravel's accounts with the amount of the payment.

Before the period of the guarantee ran out, solicitors acting for the trustees of the Association wrote to the Bank on the 29 March 1983 claiming payment of £75,000 under the guarantee. Eurotravel was by then unable to pay its debts and could not fulfil its obligations to its customers. The Bank was therefore liable under the guarantee, so on the 19 April 1983 it paid £75,000 to

the trustees.

Meanwhile, Eurotravel's trading activities had gone from bad to worse. By the 11 April 1983 it had ceased trading and it was found that its debts far exceeded its assets, so, as a result of a special resolution pursuant to s. 141 of the Companies Act, 1963, passed on that date, it was put into voluntary liquidation and the plaintiff was appointed liquidator.

The present proceedings have been brought by the plaintiff as liquidator seeking a ruling by the Court as to whether the Bank is entitled to debit against Eurotravel's accounts in the Bank the sum of £75,000 paid on foot of the guarantee. In the High Court it was held that the Bank is not entitled to do so. The Bank now appeals against that decision.

Counsel on both sides relied on a number of decided cases, but I do not find those cases particularly helpful, as they mainly deal with the right of a creditor to prove his debt, by set-off or otherwise, in a winding-up or in a bankruptcy. As I understand the Bank's case, however, what is claimed is not a right to prove the £75,000 as a debt in the winding-up, but an entitlement to

enforce its contractual right to appropriate that sum by way of debit, notwithstanding the winding-up.

Counsel for the liquidator relied mainly on two cases: Re Fenton 1931 1 Ch. 85 and Re a Debtor 1956 3 All E.R. 225, but in my view neither case covers the situation in this case.

In Re Fenton the question was whether a bankrupt who had guaranteed a company's overdraft, but had not been called on to pay anything on foot of the guarantee, could prove in the winding-up of the company the amount of the overdraft by way of set-off against a debt owed by him to the company. It was held that he could not, because at the relevant date there was no debt (only a contingent liability for a debt) owing by the company to the bankrupt which could be set-off against his debt to the company.

The present case is radically different from that. In this case the Bank does not seek to prove its debt in the winding-up. It wishes to stand apart from the winding-up and to recover its debt by debiting it against Eurotravel's accounts in the Bank. Apart from a point about double proof of the same debt (which does not arise in the present case), the reason why the claim in Re Fenton to exercise a right of set-off was disallowed was because

on the relevant date the bankrupt had not paid or been called on to pay any money under the guarantee, so on that date there was no debt owed by the company to him which could be set-off. The present case is different in that by the relevant date the Bank had been called on to pay £75,000 under the guarantee, and under the contractual arrangement the Bank was then bound to make that payment. I do not think that Re Fenton is (as seems to have been held in the High Court) authority for the proposition that it is fatal to the Bank's case that it had not paid the £75,000 by the relevant date. The question of actual payment would be material only if the Bank were seeking to prove its debt in the winding-up. It is not. It is standing on what it says is its contractual right to recover that debt by debiting it against Eurotravel's accounts.

Re a Debtor, which was also relied on by counsel for the liquidator, was to the same effect as Re Fenton. The question there was whether a guarantor of a bankrupt's debt could prove in the bankruptcy, by way of set-off, what he alleged was a debt under the guarantee, which debt he had not paid on the relevant date, but had paid later. It was held, following Re Fenton, that the set-

off claimed could not be allowed because, as the guarantor had not paid anything under the guarantee on the relevant date, there was no debt capable of being set-off on that date; and the payment later could not be held to relate back to the relevant date. It will be seen, therefore, that since (as was the case in Re Fenton) the claim was to prove a debt by way of set-off, the case was essentially different from the present one, where the claim is not to prove a debt in the winding-up but to recover it by means of a direct debit pursuant to a contractual arrangement.

I understand counsel for the liquidator and counsel for the Bank to agree that none of the reported cases covers the situation in this case. It would seem, therefore, that the matter on which the liquidator seeks a ruling falls to be decided by the application of first principles.

In the case of a voluntary winding-up of a company (such as this is), the winding-up commences when the resolution for the winding-up is duly passed (s. 253 of the Companies Act, 1963). That is the relevant date. The company then ceases to carry on business, except so far as is necessary for the winding-up. The liquidator then takes over. The assets of the company pass to him. His

primary function is to cause the assets to be collected, converted (where necessary) by sale into cash, and applied in discharge of the company's liabilities according to prescribed rules and priorities. For that purpose the creditors of the company must prove their debts. Where, as is the case here, the winding-up is that of an insolvent company, the bankruptcy law applies to debts provable (s. 284, Companies Act, 1963). This means that the liquidator approaches his task in the same way as the official assignee would deal with the administration of the estate of a person adjudged bankrupt.

To say that when the liquidator takes over, the assets of the company vest in him is a less than complete statement of the legal position. The general rule is that he acquires only such title to the assets as the company had - no more, no less. He cannot take any better title to any part of the assets than the company had. This means that he takes the assets subject to any pre-existing enforceable right of a third party in or over them. If that were not so, equities, liabilities and contractual rights validly and enforceably created while the assets were in the hands of the company would be unfairly swept aside and an unjust distribution o

the assets would result.

The relevant bankruptcy law (which is the law applicable in a winding-up such as this) is succinctly stated as follows in 4 Halsbury's Laws of England, vol. 3, para. 594:

> "The general rule is that the trustee in bankruptcy takes no better title to property than the bankrupt himself had. The bankrupt's property passes to the trustee in the same plight and condition in which it was in the bankrupt's hands, and is subject to all the equities and liabilities which affected it in the bankrupt's hands, to all dispositions which have been validly made by the bankrupt, and to all rights which have been validly acquired by third persons at the commencement of the bankruptcy."

When, on the passing of the winding-up resolution in this case on the 11 April 1983, the moneys standing to the credit of Eurotravel in its current and deposit accounts in the Bank on that date became vested in the liquidator, they became so vested subject to the right over those accounts that had been created in favour of the Bank by the documents of the 31 December 1982. That right was originally a contingent one and it was to the effect that if the Bank was called on before the 31 March 1983 by the

trustees to pay £75,000, while it would be bound to do so, it could reimburse itself by debiting Eurotravel's accounts with that sum. But when the trustees called on the Bank to pay them £75,000 on the 29th March 1983 and the Bank became forthwith bound to make that payment, Eurotravel's accounts in the Bank became actually rather than contingently subject to the Bank's right to debit. It was in that state of contractual liability that those accounts passed to the liquidator on the 11 April 1983. Immediately before the liquidator took over on that date, the Bank was entitled to say that it was bound to pay the £75,000 and entitled to recover it forthwith by debiting it against Eurotravel's accounts. If it had actually done so, I do not think the debit could have been questioned by the liquidator, for it would have been done under the terms of a guarantee which was entered into in good faith and which in no way offended the statutory provisions applicable in the winding-up.

The fact that the Bank did not pay the £75,000 or exercise its right to debit until after the winding-up had commenced seems to me to be irrelevant for present purposes. What matters is that Eurotravel's bank accounts passed to the liquidator subject

to the Bank's enforceable right to pay the £75,000 and to debit that sum against those accounts. The intervention of the winding-up did not override or pre-empt the Bank's ability to give effect to that right, any more than it would affect an enforceable lien or charge on those accounts existing on the relevant date. It follows that the Bank's accrued right to debit took precedence over the liquidator's title to the accounts.

This conclusion, it seems to me, may be said to be borne out on another ground. The applicable laws of bankruptcy governing the proof of debts in a winding-up are designed to ensure a just and equitable distribution of the assets in accordance with the debts duly proved. Such would not be the result if the Bank's claim to the right to debit were to be disallowed. By the 29 March 1983 Eurotravel owed the trustees of the Association £75,000 under the document of guarantee, and under the same document the Bank had become liable to pay that debt to the trustees. On the 19 April 1983 (which was after the liquidation had commenced on the 11 April 1983) the Bank paid that sum to the trustees and it was presumably applied in full in discharge of Eurotravel's liability to customers affected by its collapse. If the liquidator were now to be

allowed to maintain successfully that the Bank could not exercise its contractual right to debit, the result would be plainly unfair, for Eurotravel would have got the benefit of the £75,000 paid by the Bank, which was a benefit it was never intended to have except on condition that the Bank could exercise its reciprocal right to debit. Because of that condition, the liquidator is not entitled to maintain (as in effect he seeks to do) that Eurotravel should have the benefit of the Bank's compliance with its duty to pay under the guarantee and at the same time to reject the Bank's right to debit, which was the consideration for the grant of the guarantee by the Bank. He cannot approbate and reprobate in that way. Equity requires that the guarantee, being a pre-liquidation contract made in good faith and partly performed when the liquidation began, should be honoured in full.

I would hold that the Bank is entitled to appropriate by way of debit £75,000 out of the moneys in Eurotravel's bank accounts. I would allow the appeal accordingly.

Approved
S.H.
6-12-85