SAINT STEPHENS

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THE HIGH COURT

Ref No: 951 Sp Court 5

IN THE MATTER OF ST. STEPHEN'S GREEN SAFE DEPOSIT p.l.c.

(IN VOLUNTARY LIQUIDATION)

AND

IN THE MATTER OF SECTION 280 OF THE COMPANIES ACT 1963

BETWEEN

PATRICK NUNAN

APPLICANT

AND

GROUP 4 SECURITAS (INTERNATIONAL) B.V.

RESPONDENT

Judgment of Mr. Justice Blayney delivered the 28th day of July. 1986.

This is a special summons brought by the Liquidator of St. Stephen's Green Safe Deposit p.l.c. (in voluntary liquidation) (to which I shall hereinafter refer as "the Company") to have certain questions determined which have arisen in the course of the winding up of the Company. Since the special summons was issued, agreement has been reached between the parties on some of the questions so that one single question remains for determination, namely, whether an agreement in writing made on the 2nd day of April 1985 between Group 4 Securitas (International) B.V. (to which I shall hereinafter refer as Group 4), the Company and Industrial Credit Corporation p.l.c. consitutes a charge requiring registration under the provisions of Section 99 of the Companies Act 1963.

This agreement came to be executed in pursuance of a term in a

lity letter issued by the Industrial Credit Corporation to the pany in connection with a loan of £250,000 being made by the .C. to the Company. That facility letter provided that the in to be made to the Company should be secured as follows:-

"(1) A sole first floating charge over all the assets of the borrower.

(2) A sole first specific charge over the land and premises of the borrower which include a leasehold interest in premises at 16 St. Stephen's Green Dublin 2. I.C.C. to be satisfied with the terms of this lease.

(3) Group 4 Securitas (International) B.V. to give a letter of comfort and awareness for £100,000 to I.C.C. with respect to the loan to the borrower. This letter to be in a form satisfactory to I.C.C's Solicitors.

(4) Group 4 Securitas (International) B.V. to execute an agreement in a form satisfactory to I.C.C's Solicitors, that they will buy the premises referred to at (2) above for £250,000 (less any amount paid under the letter of comfort) should we request them to do so and I.C.C. would consider making such a request only in the event of default by the borrower."

It was in pursuance of the last provision of the security requirements that the agreement of the 2nd April 1985 (to which I shall hereinafter refer to as "the agreement") was entered into.

The agreement was made between Group 4 of the first part, the Company of the second part and I.C.C. of the third part. It starts with two recitals in the following form:

"Whereas:-

(a) By letter of loan offer dated the 5th August 1983 (copy of which is attached hereto hereinafter called "the loan

agreement") I.C.C. agreed to make available to the borrower a loan not exceeding £250,000 on the terms and conditions set out therein.

(b) It was agreed that part of the security for the loan would be the agreement by Group 4 upon the terms and conditions hereinafter contained."

The date of the letter of loan offer is wrongly given in the first recital - it should have been the 17th of January 1985 - both partie accepted that this was so and the intention was to refer to the letter of loan offer of the 17th January 1985.

The reference to the letter of loan offer in the first recita is important. It makes it clear that the agreement is being executed in the context of the security requirements set out in the letter. And the terms of that letter had been accepted by the Company on the 25th January 1985. The principal terms of the agreement were as follows. Group 4 agreed to purchase the premises of the Company at 16 St. Stephen's Green Dublin 2 for the sum of £250,000 should I.C.C. request it so to do but it was provided that such request should be made by I.C.C. only on the occurrence of one or more of the events of default as set out in the loan agreement. The Company agreed that during the currency of the loan it would not mortgage or charge the premises in question in favour of any person or company other than I.C.C. The Company agreed that in the event of its being in default of the terms of the loan agreement it would execute a contract for the sale of the premises for the sum of £250,000. I.C.C. agreed that on receipt of the proceeds of sale of the premises from the Company it would release its mortgage on the premises forthwith.

The agreement contained other terms also to which I shall refer when dealing with counsels submissions, but the basic terms of

the agreement were as I have just set them out.

Mr. Shanley, acting on behalf of Group 4, submitted that the effect of the agreement was to create "a charge on land, wherever situate, or any interest therein," within subsection (2) (d) of Section 99 of the Companies Act 1963 and accordingly it required to be registered under subsection (1) of that section. For a definition of the nature of an equitable charge he referred me to judgment of Peter Gibson J. in the case of Carreras Rothmans Limited .v. Freeman Mathews Treasure Limited and Another 1984 3 WLR 1016 at page 1030D.

> "The type of charge which it is said was created is an equitable charge. Such a charge is created by an appropriation of specific property to the discharge of some debt or other obligation without there being any change in ownership either at law or in equity, and it confers on the chargee rights to apply to the court for an order for sale or for the appointment of a receiver, but no right to foreclosure (so as to make the property his own) or take possession."

He also referred me to Fisher and Lightwood on Mortgages (9th edition) at page 156 where an equitable charge is defined in very similar terms. Mr. Shanley submitted that the effect of the agreement was to appropriate the Company's leasehold interest in 16 St. Stephen's Green to the discharge of the debt due to the I.C.C. and that this brought the agreement within the definition. He said that the essence of an equitable charge is that it is a security whereby property is appropriated for the discharge of a debt and that the agreement contained this essential element. He submitted that no special form is required to create an equitable mortgage; that what is required simply is the intention to create a security. He submitted that in the present case the intention was clear from the second of the two recitals in the agreement. He pointed to the following

terms in the agreement as being the appropriation of the premises to the payment of the debt: Clause 3, which prohibited the Company from mortgaging or charging the premises in favour of any person or company other than I.C.C. during the currency of the loan; Clause 10 by which all dealings by the Company with the premises (save and except a charge in favour of I.C.C.) were inhibited except with the consent of Group 4 and I.C.C.; Clauses 5 and 6 in which the Company agreed to execute the contract for sale and to complete it within three weeks from the date of the contract. Mr. Shanley argued that this gave I.C.C. a security. When the agreement was read as a whole the lessee's interest in the premises was clearly appropriated for the discharge of I.C.C.'s debt. The effect of the agreement could best be seen by comparing what I.C.C. could get on a realisation under the fixed charge, and what they could get on a realisation under the charge created by the agreement. The actual open market value of the loan interest in the premises is nil, except for the possibility of selling for £90,000 to a special buyer. It can be seen that the effect of the agreement is to enable I.C.C. to realise a price for the premises vastly in excess of what they could be sold for on the open market.

In answer to my question as to whether I.C.C. could, under the agreement, apply to the Court for an Order for Sale, Mr. Shanley submitted that they could. He said that the question was not to be looked at from the point of view of considering whether the terms of t agreement gave the right to an Order for Sale, but whether they created a charge. If they created a charge, as he submitted they d:, it followed as a matter of right that I.C.C. would be entitled to a well charging Order and to an Order for Sale. The right to a sale was an ancillary right which was available once it was established

that there was a charge.

Mr. Geoghegan, acting on behalf of the Liquidator, submitted that one had to start by making a distinction between a security and a charge. While every charge was a security, not every security was a charge. For example, the giving of a guarantee, or the delivery of a bill of exchange could amount to the giving of security, there would be no question of any charge being created. He submitted that the agreement had none of the recognised features of a charge. He said that one of the essential features was that it should be realisable by a Court Order of Sale; this remedy of sale was always available to a chargeant but it would not be available to I.C.C. under the agreement.

The transaction here was something very different. It was an agreement that in certain circumstances X would buy certain premises from Y for Z pounds. The mere fact that the motive was to get better protection for the secured lender did not make the agreement a charge. He submitted that the correct description of the agreement was that it was a conditional agreement for sale. He submitted that you must first and foremost look at the agreement and see what it means. And while there might be in it an element of appropriation, the sum mentioned in the agreement was not realisable by any of the remedies normally available to a chargeant. All that could be done would be to enforce the sale by getting an Order for specific performance or alternatively claim damages for breach of the agreement. He accepted Mr. Shanley's submission that a charge could be created informally, but he submitted that for a charge to be created the premises must be appropriated in such a way that an Order for Sale by the Court could be sought. In the light of the terms of the agreement in the present case, the Court would be puzzled if a sale were sought. The only

real remedy was specific performance. He directed my attention to Clause 8 of the agreement whereby I.C.C. agreed that, on receipt of the proceeds of sale of the premises from the Company, it would release its mortgage on the premises forthwith. He said that this was clear evidence of an intention that there should be a mortgage by the Company to the I.C.C. and further evidence of this was to be found in the agreement in the first recital which stated that I.C.C. had agreed to make available a loan not exceeding £250,000 to the Company on the terms and conditions set out in the letter of loan offer and these conditions included the requirement that the Company should give a first specific charge over the premises to I.C.C.

Having considered fully the terms of the agreement and the very helpful submissions of Counsel the conclusion I have come to is that the agreement did not have the effect of creating a charge and accordingly it did not require to be registered under Section 99 of the Companies Act 1963. My reasons are as follows.

The agreement cannot be looked at in isolation. It constituted part of the security for the loan. This is referred to in the second recital in the agreement. This element is of considerable importance in its interpretation as it means that in construing it, and in trying to determine what the intention of the parties was, one must look at the relationship of the agreement to the other parts of the security.

The other part of the security that is clearly relevant is that the Company agreed to give "a sole first specific charge over the land and premises of the borrower which include a leasehold interest in premises at 16 St. Stephen's Green Dublin 2." So from the time that the Company on the 25th of January 1985 accepted the terms of the loan offer, the Company was bound, as one of the terms of the loan,

to give a first specific charge on the premises to I.C.C. The effect of giving this charge would be that in the event of the Company making default in the repayment of the loan, I.C.C. would be entitled to apply to the Court for an Order for Sale with a view to realising the amount due on the charge.

In my opinion the agreement has to be interpreted in the light of the Company's obligation to create this specific charge. The agreement was made on the 2nd April 1985, the day before the charge was executed, but both Mr. Shanley and Mr. Geoghegan agreed that no particular significance was to be attached to this, and it seems to me that they were perfectly correct in taking this view. Having regard to the fact that under the terms of the letter of loan offer the Company was bound to grant the specific charge, it was immaterial whether the charge was executed before or after the agreement was entered into. On the date of the acceptance of the letter of loan offer, there was a binding obligation on the Company to execute the charge and enter into the agreement, and there was a binding obligation on Group 4 to enter into the agreement.

When the agreement is looked at in the light of the obligations created by the letter of loan offer, it seems to me that its relation to the specific charge created the following day is clear. It was anciliary to the specific charge. It ensured that in the event of a default being made by the Company in the repayment of the loan, I.C.C. would not have to rely solely on the remedy of a sale by the Court which might be useless if the premises had no value on the open marke but would have an additional remedy in the shape of being entitled to require Group 4 to purchase the premises from the Company for £250,000 So the specific charge gave one remedy, and the agreement gave an alternative one. In my opinion this alternative remedy did not have

the effect of creating a second charge on the premises.

The whole thrust of the agreement is that it is a security given by Group 4 and not by the Company. The Company is a necessary party, because it has to agree to sell the premises and Group 4 is obliged to buy. The substance of the agreement is that Group 4 agrees to purchase the premises. It is this obligation undertaken by Group 4 which is the essence of the security. And this is clear not merely from the terms of the agreement itself but from the manner in which the agreement is described in the letter of loan offer. The description does not contain any reference to the Company at all. It says that "Group 4 Securitas (International) B.V to execute an agreement etc." and the second recital in the agreement states that "It was agreed that part of the security for the loan would be the agreement by Group 4 upon the terms and conditions hereinafter contained." There was no reference to the Company. The reference is to the agreement being undertaken by Group 4. And in the agreement itself Clause 1 sets out the agreement by Group 4 to purchase the premises at £250,000 as requested by I.C.C

In the light of this it seems to me that it cannot be said that under the agreement the Company was appropriating the premises to the repayment of the loan. That in effect had already been done by the Company agreeing to give a specific charge on the premises to I.C.C. In the agreement the Company was playing a very subsidiary part agreeing to sell in the event of making a default in repayment of the loan, at which stage the Company could not have prevented any sale since I.C.C. would have been entitled to get an Order for Sale from the Court under its charge. So the part played by the Company in the agreement was a very subsidiary part only. It was really only concurring in the obligation being undertaken by

Group 4 and its concurrence was in effect for its benefit since Clause 8 of the agreement provided that once the proceeds of sale had been paid over to the I.C.C. the mortgage on the premises would be released.

As there are no express words in the agreement from which the intention to create a charge can be inferred, if there is any such intention, it can only be gathered from regarding the provisions of the agreement as a whole, as Mr. Shanley has urged me to do, but even adopting that approach it seems to me that there is no clear evidence of any such intention. And it seems to me in the particular circumstances that very clear evidence of such an intention would be required since at the date of the agreement the Company was under an obligation to create a specific charge on the property, and did in fact create such a charge on the following day. Any evidence of intention to create a charge would have had to be evidence to create a charge additional to the specific charge which the Company was under an obligation to grant. That the Company should have had any such intention would have been unusual since it was totally unnecessary to create an additional charge. But as I said earlier the agreement does not contain any evidence of any such intention. The correct construction to put on it is in my opinion that it was an additional security given by Group 4 and not by the Company. Any relief which I.C.C. is entitled to under the agreement is in my opinion confined to obtaining specific performance against Group 4 of its agreement to purchase the premises for £250,000. Having regar to the nature of the agreement which is concerned essentially with Group 4's agreement to purchase the premises, I cannot see how I.C.C. could succeed in a claim against the Company for an Order for Sale. It seems to me that the only relief that I.C.C. could get against the Company is an Order that it execute a contract to sell

the premises to Group 4 for £250,000. So the remedy which is available to every chargeant is not in my opinion available to I.C.C. and this is a further reason for coming to the conclusion that the agreement does not create a charge. Mr. Shanley submits that this is not the correct approach; that I should look at the agreement itself first and if I came to the conclusion that it created a charge, then I.C.C. would be entitled to an Order for Sale. I accept that this is probably the correct approach, and my conclusion is of course that the agreement does not create a charge, but at the same time I think it relevant in considering whether it does or not to take into account the fact that the terms of the agreement are not such as would entitle I.C.C. to apply to the Court for an Order for Sale.

The answer to the question set out in the special summons must be that the agreement does not consititute a charge requiring registration under the provisions of Section 99 of the Companies Act 1963.

M. Shanley.
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