IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
[2020] EWHC 1756 (Ch)

No. BR-2019-001121

Rolls Building
Royal Courts of Justice
7 Rolls Buildings
London EC4A 1NL

Thursday, 7 May 2020

Before:

ICC JUDGE MULLEN

IN THE MATTER OF LEWIS McEWAN

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N :

CLIPPER HOLDING II SARL — Petitioning Creditor

- and -

LEWIS McEWAN — Debtor

MR SAMUEL HODGE appeared on behalf of the Petitioning Creditor.

MS LOUISE DELGADO appeared on behalf of the Debtor.

J U D G M E N T

(Remote hearing via Skype)

JUDGE MULLEN:

1 This is the second hearing of a bankruptcy petition presented by Clipper Holding II SARL against Mr Lewis McEwan. It is based on debt somewhat in excess of £1.3 million that said to be due under a facility agreement which Mr McEwan entered into with AIB Group (UK) plc in February 2014. Under that agreement a facility of up to £2.1 million was provided and was to expire on 4 February 2015. The debt was assigned to the petitioning creditor and the security to which the debt was subject was released in the circumstances that I will describe. It is not in dispute that the petitioning creditor is entitled to present the petition on the basis of having succeeded to Allied Irish Bank Group pursuant to the assignment and I need not say anything more about that.

2 It is said by the petitioning creditor that, as a result of default on the part of Mr McEwan, it made a written demand of him, as required by the facility agreement, by letter dated 4 July 2016. That sum required repayment of the outstanding sum of £2.6 million. There is a question, to which I will return, as to whether that demand was served.

3 As a result of that default, the parties entered into a settlement agreement on 12th October 2017. This is described in Mr Hodge's skeleton as the first settlement agreement. The first settlement agreement acknowledged the facility, it acknowledged the assignment to the petitioning creditor, and it acknowledged that Mr McEwan had agreed to settle his outstanding liabilities by a number of payments. The first of these was £2.2 million, plus a contribution to legal costs, and this was to be followed by a payment of £34,000 in respect of receivers appointed over certain properties, with a final payment of £250,000 to be made by 31st March 2018. The initial payment was made and, as a result, the petitioning creditor's security was released in accordance with the terms of the first settlement agreement. The other payments were not made, as a result of which a statutory demand dated 17 April 2018 was served upon Mr McEwan on 10th May 2018. That sets out a debt due to the petitioning creditor of a little over £1.19 million, and it breaks it down as to principal, default interest and further interest.

4 As a result of the presentation of that statutory demand, a second settlement agreement, dated 13 September 2018, was entered into. The second settlement agreement recited the service of the statutory demand, the default under the first settlement agreement, and it stated that the total sum due from Mr McEwan stood at £1.19 million-odd. It provided that Mr McEwan would be released from his liability if he made an initial payment of £10,000, a second payment of £140,000 within four weeks and a final payment of £50,000 by 31st January 2019.

5 Mr McEwan paid the initial payment but did not comply with the remaining terms of the second settlement agreement. The parties thereafter varied the second settlement agreement by a side letter, dated 16 April 2019. Under the terms of this, the balance of the settlement sum of £200,000 due under the second settlement agreement was varied and reduced to £190,000. That was to be paid by 1st May 2019 from the sale of an investment property. If it was not paid, the settlement sum was to increase to £210,000 to be paid by an instalment of £40,0000 paid by 1st May 2019, with nine other monthly instalments of thereafter. Mr McEwan paid the £40,000 and a further instalment of £18,800.

6 It is not in dispute that Mr McEwan did not comply with any of those agreements in full. He made substantial payments pursuant to them but all of those agreements were breached in one way or another. The petitioning creditor therefore contends that the whole of the balance outstanding under the terms of the original facility agreement is now due, less payments made, and that it can petition for that sum accordingly.

7 Mr McEwan filed a notice of opposition in answer to the petition, and directions were given for this hearing. I have read Mr McEwan's notice of opposition and the evidence filed by him and that on behalf of the petitioning creditor. There are four grounds on which Mr McEwan relies and these have been set out in a very helpful skeleton argument of Ms Louise Delgado, who appears for him.

8 The first question is whether the petitioner served the initial demand required under the facility agreement and whether subsequent demands were necessary pursuant to the settlement agreements in order to cause the petition debt to fall due. The second argument is that the petition fails adequately to particularise the petition debt. It is argued that there are differing sums in the statutory demand and in the petition, which gives rise to the question of whether it can be said that there is a liquidated debt on which to found a petition. Thirdly, there is a question as to whether the side letter, to which I have referred, caps the maximum amount due to the creditor. Finally, it is said that the default interest rates that are relied upon by the petitioning creditor are penalties and liable to be set aside on that basis or on the basis of the court's powers under the Consumer Credit Act 1974. If none of those arguments are successful, Mr McEwan seeks time to pay the debt.

9 I should remind myself that there is extensive authority as to the threshold that Mr McEwan here has to reach in order to show that the debt is genuinely disputed so that the petition falls to be dismissed. That is not a high threshold and even a shadowy defence to the petitioner's claim has been found to be sufficient to require the petitioner to bring ordinary proceedings to obtain judgment on the debt. The court is however enjoined to be wary of the raising of clouds of objections. The purpose of this hearing is not however to conduct a mini-trial. I bear those principles in mind.

10 The first point is the initial demand. I am satisfied that the demand under the facility agreement was served. Mr McEwan does not really make a positive case that it was not. He says he cannot remember receiving it and he does not believe that it was served. It appears in the bundle bearing a date which reflects the petitioner creditor's case as to its creation. It has repeated been accepted by Mr McEwan that the petitioner had the right to pursue the debt over the several years that followed. It seems to me that there really is no basis now to claim that the demand was not served.

11 Mr McEwan also says that further demands were required following the defaults under the settlement agreements. That argument cannot succeed. In my judgment the effect of the service of the initial demand under the facility agreement was that the entire sum due under facility agreement became due and owing. The subsequent settlement agreements do not require any further demands to be presented on the basis of the default, and just to make that good, I should briefly refer to the provisions of the documents. At clauses 3.1 to 3.4 of the first settlement agreement, the requirement for the various settlement payments are set out. At clause 3.6 it is provided that:

> "Strictly subject to, and in consideration of, the Borrower complying with its obligations in clauses 3.1 to 3.4 above, the Lender agrees to release the Borrower from the Borrower's Liabilities."

At clause 3.8 it provides:

> "For the avoidance of doubt, should the Borrower not comply with the provisions of clauses 3.1 to 3.4 above the Lender will not be required to comply with the provisions of clause 3.5 and 3.6 above or clause 4 below and the releases referred to in those clauses shall not take effect."

That makes it clear that the petitioning creditor would release Mr McEwan from his liabilities under the facility agreement if he complied with his obligations under the first settlement agreement. If that was not done there was no requirement on the part of the petitioning creditor to release the debt. If its terms were complied with the debt under the facility agreement would be extinguished. If they were not complied with it would not be extinguished and the position as it was prior to entry into the first settlement agreement would continue. Mr McEwan did not comply with the terms of the first settlement agreement, his liability under the facility agreement remained in existence and no further demand was required under the first settlement agreement.

12 That is the same in relation to the second settlement agreement. This, again, provided for a payment of some £200,000 and it provided, once again, at clause 3.5 that,

> "Strictly subject to and in consideration of the Borrower complying with its obligations in clauses 3.1 to 3.4, the lender agrees to release the borrower from the borrower's liabilities."

It goes on to say at clause 3.7, for the avoidance of doubt that, should the Borrower not comply with the provisions of clauses 3.1 to 3.4, then the Borrower acknowledged that the Lender was immediately entitled to present a bankruptcy petition for the "Full Amount", less any payments made under the second settlement agreement, based on the statutory demand served upon him on 10th May 2018. The "Full Amount" is defined as the sum of £1,194,171.91. It seems to me there is absolutely no doubt that that, again, was an arrangement which said, "You will be released from your underlying obligations only if you comply with the terms of this deed". It is not in dispute that those terms were not complied with. Mr McEwan was not released, his liabilities under the facility agreement continued, and no further letter of demand was required.

13 The side letter varies the settlement sum due under the second settlement agreement but provides that all the other terms set out in that settlement agreement remain the same. It does not say that any notice of default is required in order for any sum to fall due, whether the full sum or the lesser sum, if the debtor is right as to the effect of the side agreement. It seems to me that there is nothing in the points raised about the service of demands.

14 The second point is whether the debt in petition is inadequately particularised. In my view, it is properly particularised. The first complaint is that there is no reference to the settlement agreements. On my interpretation of the settlement agreements, and I shall come to the effect of the side letter on the amount of the debt in a moment, none of them needed to be mentioned, because all they were doing was saying that Mr McEwan would be released from the debt due under the facility agreement if he complied with their terms. He did not do so and so they fell away. The point made about the difference between the sums set out in the statutory demand and the petition is simply explained by the claimed accrual of further interest and the credits made for payments following the presentation of the statutory demand. Those sums are all set out and what debt is said to be due can clearly be calculated.

15 Dealing with the third point, which is whether the side letter caps the underlying debt, it is quite clear that it does not. I have briefly set out the terms of the second settlement agreement. It provides for the payment of a settlement sum in clauses 3.1 to 3.4, and the release as a result of complying with that is set out in clause 3.5. The side letter says in terms that the parties had agreed to vary that settlement sum and to vary the timeframe for its payment. So the effect of the side letter is simply to substitute the settlement sum and the mechanics and timetable for payment for that in the second settlement agreement. It says the other terms of the settlement deed remain the same. It is simply the amount of the settlement sum that is varied and, if that was not paid, the remaining terms of the second settlement agreement remain the same, that is to say that the balance due under the facility agreement remains outstanding.

16 That brings me to the final substantive point that was made by Ms Delgado, which is that the default interest here is in the nature of a penalty. It is well settled that the court will not uphold penalty clauses in contracts. The court also has extensive powers, even assuming these charges are not in the nature of penalties, to strike them down under the Consumer Credit Act. I will not recite the case law on penalties or the relevant provisions of the Act here.

17 I do not have to be satisfied that Mr McEwan would obtain any relief on either basis. I just have to consider whether there is anything in this complaint that he raises. It is not in dispute, of course, that he is raising this very late in the day or that has not brought this up at any prior time but Mr Hodge says that he simply cannot make those points now because of the effect of the second settlement agreement. The second settlement agreement recites the history of the debt and states that, following service of the statutory demand in 2018 after Mr McEwan failed to meet the terms of the first settlement agreement, the petitioning creditor is entitled to present a bankruptcy petition against the Mr McEwan based on the full amount outstanding. Then it says at recital F:

> "The Borrower and the Lender have agreed to settle the Full Amount on the terms set out below."

As I have said, the "Full Amount" is defined in a sum of over £1.19 million in the interpretation section. The deed goes on to provide that, if the terms of the settlement were not complied with, the petitioning creditor was entitled to present a bankruptcy petition immediately for the full amount, less any payments made, on the basis of the statutory demand.

18 Mr Hodge has taken me to the authorities on contractual estoppel and, in particular, the case of *Bikam OOD v Adria Cable SARL* [2013] EWHC 1985 (Comm), in which Popplewell J said this at paragraph 160:

> "The plea based on contractual estoppel is, in my view, well founded. Clause 2.1 of the Net Debt Agreement provided that: "The Sellers and the Buyer hereby agree that the Net Debt Amount of the Company is BGN 45,625,990". This is a contractual agreement as to the factual position. Where parties settle in a contractual document a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and for its subsequent performance, neither party can subsequently deny the existence of the facts and matters upon which they have agreed... For such an estoppel it is not necessary to show that it would be unconscionable for a party to resile from the agreed position (see *Springwell* at [177]-[178]), but in any event I would regard it as unjust that the Sellers should be

able to resile from the express agreement reached in the Net Debt Agreement as to the amount of the net debt, which was a freely negotiated commercial compromise."

19 I raised the point with Mr Hodge as to whether there was actually a dispute as to the underlying debt here which could be said to be settled by any of these settlement agreements and Mr Hodge took me to the statement of Mr McEwan. He drew my attention to paragraphs 11 to 14 in which Mr McEwan explains that he received the statutory demand following the failure to comply with the first settlement agreement and that he was "absolutely shocked" by the sum claimed. He then sets out how that was broken down in the demand. He says that he raised these points with the petitioning creditor, which eventually resulted in the second settlement agreement. That further settlement agreement expressly states what the Full Amount due is and that the petitioning creditor shall be entitled to present a petition on it in the event of the default.

20 It is quite clear to me, on the evidence that Mr McEwan has put in, that the amount of the sum due under the facility agreement was an issue to which he was alive. He was surprised by the claimed amount and doubted that he owed such a large sum, which was said to comprise both a large principal amount and a large sum of default interest. Yet to compromise that dispute, he entered into a further settlement agreement reciting an agreed sum for the underlying debt due. In my judgment he is now estopped from now disputing the amount of the debt, at least to the extent of £1.19 million, less the £68,000 that he has paid. Moreover, I consider that the effect of the second settlement agreement is to go further because it was entered into following receipt of the statutory demand, which sets out the principal and the default interest. It seems to me that, in agreeing that sum, the parties have settled on an ongoing basis how the debt is to accrue and be calculated, both as to principal and ongoing interest.

21 I do not have to consider the penalty or Consumer Credit Act points further, because, in my view, those matters are settled. This debt has been due for a very long time, agreements have been entered into as to the amount and it is not open to the debtor now to dispute the underlying debt.

22 That being so, it seems to me that there is no genuine or serious dispute as to the underlying debt, which means that the question now is whether I should make a bankruptcy order today or give Mr McEwan time to pay the debt, in which case I have to be satisfied that there is a reasonable prospect of paying the debt in a reasonable time.

L A T E R

23 I have to say that I do not think that Mr McEwan has done himself any favours in the repeated breaches of the settlement agreements that he has entered into but I think Ms Delgado is right that I can be satisfied that there is sufficient prospect of payment within a reasonable time to allow an adjournment. She is right that this the first substantive hearing of the petition because, thus far, the matter has been focused on the question of whether the debt is genuinely dispute, but there is quite a reasonable indication that Mr McEwan is a man of substance and that the debt can have some prospect of being paid within a reasonable time. I think I need to give him the opportunity to put matters in hand and show that this debt is going to be paid.

24 So I will adjourn the petition into the general bankruptcy list on the first open list in 21 days. I cannot give a fixed date now, because I do not know what the list is like, but it will be 21 days or as soon thereafter as it can be put into the general bankruptcy list.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***

Official Court Reporters and Audio Transcribers

5 New Street Square, London, EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

civil@opus2.digital

** This transcript has been approved by the Judge