

A BANKING DISPUTE (NUMBER 1)

The Bank claimed against George (i) on his director's personal guarantee (limited to a certain sum) for his company's borrowings, (ii) on his (unlimited) liabilities for partnership borrowing (iii) on his liabilities for personal borrowing. All were validly secured by a second charge over George's house, the equity in which was by this time inadequate to meet all the Bank's (valid) claims. The personal guarantee was given in support of a Company debenture.

No formal legal transfer of partnership assets and liabilities to the Company ever took place, and the partnership overdraft at the Bank was not transferred to the Company. The partnership loan was always intended by the Bank to stay outside the Company, as the Bank refused to allow the Company Balance Sheet to be saddled with the total partnership debt to the Bank.

The Company was now in liquidation, and because (through a sequence of misadventures) the Bank's company debt in the liquidation was only £1000, it was forced to claim its enormous personal debt from George (i.e. partnership and personal borrowings) by claiming all the equity in his house after the Building Society mortgage.

If the partnership overdraft had been transferred to the Company, the Bank would have had priority on company assets by virtue of its debenture, and the very large amount of debtors subsequently recovered by the liquidators would have gone to reducing the Bank debt further and not (as now) been allocated to the other creditors. If the Bank debt had been reduced as expected, the claim against the equity in the house would have been very much lower.

A counterclaim was being made by George that the amount of the Bank's claim should be limited to the sum that ought to have been owed to the Bank, had the partnership overdraft been transferred to the Company. This required a fair amount of speculative assessment and the mediator invited the parties to agree on certain assumptions to keep the process moving. This was agreed, but not without difficulty .

Accompanying George at the mediation was his wife Mildred and her solicitor. Enquiry by the solicitor - mediator revealed that George's former business partner was Gracie (wife No 2, and now bankrupt). Mildred was wife No 3 and had not only paid the entire (very large) deposit for George's house but had put all the balance of her savings into her husband's company as a loan, (now lost). This was a complete shock to the mediator, in that he had no idea that there was a matrimonial dimension to the Bank's claim. The Bank were vaguely aware that there was an issue but believed that it was not particularly material to the repossession claim.

When she was asked by the Bank to sign her consent to the second mortgage, she prudently took independent legal advice. She required that there be a full Company Debenture in place before signing her consent (and it was), believing that this debenture would cover most (if not all) of the Company debt, and that George's personal guarantee and the second charge on the matrimonial home (as a back-up) would be unlikely to be called upon. The Bank and George agreed that this would have been correct, if George had completed a formal legal transfer of assets from the partnership to the Company, (as he thought, and said to her that he had) and if the partnership overdraft had been transferred to the Company (which Mildred did not know about, because she was not involved with the Company and was given no access to the Bank Statements etc).

Mildred was now shocked to learn that the Company paperwork was incomplete, both internally and at the Bank. Thus the Bank was entitled to sell the house over the heads of herself and her two children by a previous marriage.

The solicitor-mediator also noted that "hell hath no fury like a woman scorned". George had recently moved out and was living a long way away at an undisclosed address. He had no money to service the Building Society mortgage for several months now or pay Mildred maintenance. He had no capital, no assets - only income from a new job as commercial agent which would take time to filter through. So Mildred had lost her husband, her savings and was about to become homeless and penniless.

Mildred's alternatives, she came to recognise were: -

- (1) eviction, no house, no deposit and penury or
- (2) negotiate the best she could for a slice of the equity and (possibly) the chance to stay in her own home.

Three different agendas were fast developing :-

Bank

- (1) Recover as much total debt as realistically possible.
- (2) Recognise that execution of its procedures had been less than perfect.
- (3) Show George that the responsibility for the inadequate paperwork was largely his fault. After all, all he produced to the Bank was a statement of partnership closing balances and opening company balances. He never effected a legal transfer of the assets and only agreed a facility letter many months later.
- (4) No publicity.

George

- (1) Negotiate as much of the equity in the house as possible.
- (2) Negotiate the basis of a matrimonial settlement with Mildred.
- (3) Try to package a write-off by the Bank of as much debt as he could negotiate away.
- (4) Vent his feelings against the Bank and show it that the responsibility for the inadequate paperwork was entirely the Bank's fault. After all, the Bank saw the opening/closing balances, and should have told him it needed to see a formal transfer of assets and agree a facility letter before the partnership overdraft could pass across.
- (5) Avoid bankruptcy

Mildred

- (1) Persuade George to allocate to her all and any part of the equity that he might negotiate from the Bank, as the basis for a matrimonial settlement.
- (2) Keep the house free of any future claim by the Bank.
- (3) Avoid personal financial disaster and homelessness.
- (4) Vent her feelings against George.

The solicitor-mediator first established with the Bank that it was prepared to consider giving Mildred (but not George) a small slice of the equity in George's house. The solicitor-mediator then kept George and Mildred together in private meetings, as they had an identity of interest in maximising the slice of the equity and each could contribute jointly to discussions

The solicitor-mediator concentrated first on the house equity, as (subject to assumptions) it was ascertainable, and it was the only asset that George had.

After much shuttle-diplomacy over several hours then Bank conceded that it would take a fixed sum within four months after the mediation, representing two-thirds of the equity plus a slice of super-profit (50/50) if the house was sold within 2 years of the mediation over a certain price.

Mildred recognised that this kept two options open to her:- (1) sell the house knowing an identifiable surplus could be used for a deposit, or (2) raise a loan to pay the Bank its fixed sum, keep the house for over 2 years, and avoid the Building Society's early repayment penalties, estate agency sale commission, stamp duty on a purchase, and removal costs. She agreed to this as the best (and only) choice on the table. Because of all this, the Bank could keep a higher sum of the equity, and both were winners.

George was still venting his feelings against the Bank, but came to recognise that Mildred's decision formed the basis of a matrimonial settlement, on her terms at no cost to him.

The solicitor-mediator now turned to the massive balance of personal and partnership debt owed by George to the Bank, which was not minded to let George off lightly.

More shuttle-diplomacy showed the Bank's growing recognition that you cannot get "blood from a stone" but George was compelled to recognise his position. The Bank settled at requiring George to pay a one-off lump sum debt (a fraction of the total debt) within four months after the mediation or double that over 5 years interest-free. The Bank agreed that if Mildred met her obligations and George did not, the Bank would not go against Mildred's house.

Mildred's solicitor then reminded George that George's financial position was still very unhealthy. To make the transfer of the house to Mildred "bomb-proof" against a possible Trustee in bankruptcy of George, would George concur in all reasonable documentation, court orders etc? George agreed.

All parties agreed to a confidentiality clause, keeping the facts out of the glare of publicity. Through mediation, the parties reached on the day an agreement outside the adversarial nature of the court process. The settlement achieved was not "popular" with anyone, but the best available, bearing in mind the wildly different agendas of the parties.