

## **Mahon-v-FBN Bank (UK) Ltd ( 6 June 2011).**

**The Message:** Banks may face difficulties enforcing personal guarantees.

**The Case:** A husband and wife sought to rely on failings by their Bank to set aside statutory demands to recover sums claimed under personal guarantees Mr Mahon is a residential property developer who conducted his business through a company called Criccieth Homes Limited. He was the sole Director of this company and his wife was the Secretary and sole shareholder.

Mrs Mahon played no part in the management or administration of the company. She looked after the couple's 3 children and also worked from home as a cake baker and decorator. She was joint owner of the family home which was worth about £450,000 in early 2008.

In 2007, Mr Mahon approached various banks to obtain further funding and he claimed he chose to place his business with FBN because they represented they were experienced in the field and interested in funding residential and commercial development projects.

FBN made loans to the company and they obtained personal guarantees to further secure their lending. They dealt with Mr Mahon throughout and never sought to write separately to Mrs Mahon. Their solicitors sent the documents for execution to the company's solicitors and confirmed they required confirmation that the solicitors had explained the meaning and effect of the guarantees to the Mahons.

According to Mrs Mahon, she never received any truly independent advice. Her husband drove her on a 500 mile round trip to meet the solicitors and she only spent 5 minutes with them with her husband present at all times. She claimed she felt she had no option but to sign the documentation put in front of her.

In June 2008, Mr Mahon approached FBN for financing for a further project but the person he had previously dealt with had left and they declined on the basis of lack of experience of the sort of financing that was needed.

Subsequently, the company defaulted and FBN claimed under the guarantees. On 9 October 2009, as the necessary prelude to taking bankruptcy proceedings, it served statutory demands on the Mahons claiming £1,269,000 prior to giving credit for the properties charged to it.

Both of the Mahons sought to set aside the statutory demands. Mrs Mahon did so on the basis she had acted under the influence of her husband and not been properly advised. Mr Mahon did so on the basis that the properties were worth more than the debt and FBN had misrepresented its experience and willingness to lend so that he had transferred his banking relationship to them and suffered loss as a result.

A Court can set aside a statutory demand if it is satisfied that there is a substantial dispute over the debt or there is a cross-claim that exceeds it or there is sufficient security for it.

It was made clear in RBS-v-Etridge (2001) that a Bank is put on enquiry that there may be undue influence by a husband where a wife stands surety when she is not actively involved in the business and plays no part in the loan arrangements. In those

circumstances, a bank has to take appropriate steps to make sure the wife understands what she is being asked to do and has received independent legal advice. It should meet separately with the wife to warn her of the risks she will be undertaking.

FBN argued it could rely on the fact Mrs Mahon was the company secretary and sole shareholder and that the onus was on her to prove she had been subjected to undue influence. However, the Court noted that neither FBN nor its solicitors took steps to ensure that the requirements as set out in the Etridge case had been met and, in particular, did not check that Mrs Mahon had been separately advised and had received a full explanation of the transaction and the serious consequences that could result from guaranteeing a loan facility.

The Court held that there was a genuine dispute as to the validity of Mrs Mahon's guarantee as it would be ineffective if she had acted under undue influence and it therefore set aside the statutory demand against her. It also set aside the demand against Mr Mahon because there was also a genuine dispute as to whether the Bank had made misrepresentations to him to secure his custom, as well as issues as to the rate of interest charged and whether the properties charged to the Bank may cover the debt.

Accordingly, FBN will now have to pursue Court, rather than insolvency, proceedings to try to make any recovery against the Mahons and it would appear that Mrs Mahon, at least, has a strong defence. Clearly, solicitors acting for lenders and for guarantors need to ensure they advise properly so that guarantees are understood and enforceable.