Neutral Citation No: [2017] NICh 29 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* BUR10506 *Delivered:* 15/12/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

2017/18542

BETWEEN:

EILLEEN O'CALLAGHAN

Appellant

-and-

CLIPPER HOLDING II SARL

First-named Respondent

THE OFFICIAL RECEIVER FOR NORTHERN IRELAND

Second-named Respondent

HENRY ANTHONY SINNERS AND NICHOLAS MYERS OF SMYTH & WILLIAMSON LLP

Third-named Respondent

BURGESS J

[1] These are two appeals from the Bankruptcy Master, namely:-

(a) The making of a Bankruptcy Order on 31 March 2017 ('the Order') in respect of the Appellant; and

(b) The refusal of the Master to annul or rescind the Order.

[2] The Appellant first served a Notice of Appeal of the Bankruptcy Order, but subsequently, by application dated 30 May 2017, she applied for the following relief, inter-alia:

(a) To annul the Order pursuant to Article 256 of the Insolvency (Northern Ireland) Order 1989 ('the 1989 Order') on the basis that the Order should have been made: or

(b) That the court should rescind the Order under Article 371 of the 1989 Order.

[3] On 17 January 2017 the First-named Respondent served a Statutory Demand on the Appellant claiming the aggregate sum of £509,786.59, being monies claimed as due under a Guarantee and Indemnity dated 28 May 2013 ('the Guarantee'), and also pursuant to a global Deed of Transfer dated 29 January 2016 made between the original lender (AIB Group (UK) Plc) and the Appellant, together with interest. The Guarantee was to secure funds to be advanced or provided to Cloghogue Enterprises Limited ('the Company').

[4] The Secondnamed Respondent is the Official Receiver for Northern Ireland, and the Third-named Respondents have been appointed as the Trustee in Bankruptcy of the Appellant.

[5] The 'first' appeal was adjourned pending the annulment/recession application, the reason being that, if the latter was successful, the appeal would be otiose. The application was heard by the Master, who refused to annul or rescind the Order. The Appellant then appeals that decision and therefore the two appeals are now listed, although the matters and issue overlap.

[6] The central issue in this appeal is whether the court, even at this late stage of the proceedings, has the power to revisit the basis of the debt supporting the Statutory Demand if so, what is the test to be applied and whether the Appellant has satisfied the court that she meets any such test.

[7] I have read the considered judgement of Master Kelly which records accurately the history of this matter, including the inactivity at different stages of the proceedings on the part of the Appellant. Nevertheless, while that aspect of the background may inform the answer to whether the Appellant has satisfied any test, the legal position remains that by Article 256(1)(a) and Article 371 of the 1989 Order, a bankruptcy order may be annulled if it at any time appears that on any grounds existing at the time the Order was made, the Order ought not to have been made

[8] The logic of Article 256(1)(a) is therefore clear. If the debt supporting a Statutory Demand was not owed, then a bankruptcy order made on foot of that Statutory Demand ought not to be made. The very essence of the insolvency legislation in relation to the bankrupting of any person must surely be that money is owed to the petitioning creditor. I accept of course that there remains discretion on the part of the court to refuse annulment even if a party establishes a prima facie case for relief. However, in circumstances where the underlying, underpinning debt to the alleged act of bankruptcy is amenable to challenge, to refuse relief in those circumstances would not only not uphold the integrity of the insolvency regime and

the underpinning principles, it would militate directly against that very integrity and those principles.

[9] I am grateful to counsel for their comprehensive Skeleton Arguments. I believe that the approach of the court to answer the first of the above to questions is agreed by them and I adopt their approach.

[10] In Guinan III v Caldwell Associates Ltd [2004] EWHC 3348 (Ch), Neuberger J stated:

> "16. I turn then to what at least to my mind is the central point in this case, which is whether or not Mr Caldwell has an arguable case. In this connection it is I think, common ground, and consistent with what was said by Laddie J in paragraph 60 of his judgement in Everard v The Society of Lloyd's [2003] EWHC 1890 [2003] BPIR 1286, that The court's assessment of the seriousness of the challenge should not differ from one stage to the other.
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> In other words, if there is what he called 'a genuine triable issue' then, whether it is raised at the statutory demand stage, the petition stage or the annulment stage, it is an equally valid point. However, as I mentioned, that is not an end of the matter in this case, because, even if there is a genuine triable issue, that does not automatically mean that I should annul the bankruptcy: I still have a discretion. But, subject to that, as I think Mr De La Rosa, albeit sub silentio, all but accepted, the test is the same: is there a genuine dispute?"

[11] Rule 6.005(4)(b) of the Insolvency Rules provides that a Statutory Demand may be set aside where the debt is disputed upon grounds which appear to the court to be 'substantial'. A debtor should not be a worse position than a party seeking to set aside a judgment or seeking to avoid summary judgment. In Allen v Burke Construction Ltd [2010] NI Ch 9, Deeny J stated:

> "The court is not holding a full trial of the matter: it must only decide if the grounds appeared to be substantial. They must be genuine. The grounds of the dispute do not consist of some ingenious pretext invented to deprive a creditor of his just entitlement. It must not be a mere quibble."

[12] Therefore, I can derive from the above first, that even at this late stage the Court has the power to allow a debtor to challenge a statutory demand, and secondly that the approach to a decision to allow any such challenge in any

particular case is that the court should decide whether the debtor has shown grounds for a 'substantial dispute', and that the approach to that question should be that which is adopted in circumstances where a debtor is seeking to set aside a judgement or seeking to avoid summary judgement.

[13] At paragraphs [8]–[19] inclusive of her judgement, the Master sets out the factual background to this matter and I do not require to rehearse it. The nub of this argument arises from the Guarantee entered into by the Appellant to secure an offer of finance from her then bank to the Company ('the new facility'), the amount being offered being made up of the renewal of a previous facility and the offer of an additional amount (Facility 6) which was earmarked for a particular purpose. The Guarantee did not exist in respect of the previous facility. It does appear there was provision for a previous guarantee to be provided by the Appellant in previous facility offers, but in different terms to the Guarantee. This previous provision was not replicated in the bank's requirement for the new facility. I enquired as to the status of the previous guarantee as a potential matter to be considered by me in terms of the contractual conditions of the new facility, which are in dispute. I note that counsel for the Appellant disputes any role for this previous guarantee. With respect I do not agree, but in the event I am advised it was never required by the bank to be completed.

[14] The argument on behalf of the Appellant is that the additional, earmarked, funds were never drawn down and that therefore the Guarantee falls away. In those circumstances there would be no personal liability of the Appellant to the bank in order to support the amount claimed under the Statutory Demand. The counter-argument is that the Guarantee was to support the whole of the funds provided for in the new facility, and that the amount due by the Company was secured by the Guarantee to the extent provided.

[15] Any distinction between the funds to be the subject of the Guarantee is not set out in the accepted Facility Letter, signed by the Appellant with the legal advice, which was confirmed in writing in the acceptance of the Facility Letter. The Appellant however says it was an explicit agreement with the bank official, a Mr Stack, that there was a specific link between the Guarantee and the additional, earmarked funds.

[16] There is no doubt that the Appellant has not been assisted by her failure to engage with the legal process from the start (that is the service of the Statutory Demand) up to the making of the Order. It is also a fact that the present argument was not put forward at the earliest time. This is referred to by the Master in paragraph [20] of her judgement. In her assessment of whether or not there were grounds to establish that there was a substantial dispute which should be considered, she referred to the Appellant's 'conduct and lack of candour' in a different case; that she was an intelligent woman who understood business affairs; and also a lack of evidence to support her proposition.

[17] Undoubtedly some of these factors are relevant for the court's consideration, the one exception being the court's hesitation as to the role of the Appellant's conduct in a different matter altogether. However I have come to a different conclusion to that of the Master and I can set out my reasons in brief form namely:

- There has been no examination of the background to the negotiation of the new facility. Given the present stage of these proceedings there has been no discovery of documents such as documents in the possession of the bank recording discussions in relation to the facility; any recommendations of Mr Stark to his line manager: notes of any relevant Credit Committee in its consideration of any such recommendation and/or any enquiries that may have been made before the new facility was offered: no clarification that may have been sought from the Appellant; or indeed any records of the Company to whom the facility was offered and by whom it was accepted.

- If the Appellant is right, that there was a link between the Guarantee and the additional Facility 6, and the fact that the funds under Facility 6 were not advanced, the court would require to consider (a) whether there was a misrepresentation: and/or (b) what was the consideration for granting the Guarantee to secure the entirety of the new facility?

- The responses, or lack of responses, on the part of the Appellant can certainly be taken into account in considering her assertions, but I do not accept that without more they remove entirely any argument as to whether there is an arguable case. Rather they go to the weight of her evidence rather than, at this stage, undermine her assertions in terms of a genuine argument. It should be remembered that it is a precondition to the exercise of the court's power that the issue being advanced was in existence at the time that the Statutory Demand was made, yet was not made.

- Facility 6 was a new provision, as was the requirement for the provision of the Guarantee in new terms to any that might have been required beforehand, as is the fact that Facility 6 was never advanced. That factual matrix is not in dispute. What is in dispute is the correlation, if any, between the Guarantee and Facility 6. That appears to this court to be an area of genuine consideration and should be the subject of proper examination with the benefit of all evidence.

[18] Having reached this conclusion I will hear submissions from counsel for both parties as to the next step and the context in which that examination should take place, namely whether the court should proceed to annulment under which the matter would return to the stage before the petition was presented or in the context of the bankruptcy proceedings.