CENTRE DE DROIT
BANCAIRE ET FINANCIER

Bank Failure

Fraudulent intent and its recognizability

Par Yannick Caballero Cuevas le 5 September 2022

In a ruling 5A_13/2022, the Swiss Federal Supreme Court examines whether the beneficiary of claims asserted – in the context of a bank bankruptcy – could or should have recognized the bank's fraudulent intent under art. 288 LP.

Anne is a client of Banque Privée Espírito Santo (Suisse) SA, based in the canton of Vaud. This establishment is part of the Espírito Santo group, of which Anne's family is a founding member.

In the course of 2014, one of the Group's Luxembourg-based companies experienced financial difficulties that could have a significant impact on the private bank, due to its customers' exposure to products issued by this company. These financial difficulties were reported in various press articles.

On July 21, 2014, the bank accepted an offer from a third-party company to take over part of its customer base. The following day, it decides on its voluntary liquidation, which is registered on July 28, 2014 in the Commercial Register of the Canton of Vaud. Anne is informed of the transfer of her banking relationship to the third-party company. Subsequently, FINMA withdraws the bank's authorizations and declares it bankrupt.

From January 1, 2014 to September 19, 2014, Anne makes several transfers to various recipients and to one of her accounts held with another bank, as well as cash conversions.

Anne passed away in 2017. On January 31, 2018, the members of the heirship open a claim action (art. 20 al. 3 OIB-FINMA) before the Chambre patrimoniale du canton de Vaud. They claim that the assets deposited in the late Anne's account and the cash derived from these assets should be separated from the bank's bankrupt estate. The bankrupt estate raises the revocatory exception in respect of cash transfers and conversions into segregable securities made between January 1 and September 19, 2014. At a hearing, Marc, Anne's son and a director of the Luxembourg company from November 1994 to July 2014, stated that his mother had no direct personal contact with the group's senior executives on business matters, but that she might bump into them at events. He adds that she had always had confidence in the family and in the way they conducted business. Subsequently, the Chambre patrimoniale accepted the exception of revocation within the meaning of art. 288 LP and dismissed the claim insofar as the value of the heirs' claims was lower than that of the revocable deeds.

The heirs appealed against this judgment to the Civil Court of Appeal of the Vaud Cantonal

Court, which dismissed the appeal. They then lodged an appeal in civil matters against this ruling, complaining of a violation of art. 288 al. 1 and 2 LP and of arbitrariness in establishing the facts.

Art. 288 para. 1 LP allows the revocation of fraudulent acts by the debtor towards his creditors. In order to do so, the beneficiaries of such acts must have been aware of the debtor's fraudulent intent, or have been able to or should have been able to recognize this intent by exercising the care required by the circumstances. The Federal Supreme Court points out that the recognizability of fraudulent intent should not be accepted too readily. In fact, the duty to inform only applies in the presence of clear indications.

Although it is up to the claimant to prove the facts on which the grounds for revocation and the recognizability of fraudulent intent are based, art. 288 para. 2 LP provides for a reversal of the burden of proof for beneficiary creditors close to the debtor. The question of knowledge of fraudulent intent is a question of fact, while the question of its recognizability is a question of law.

In the case in point, the Federal Court noted that the bankrupt's fraudulent intent at the time of the transfers of funds and conversions of cash into securities on behalf of the beneficiary was not disputed. As of April 14, 2014, the bank's financial position was seriously compromised, given the group's serious financial problems.

The Federal Court goes on to analyze the question of whether Anne could or should have recognized the intent to commit fraud, and whether she actually knew of this intent. It also specifies that the relevant fact is whether the information about the group's debacle was known and accessible, and not whether Anne had actually taken cognizance of the press articles.

According to the assessment of the first judges – confirmed by the Cantonal Court – Anne could and should have known about the financial difficulties faced by the group and the bank. As early as July 23, 2014, she was aware of this situation, given the transfer order for EUR 1,200,000 made the day after the publication of a press article announcing that the Group's crisis was affecting Switzerland, and the letters from the bank informing her of the transfer of her banking relationship to a third-party company. In addition, she could and should have been aware of the bank's financial situation by virtue of the press articles and her family ties with the bank's directors.

Accordingly, the Federal Court rejected the claim of arbitrariness and dismissed the appeal.

This ruling highlights the creditor's heightened duty to inform in the event of the bankruptcy of a relative or close associate. Art. 288 para. 2 LP presents the creditor with a delicate choice : either he does not make inquiries, or he does. The first choice exposes him to the grievance that he could and should have recognized this intention without having the evidence to overturn the legal presumption. The second choice may enable the creditor to prove that he could not have recognized the fraudulent intent, or, conversely, that he did in fact know of it.