CENTRE DE DROIT
BANCAIRE ET FINANCIER

Attachment of the bank against the guarantor of a loan

(High) requirements relating to the plausibility of the ownership of the attached assets

Par Romain Dupuis le 14 April 2025

In a recent judgement, the Federal Court rejected a bank's appeal against a judgement of the Vaud Cantonal Court refusing to order the seizure of real estate belonging to the debtor's ex-wife (judgement 5A_754/2024 of 18 February 2025).

Although the judgement in question mainly concerns matters of enforcement, in particular in relation to the degree of likelihood that the creditor must achieve in order to obtain a sequestration, this case is a telling example of the difficulties that a creditor bank may face in the recovery of personal guarantees.

Under the terms of a contract dated 25 December 2014, a bank granted company E a loan for a maximum amount of USD 11 million, to be paid in several instalments, each giving rise to a 'supplementary agreement' forming part of the basic contract.

The following day, B, a wealthy Russian businessman and shareholder of company E, entered into a contract with the bank under the terms of which he guaranteed repayment of the loan. His wife, from whom he has been separated since the beginning of 2014, consented to this undertaking in writing. Since the separation, the spouses have agreed that the latter will remain in the marital home in the canton of Vaud with the couple's child, while B has left Switzerland to start a new life in Russia.

In January 2016, the bank concluded the final 'supplementary agreement' with company E relating to the aforementioned loan.

One month later, B and his now ex-wife signed a divorce agreement, ratified by a judgement of 8 July 2016, which provided, in particular, for the transfer of full ownership of the buildings forming the former marital home to the ex-wife, with B undertaking to assume all the related charges. The transfer was entered in the land register on 3 June 2016.

However, B's financial situation deteriorated significantly.

Firstly, company E was unable to repay the loan granted by the bank, so the bank sued B before the High Court of Justice in London under the guarantee contract and in October 2017 obtained a judgment ordering B to pay it more than USD 12 million.

Subsequently, in November 2018, a Russian court declared B to be personally bankrupt. By a subsequent decision of 30 December 2021, the same court revoked the transfer of the properties agreed by B and his ex-wife in their divorce agreement, on the grounds that it was intended to harm B's creditors, which his ex-wife could not have been unaware of. These Russian decisions are not recognised in Switzerland.

In July 2023, on the strength of the judgement obtained in London, the bank requests – and obtains – (1) the declaration of the enforceability in Switzerland of the judgement in question, and (2) the sequestration of the properties belonging to B's ex-wife to the tune of some CHF 11 million.

The sequestration order is, however, revoked on objections lodged by B and his ex-wife, on the grounds that the bank failed to make it plausible that B was the 'real' owner of the properties for which sequestration was required. This decision is confirmed by the Vaud Cantonal Court.

On appeal by the bank, the Federal Court must rule – from the point of view of the prohibition of arbitrariness (art. 98 LTF) – on the question of whether or not the bank has made it plausible that the buildings referred to in the sequestration, registered in the land register in the name of B's ex-wife, actually belonged to B.

In essence, the Vaud Cantonal Court considered it likely that the full ownership of the properties had been transferred to B's ex-wife as part of the liquidation of the matrimonial property regime. Conversely, the bank had not made it likely that the transfer of the properties had taken place in circumstances that would have justified its revocation within the meaning of art. 285 et seq LP, making the entry in the land register inaccurate.

The Federal Supreme Court began by pointing out that, in principle, only assets that legally belong to the debtor can be sequestered, unless the creditor can make it plausible that assets in the name of third parties actually belong to the debtor. In the case of the sequestration of properties registered in the name of third parties, the creditor must make it plausible that the transfer of ownership can be revoked.

In the case in question, the Federal Court considers that the bank has not succeeded, for the following reasons in particular :

- No significant deterioration in B's financial situation between the de facto separation in 2014 and the signing of the divorce agreement in 2016 has been made plausible ;
- It is likely that the ownership of the properties was transferred to the ex-wife to settle the financial consequences of the divorce and not to harm the creditors ;
- The two Russian decisions of 2018 and 2021, which are not recognised in Switzerland, do not allow us to consider that B was over-indebted at the time of the conclusion of the divorce agreement in 2016 ;
- The temporal proximity between the payment of the last instalment of the loan and the conclusion of the divorce agreement does not call into question the finding that, at the time the divorce agreement was signed, B was in a favourable financial situation.

In our opinion, the Federal Court's requirements in terms of plausibility are particularly high in this case and are almost equivalent to strict proof, which should in principle be the subject of the claim procedure. On reading the judgement, it appears that the bank did in fact provide a

significant number of factual elements, which were, however, quickly dismissed.

In any case, this judgement clearly illustrates the risks associated with personal guarantees. A real security, for example on the disputed buildings, would probably have enabled the bank to recover the loan granted much more easily.
