Neutral Citation Number: [2010] IEHC 347

THE HIGH COURT

2009 3108 S

BETWEEN

DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK

PLAINTIFF

AND

RQB LIMITED (FORMERLY KNOWN AS REDQUARTZ BOUNDARY LIMITED),

PADDY KELLY, NIALL MCFADDEN AND PAUL PARDY

DEFENDANTS

JUDGMENT of Mr. Justice Brian McGovern delivered on the 23rd day of July, 2010

1. In these proceedings, the plaintiff (hereinafter referred to as "the Bank") seeks judgment against the third named defendant in the sum of €8,876,803.16 with contractual interest thereon on foot of a guarantee dated 23rd December, 2005, to secure monies advanced by the Bank to RQB Limited. RQB Ltd. (the first named defendant) is in liquidation and the third named defendant was a director of that company since 2005. The plaintiff provided an overdraft facility to RQB Ltd. on terms set out in a facility letter of 19th December, 2005. This facility was secured by joint and several guarantees given by the third named defendant and by Paddy Kelly (the second named defendant) and Paul Pardy (the fourth named defendant). RQB Ltd. failed to comply with the terms of the facility granted, and on 22nd July, 2009, a demand for repayment of the debt was made of the first named defendant by the Bank. The first named defendant was not in a position to repay the monies advanced and by letters of demand dated 24th July, 2009, the Bank wrote to each of the guarantors, namely, the second, third and fourth named defendants, demanding immediate repayment of the sums then due, namely, €8,563,306.30, in accordance with the terms of the guarantee.

2. In this hearing, the plaintiff seeks judgment against the third named defendant, Niall McFadden. Summary judgment has been obtained by the plaintiff against the second and fourth named defendants on 12th August, 2009, and against the first named defendant on 23rd September, 2009. On 16th October, 2009, the proceedings against the third named defendant, Niall McFadden, were adjourned for plenary hearing.

3. The second, third and fourth named defendants entered into two guarantees to secure the facilities either made available to or offered to RQB Limited. The first was a guarantee of 23rd December, 2005, and the second was a guarantee of 10th September, 2008. These proceedings are brought against the second, third and fourth named defendants on foot of the 2005 guarantee. The summary judgment already obtained against the second and fourth named defendants on 12th August, 2009, was in respect of that guarantee.

4. The third named defendant claims that if he has any personal liability for the debts of the first named defendant it is on foot of the guarantee of 10th September, 2008, as it replaced the 2005 guarantee. This is denied by the plaintiff. The issue in this case is a relatively simple one, namely, whether the plaintiff is bound under the 2005 guarantee or the 2008 guarantee. It is not disputed that he executed both guarantees and that they were proper as to their form.

5. At the conclusion of the plaintiff's case, counsel for the third named defendant informed the Court that he did not propose going into evidence. It is accepted by the parties that the principles set out in *O'Toole v. Heavey* [1993] 2 I.R. 544, apply. In this case, there do not appear to be any notices claiming contribution or indemnity, and since judgment has been obtained against the other defendants, it seems to me that the ruling in O'Toole and Heavey can be applied as though there was just one defendant. That rule is as follows:

> *"If, upon a applying for a non-suit at the conclusion of the plaintiff's case, in a case where one defendant only has been sued, it is indicated that the defendant does not intend, if the application is refused, to go into evidence, then, in effect, the learned trial judge is being asked to determine the following question, which is: having regard to his view of the evidence of the plaintiff, whether the plaintiff has (that being the only evidence before him) established as a matter of probability the facts necessary to support a verdict in his favour. Unless he is so satisfied, he must dismiss the action; if he is so satisfied, it appears to me that he must give judgment for the plaintiff."*

Expressed in simple terms, what this means is that I have to decide whether the plaintiff has established, at the conclusion of its Case, on the balance of probability, that the third named defendant is bound by the 2005 guarantee.

Background

6. On 19th December, 2005, the plaintiff Bank issued an overdraft facility to the first named defendant ("RQB") offering the company an overdraft facility in the sum of €12m. for the purpose of assisting with the acquisition of properties and other investments, pending the injection of investor equity. The offer contained in the facility letter was subject to the acceptance of same by RQB and to compliance with the terms and conditions set out therein. The facility letter, at clause 7 thereof, provided for security and stated:

> *"The overdraft facility will be secured by;*
>
> > *(a) Joint & Several Guarantees of €12,000,000 (Twelve million Euro) from Patrick Kelly, Niall McFadden and Paul Pardy.*
>
> *Any security held now or at any future time shall be security for all the Borrowers' liabilities to the bank (actual or contingent and whether as principal or surety)."*

The terms of the offer in the facility letter were accepted by RQB and monies were drawn down against the facility. At the time of the letter of demand, dated 11th June, 2009, the outstanding liability of RQB was €8,521,006.62.

7. The 2005 facility was repayable on demand and subject to review on 21st December, 2006. At the end of 2006, the Bank had discussions with RQB and it was agreed to continue the 2005 facility on the understanding that it was repayable on demand.

8. In the early summer of 2008, RQB requested that the Bank would restructure the 2005 facility and discussions took place between the parties. On 10th June, 2008, Mr. Kenneth Dobson, Head of Corporate Banking Ireland, for the plaintiff, sent an email to Mark Buckley of the first named defendant, setting out in broad terms the way in which they were prepared to restructure the facility.

9. The restructuring of the facility involved the creation of a €2m overdraft available until 30th June, 2009, to fund business restructuring costs and a loan of €8m to restructure existing borrowings for a three-year term, expiring on 30th June, 2011. The security was stated in the email to be:

> *"Continuation of existing Joint and Several Personal Guarantee of shareholders (N. McF., P.K. and P.P.) - the bank will, however, agree to review these on an annual basis, and without commitment, consider a reduction in exposure and/or cancellation of same.*
>
> *Floating charge over assets of RQB (this is a new security)."*

10. Other matters were referred to in the email, including the provision of up to date Personal Assets Statements of the guarantors, financial covenants concerning minimum net worth and the provision of appropriate financial information.

11. Two facility letters were issued by the Bank on 7th July, 2008, in respect of a €2m overdraft and an €8m loan, but the matter was not brought to a conclusion because of objections by the fourth named defendant, Mr. Pardy, who was reducing his involvement with the first named defendant and was not willing to sign an acknowledgement that the guarantors would be bound by the 2005 guarantees in respect of such new facility.

12. Further facility letters were issued on 7th August, 2008, but, again, no agreement was concluded.

13. On 4th September, 2008, the plaintiff offered the first named defendant a loan facility of €8m and an overdraft facility of €2m, subject to the terms and conditions contained in the facility letter. The loan facility was to be secured by a Joint and Several Guarantee in the amount of €8m from the second, third and fourth named defendants, and a First Fixed and Floating Charge over assets and undertakings of the company. Clause 8 of the proposed loan facility contained *conditions precedent* and provided:

> *"Prior to utilisation of the facilities referred to at clause one above, the Bank is to be provided with Personal Asset Statements of the Guarantor. Such Personal Asset Statements are to be satisfactory to the Bank."*

Clause 11 provided that the offer was to remain open until 30th September, 2008, and would be subject to renegotiation if acceptance was not received by that date. Clause 12 provided that the facilities would be made available on completion of the security arrangements and on compliance with the provisions of clause 11 and would be subject to renegotiation if utilisation had not commenced by 30th September, 2008. The letter was stated to be supplemental to the bank's letter of the same date in respect of the overdraft facility.

14. The overdraft facility of €2m was to be secured by Joint and Several Guarantees in that amount from the second and third named defendants (but not the fourth named defendant) and by a First Fixed and Floating Charge over the assets and undertakings of the company.

15. Clause 11 of the overdraft facility set out *conditions precedent* and provided that prior to utilisation of the facilities, the bank was to be provided with Personal Asset Statements of the guarantors and these had to be satisfactory the bank. Clause 13 provided that the offer would remain open until 30th September, 2008, and would be subject to renegotiation if acceptance was not received by that date. Clause 14 provided that the facilities would be made available on completion of the security arrangements and on compliance with the provisions of clause 11 and would be subject to renegotiation if utilisation had not commenced by 30th September, 2008.

16. The evidence establishes that it was intended that the 2008 guarantee would replace the 2005 guarantee. There was no controversy about this. The 2008 guarantee was signed on 10th September, 2008, by the second and third named defendants in respect of the overdraft of €2m and the second, third and fourth named defendants in respect of the €8m loan. Both were typed documents presented by the bank for the signature of the guarantors. The guarantee in respect of the overdraft contained, at the beginning, a manuscript addition which read as follows:

> *"This guarantee and the guarantee of €8m dated today, replaced the guarantee on the original RQB Ltd. liabilities dated 2005, as amended."*

It was initialled by the third named defendant. There was also a manuscript entry at the end of the agreement and before the signature section. This was also initialled by the third named defendant and read as follows:

> *"The bank shall have no recourse hereunder to the family homes of Niall McFadden and Patrick (Paddy) Kelly (within the meaning of the Family Home Protection Act 1976 (as amended from time to time)."*

17. On the loan guarantee of the same date, there is a manuscript entry at the commencement of the document initialled by the third named defendant which states:

> *"This guarantee and the associated guarantee of €2m replaced the guarantee on the original RQB Ltd. facilities dated 2005 as amended."*

At the end of the document and before the signatures, the following words appear in manuscript:

> *"The bank shall have no recourse hereunder to the family homes of Niall McFadden, Patrick (Paddy) Kelly and Paul Pardy (within the meaning of the Family Home Protection Act 1976, as amended from time to time)."*

That is initialled by the third and fourth named defendants.

18. In the course of his evidence, Mr. Kenneth Dobson referred to a telephone conversation which he had with Mr. Declan Cassidy, a director of RQB, on 10th September, 2008. In the course of that telephone conversation, he admits that he agreed that the manuscript amendments could be made. He even went so far as to admit that he agreed the amendments *"word for word"* with Mr. Cassidy. He also agreed that by 20th October, 2008, the only outstanding issue was with the second named defendant, Mr. Paddy Kelly, who had not provided a Personal Asset Statement and also had defaulted on obligations to the bank. He agreed that if the issue involving the second named defendant was resolved, they would draw down the facilities.

19. The facilities offered in the letter of 4th September, 2008, were accepted by the first named defendant some time after 10th September, 2008, and, apparently, before 30th September, 2008, which was the date up to which the offer remained open. The facilities were not drawn down or utilised by 30th September, 2008, and the plaintiff argues that this meant the provision of facilities would have to be renegotiated, as provided for in clause 14 of the facility letter. The plaintiff argues that the restructuring was not complete for that reason, and also on account of some outstanding security issues to be resolved by the second named defendant, Mr. Kelly.

20. In defending this action, the third named defendant maintains that everything that needed to be done had been done and there was no impediment to a drawdown of the facilities taking place under the September 2008 offer. When Mr. Dobson gave evidence of his telephone conversation with Mr. Declan Cassidy on 10th September, 2008, he stated that Mr. Cassidy informed him that he wanted two amendments put into the guarantees; one relating to the family home and one relating to the discharge of the 2005 guarantee. According to Mr. Dobson, Mr. Cassidy advised him that the third named defendant did not want to have two guarantees concurrent and:

> *". . . wanted to be absolutely sure that the 2008 guarantee would replace the 2005 guarantee <u>when the restructure was completed</u>." (Underlining added)*

(Transcript 2, page 9)

He was pressed on this in cross-examination. Counsel referred him to his affidavit sworn on 8th September, 2009, in which he stated at paragraph 16;

> *"I say that it was at all times understood that the new guarantees would only replace the existing guarantee if and when the Proposed Facilities were drawn down."*

In evidence, Mr. Dobson said he believed that was the gist of the discussion that took place, although he could not specifically recall it. In his witness statement, he said:

> *"On or about 10th September, 2008, Mr. Declan Cassidy, a director of RQB Ltd., telephoned me requesting that these amendments be made to the guarantee. I was willing to agree the insertions on the basis that the Proposed Guarantees would replace the 2005 Guarantee only when the Proposed Facilities were utilised."*

Although this version of events was challenged by the third named defendant, he did not give evidence. Therefore, a great deal depends on whether or not I accept the evidence of Mr. Dobson in that regard. Although the third named defendant was not a party to this conversation, Mr. Cassidy was never called in evidence to challenge Mr. Dobson's account.

21. Under the terms of the 2008 facility, the first named defendant was required to create a floating charge. This was done, and although there was some initial problem about its execution, it appears to have been duly executed and registered. No clear evidence was given as to the date of its registration and no record from the Companies Registration Office was produced. The third named defendant claims that the plaintiff is relying on the floating charge and that that, of itself, is evidence of the fact that the 2008 guarantee supplanted the 2005 document. The bank, for its part, claims that it is merely keeping its options open.

22. I accept that the plaintiff is keeping its options open with regard to the floating charge. But that does not, in my view, conclusively determine the issue as to whether or not the 2008 guarantee applied and supplanted the 2005 guarantee.

23. I accept the evidence of Mr. Kenneth Dobson that, after the 2008 guarantees were signed, the only issue to be resolved was the Personal Asset Statement from the second named defendant and, if this matter had been put right, a drawdown would have taken place. Mr. Dobson, in his evidence, said that it was only when the plaintiff started to arrange a drawdown that they realised there was a problem with one of the guarantors, namely, the second named defendant. In any case, no drawdown took place.

The law

24. The law on the principles of construction of commercial documents is well settled in this jurisdiction. The Irish courts have adopted the principles set out by Lord Wilberforce in *Reardon Smith Line Limited v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989. At p. 995, he said:

> *"No contracts are made in vacuum. There is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but the phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this, in turn, presupposes a knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."*

He went on to say, at p. 997:

> *". . . what the court must do, it must be to place itself in thought in the same factual matrix as that in which the parties were."*

25. In *Igote Limited v. Badsey Limited* [2001] 4 I.R. 511, the Supreme Court adopted, with approval, those comments of Lord Wilberforce. At p. 515, Murphy J. stated:

> *"The dangers involved in exploring the background or surrounding circumstances to a document under construction and the limitations which must be placed upon the factual matrix rule were referred to in Plumb Brothers v. Dolmac (Agriculture) Limited [1984] 271 E.G. 373 by May L.J. when he stated at p. 374:*

> *'There has grown up a tendency to speak about construing documents in or against what is described as the 'factual matrix' in which the contract or documents first saw the light of day. In truth, that is only, I think, a modern way of saying what has always been a rule for a long time that, in construing a document, one must look at all of the circumstances surrounding the making of the contract at the time it was made. There is the danger, if one stresses reference to the 'factual matrix' that one may be influenced by what is, in truth, a finding of the subjective intention of the parties at the relevant time, instead of carrying out what I understand to be the correct exercise, namely, determining objectively the intent of the parties from the words of the documents themselves in the light of the circumstances surrounding the transaction. It is not permissible, I think, to take into account the finding of fact about what the parties intended the document to achieve when one is faced with the problem some five, ten or many years later of construing it. In deciding what the document did, in fact, achieve, all that one can look at are the general circumstances surrounding the making of the documents and in which it was made, and deduce the intention of the parties from the actual words of the document itself. The contract between the parties is what they said in the relevant document. It is not for this or any court to make a contract for the parties different from the words that the documents actually use, merely because it may be that the parties intended something different'."*

This view was expressly adopted by the court, as it had been previously by Griffin J. in *Rohan Construction Limited v. Insurance Corporation of Ireland* [1988] I.L.R.M. 373.

26. As to the manner in which contracts of guarantee should be construed, I accept the argument of Mr. Fanning B.L., counsel for the third named defendant, who argues that they should be construed strictly. Where a party agrees to be answerable for the debts or liabilities of another, and the document purporting to impose such liability has been proffered by a bank, as was the case here, the document must be strictly construed, and if there are any ambiguities in the document, they must be resolved against the bank. The guarantees of 2005 and 2008 do not, in their printed form, appear to have any ambiguity. The manuscript additions to the 2008 guarantees do no more than reflect the intention of the parties. The only disagreement between the parties concerns the question of whether the circumstances which were necessary to trigger the 2008 guarantees had occurred.

Application of the law to the facility letters and guarantee

27. The facility letter of 19th December, 2005, offered the first named defendant €12m by way of overdraft facilities subject to the security set out in clause 7 which was a:

> *"Joint and Several Guarantee of €12m (twelve million Euro) (from Patrick Kelly, Niall McFadden & Paul Pardy.*
>
> *Any security held now or at any future time shall be security for all the borrowers liabilities to the bank (actual or contingent) and whether as principal or surety)."*

After clause 15, the following paragraph appeared:

> *"No person has authority on behalf of the Bank orally to vary the terms of this letter, any variation of which must be in writing under the hand of a duly authorised signatory of the Bank. Any leniency or forbearance afforded by the Bank shall in no way be construed as prejudicing the right of the Bank under this letter."*

The facility was accepted by the first named defendant, and, by implication, the other defendants.

28. On 23rd December, 2005, guarantees were signed by the second, third and fourth named defendants in which they jointly and severally agreed:

> *". . . to pay and satisfy to the Bank, on demand, all and every the sum and sums of money which now are, or shall at any time, be owing to the Bank, anywhere on any account whatsoever, whether from the principal, solely, or from the principal, jointly, with any other person or persons . . ."*

29. The guarantee was limited to the sum of €12 million. Clause 2 of the guarantee agreement said that it was:

> *". . . a continuing security and shall extend to cover any sum or sums of money which shall, for the time being, constitute the balance due from the Principal to the Bank upon any such account as herein before mentioned."*

Clause 3 stated:

> *"This guarantee shall be binding as a continuing security on us and each of us and each of our executor's administrators and legal representatives until the expiration of three calendar months after each of us, or in the case of all or any of us dying or becoming, under disability, the executors, administrators or legal representatives of the person or persons so dying or becoming under disability shall have given to the Bank notice in writing to discontinue and determine the same."*

The third named defendant has not given any notice under that clause.

30. The 2008 guarantee was stated to be in addition to and not to be prejudiced or affected by any collateral or other security and it was stated to be in addition and not in substitution for any other guarantee for the principal given by the guarantors to the bank.

31. The facility letters of 4th September, 2008, were in broadly similar terms. One was offering a €2m overdraft and the other an €8m loan. They were both subject to the bank's normal terms and conditions, together with the specific conditions set out in the letter. The security was to be a joint and several guarantee of the second, third and fourth named defendants for the loan, the second and third named defendants for the overdraft, and a first fixed and floating charge over the assets and undertaking of the company. It was also provided that:

> *"Any security held now or at any future time shall be security for all the Borrowers' liabilities to the Bank (actual or contingent and whether as principal or surety)."*

The conditions precedent provided:

> *"Prior to utilisation of the facilities . . . the Bank is to be provided with Personal Asset Statements of the Guarantor. Such*

Personal Asset Statements are to be satisfactory to the Bank."

The offer was to remain open until 30th September, 2008, and would be subject to renegotiation if acceptance was not received by that date. It appears that acceptance was received by that date. The agreement also provided that facilities would be made available on completion of the security arrangements and on compliance with the conditions precedent and would be subject to renegotiation if utilisation had not commenced by 30th September, 2008. "Utilisation" had not commenced by 30th September, 2008, and, in fact, never commenced. The facility letter provided:

> *"No person has authority on behalf of the Bank, orally, to vary the terms of this letter, any variation of which must be in writing under the hand of a duly authorised signatory of the Bank. Any leniency or forbearance afforded by the Bank shall in no way be construed as prejudicing the rights of the Bank under this letter."*

In my view, there was nothing ambiguous about any of these clauses.

32. The guarantees signed on 10th September, 2008, were stated to be in addition to and not in any prejudiced or affected by any collateral or other security held by the bank. Clause 14 states:

> *"This Guarantee shall be in addition and not in substitution for any other guarantee for the Principal given by all or any of us to the Bank."*

It is of interest to note that clause 14 in each of the 2008 guarantees is similar, although a manuscript amendment appears to have been made and then corrected in respect of clause 14 of the guarantee given for the €8m loan. The clause had been amended so as to read:

> *"This Guarantee shall be in . . . substitution for any other guarantee for the principal given by all or any of us to the Bank."*

The words *". . . addition to and not in . . ."* had been taken out. But they were then corrected and reinstated by the insertion of "stet" and this was initialled in the margin.

33. Construing the 2005 and 2008 guarantees and the facility letters, there does not appear to be any ambiguity and they are clear on their face. The intention of the parties can be ascertained from the language which has been used, considered in the light of the surrounding circumstances and the objects of the agreements. In attempting to ascertain the presumed intention of the parties, the courts must use an objective approach. In Analog Devices B.V. v. Zurich Insurance Company [2002] I.R. 272, Fennelly J., giving the judgment of the Supreme Court, stated at p. 294:

> *"Insofar as Irish law is concerned, a contract is to be interpreted objectively in accordance with the meaning of the words the parties have used. The corollary is that parol evidence is not admissible so as to add to or vary that meaning."*

Mr. Kenneth Dobson accepted, in evidence, that the 2008 guarantee was to supplant the 2005 guarantee, but only when all the outstanding security issues had been resolved and when the facilities were renegotiated, having not been drawn down or utilised by 30th September, 2008. It is quite clear from the 2005 and 2008 facility letters that no one had authority on behalf of the bank, orally, to vary the terms of the facility letters, and that any variation would have to be in writing under the hand of a duly authorised signatory of the bank. This was accepted by the company and the second, third and fourth named defendants, as directors of the first named defendant. No variation of the terms of the facility was made in writing under the hand of a duly authorised signatory of the Bank.

Conclusion

34. I am satisfied that the plaintiff had agreed that the 2008 guarantee would supplant the 2005 guarantee, but only when the restructured facilities had been drawn down and all the security had been in place. The facilities offered on 4th September, 2008, were required to be renegotiated as they had not been drawn down by 30th September, 2008. The 2005 guarantees clearly continued in respect of the facilities drawn down on foot of the offer made in the letter of 19th December, 2005. The security given in respect of those facilities continued until such time as the restructured loan was drawn down. This never took place. I accept the evidence of Mr. Dobson that when he spoke to Mr. Declan Cassidy on the telephone on 10th September, 2008, it was agreed that the 2008 guarantee would supplant the 2005 document when the restructured loan was drawn down. That was his sworn evidence and that was his evidence in an affidavit sworn by him in these proceedings. He said that it was at all times understood that the new guarantees would only replace the existing guarantee if and when the proposed facilities were drawn down. That seems to me to be entirely plausible and, indeed, likely, as it represented sound business and common sense. While the third named defendant challenged Mr. Dobson on this point, he did not go into evidence. Mr. McFadden was not a party this discussion, but Mr. Cassidy, a fellow director of the first named defendant, was. Mr. Cassidy was never called to give evidence on this point. In any event, the facility letter of 19th December, 2005, set out the security required for the original overdraft facilities which had been drawn down, including the provisions of the guarantee, and this had never been varied in writing by a duly authorised signatory of the Bank.

35. Since I accept the evidence of Mr. Dobson, and since the restructured facilities never became operative, it follows that the 2005 guarantee remained in place and the third named defendant is bound on foot of that guarantee.

36. The plaintiff is entitled to succeed and to judgment against the third named defendant for the sum claimed in these proceedings on foot of the guarantee of 23rd December, 2005.