THE HIGH COURT

[2015 No. 400 S]

BETWEEN

NATIONAL ASSET LOAN MANAGEMENT DAC

PLAINTIFF

AND

THOMAS ANDERSON

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 9th day of February, 2018.

Background

1. This is an application for summary judgment in the sum of €776,727 against the defendant as guarantor of certain monies advanced by Anglo Irish Bank Corporation plc ("the Bank") to the Aikens Partnership ("the Borrower"). The monies were advanced pursuant to a facility letter dated 21st March, 2007 ("the 2007 Facility Letter") and a subsequent facility letter dated 25th March, 2008 ("the 2008 Facility Letter").

2. The Bank is a participating institution within the meaning of the National Asset Management Agency Act 2009 ("the 2009 Act"). Pursuant to the provisions of the 2009 Act, the plaintiff acquired the rights and obligations of the Bank in respect of the 2007 Facility Letter and the 2008 Facility Letter.

3. Under the terms of the 2007 Facility Letter, three loan facilities, facility A, facility B and facility C, were extended to the borrower. Facilities A and B were to be repaid on or before 31st December, 2007, and facility C was to be repaid on or before 30th June, 2007.

4. By way of security for the said loans, the defendant was required to provide a personal guarantee and indemnity in respect of any interest or costs accruing over and above the limit of the said facilities A,B and C to a maximum amount of €1,500,000. Further, appended to the 2007 Facility Letter, was a document entitled "Guarantor's Acceptance", whereby the defendant guaranteed the performance by the Borrower of its obligations pursuant to the 2007 Facility Letter.

5. Subsequently, the defendant entered into a "Guarantee and Indemnity" dated 23rd March, 2007 ("the Guarantee"). Under the Guarantee the defendant:-

> "[I]n consideration of the Bank making facilities available to the Principal Debtor, the Guarantor as Principal Obligor and not merely as surety hereby irrevocably and unconditionally and jointly and severally guarantees the due and prompt payment or discharge to the bank of (and undertakes on written demand by the Bank to pay or discharge) any interest accrued on facility A and B (as defined in the Facility Letter) together with any costs of the Aikens Partnership (above the combined limit of €12,375,000) up to a maximum amount of €1,500,000.."

The "Facility Letter" was defined in the Guarantee as:-

> "[T]he Facility Letter dated the 21st day of March, 2007, together with any amendments, additions or alterations thereto between the Bank and the Principal Debtor".

6. There were a number of other terms in the said Guarantee which I will return to in the context of submissions made by the parties.

7. The 2008 Facility Letter referred to facilities A and B and extended the date for repayment to on or before 28th February, 2009. The Facility Letter stated:-

> "[t]his Facility Letter is in replacement of and not in addition to all previous Facility Letters addressed to the Borrower from the Bank."

8. By way of security, the 2008 Facility Letter provided for a personal guarantee by the defendant in respect of facilities A and B limited to a maximum amount of €1,500,000. Further appended to the 2008 Facility Letter was a document entitled "Guarantor's Acceptance" whereby the defendant guaranteed the performance by the Borrower of its obligations to the Bank. This "Guarantor's Acceptance" was signed by Mr. Michael Ormonde on behalf of the defendant pursuant to a power of attorney.

9. The defendant did not enter into a further guarantee and indemnity which was provided for in the 2008 Facility Letter.

10. The Borrower defaulted and the plaintiff is now seeking to recover the sum of €776,727, that being the balance of monies on foot of the guarantee. The plaintiff further relies upon the document entitled "Guarantor's Acceptance" attached to the 2008 Facility Letter, referred to above.

Defence

11. The defendant seeks to have these proceedings remitted to plenary hearing on the following grounds:-

> i. In other proceedings entitled *National Asset Loan Management Ltd v. Michael Ormonde*, this Court gave judgment against the said Michael Ormonde in respect of his liability under a similar guarantee. The defendant submits that, despite some similarities between his position and that of Mr. Ormonde, there are a number of material differences which distinguish his case from that of Mr. Ormonde.
>
> ii. The plaintiff is not entitled to rely upon the guarantee as the guarantee only secured the defendant's indebtedness "as defined in the Facility Letter" which is referable to the 2007 Facility Letter only and which was replaced by the 2008 Facility Letter.
>
> iii. The plaintiff is not entitled to rely upon the "Guarantor's Acceptance" attached to the 2007 Facility Letter as Mr. Ormonde did not have the legal authority to execute the acceptance on the defendant's behalf.

12. In support of the defendant's submission that the wording of the guarantee only covers liabilities arsing from the 2007 Facility Letter, the defendant relies on the Court of Appeal (UK) decision in *Triodos Bank NV v. Dobbs*, [2005] EWCA Civ 630:-

> "9. The question is then whether what is said to be an amendment or variation is correctly so called. To my mind an agreement which truly 'replaces' the original loan agreement would not rightly be called an amendment or variation to the original agreement, since it will be a new agreement. This will be particularly true in the context of a guarantee which obliges the guarantor to pay sums falling due 'under or pursuant to' a particular loan agreement. Once that loan agreement has been replaced by a second and different agreement, the sums due under that new and different agreement cannot be sums due 'under or pursuant to' an earlier agreement. For this purpose it does not matter whether the old agreement is discharged in the sense of the loan being fully repaid and a new agreement then made (in the technical sense of there being a novation) or whether there is a replacement agreement which is, for the future, treated as governing the parties relationships. The new governing agreement is not the agreement 'under or pursuant to' which there falls due the money which the guarantor has guaranteed to pay".

13. On the issue of the validity of the signature on the "Guarantor's Acceptance" document, in para. 8 of his affidavit, sworn 1st December, 2016, the defendant states:-

> "I confirm that I did not give any power of attorney or otherwise lawfully authorise Mr. Ormonde to execute the Guarantor's Acceptance on my behalf"

14. Clause 9.2(ii) of the borrower's partnership agreement created a power of attorney in Mr. Ormonde's favour. The defendant submits that such power is limited and refers to the wording of Clause 9.2 which is entitled "Power of Attorney". Clause 9.2(ii) provides:-

> "As security for the compliance with his obligations under the terms of this agreement and so as to ensure that the Business of the Partnership shall not be disrupted, interfered with, delayed or damaged by reason of the death or default of the Subordinated Partner and for the protection of the property interests of all of the Partners, the Subordinated Partner hereby irrevocably and unconditionally appoints Michael Ormonde to be the Subordinated Partner's lawful Attorney in the subordinated partner's name and on the Subordinated Partner's behalf to execute any and all contracts, leases… indemnities… and all other documents or agreements which are required to be executed solely in connection with the Business of the Partnership. The Subordinated Partner declares that this Power of Attorney is irrevocable and is being given to secure his obligations hereunder and for the protection of the property interest of the partners and by way of security…"

15. The defendant relies upon the following passage from Powers of Attorney, Trevor M. Aldridge (10th Edition), at p.15:-

> "the power of attorney given for limited purposes is strictly interpreted by the courts, so that forethought into deciding what is needed and precision in drafting are more important…"

Plaintiff's Application for Summary Judgment

16. In support of its application, the plaintiff makes the following submissions:-

i. The facilities provided for under the 2008 Facility Letter were not new facilities but were in fact the same facilities as had been previously made available under the 2007 Facility Letter and remain subject to the guarantee of the defendant. The defendant in his affidavit of 14th October, 2016, confirmed that:-

> "[N]o additional monies were extended under the 2008 Facility Letter, the 2008 facility extended the time permitted for the Partnership to repay their borrowings from 31 December, 2007 to 28th February, 2008"

ii. The wording of clause 3.1 of the guarantee provides:-

> "This guarantee shall be continuing security for all monies and liabilities which for the time being constitute the balance due, owing or incurred in respect of the Indebtedness..."

iii. Clause 5.1 of the guarantee provides:-

> "The Bank shall be entitled at any time, without thereby prejudicing its rights against the guarantor hereunder, at its absolute discretion, and with or without the assent or knowledge of the guarantor:
>
> (a) …
>
> (b) to determine, extend, increase, renew, vary or otherwise amend the terms upon which any credit accommodation or facility may have been granted to the Principal Debtor,
>
> (c) …
>
> (d) to compound with, grant time or indulgence to, accept compositions from, agree to the terms of any rescheduling of indebtedness or make any other agreement with the Principal Debtor or any other person whatsoever…"

17. The defendant submits that the aforesaid terms of the guarantee make it expressly clear that any indebtedness arising from 2008 Facility Letter was covered by the Guarantee.

18. In respect of the defendant's contention that Mr. Ormonde did not have authority to sign the Guarantor's Acceptance, it is submitted that such defence is both belated and misplaced.

19. The plaintiff relies on the terms of clause 9.2(ii) of the partnership agreement which is set out at para. 14 above.

20. The plaintiff submits that the defendant is estopped from denying his liability under the guarantee having had the Guarantor's Acceptance signed by his duly authorised attorney and thus permitted the plaintiff to reschedule the loan and thereby benefited from such rescheduling.

The Test to be Applied

21. The Court must decide whether the defendant has established that he has a fair or reasonable probability of having a real or *bona*

fide defence to the plaintiff's claim. I refer to the Supreme Court decision of *Aer Rianta c.p.t. v. Ryanair Ltd* [2001] 4 IR 607.

22. In this case, the defence put forward is essentially a matter of construction of the guarantee, the Facility Letters, the documentation appended to them and the power of attorney set out in the partnership agreement. The Court is entitled to resolve these matters on the hearing of a motion for summary judgment rather than remitting the action to plenary hearing. As was stated by Clarke J. (as he then was) in *McGrath v. O'Driscoll & Ors* [2007] 1 ILRM 203, at p. 210:-

> "So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment…"

Decision

23. Counsel for the defendant, Mr. Patrick Leonard SC, is correct when he submits that there are certain differences between the facts in this action and those in *National Asset Loan Management ltd v. Michael Ormonde* notwithstanding that both actions arise from the same commercial transaction. In reaching my decision, I have had regard to such differences, in particular, the wording of the defendant's guarantee.

24. The defendant specifically relies upon the wording of the guarantee which I set out at para. 5 above. It follows from this, according to the defendant, that the 2008 Facility Letter "replaced" the 2007 Facility Letter. Hence the reliance which the defendant places on the passage, quoted at para. 12 above, from *Triodos Bank NV v. Dobbs*.

25. It is accepted by the defendant that no additional monies were extended under the 2008 Facility Letter and that this Facility Letter extended the time for the repayments of the two standing facility "A" and "B", which were still outstanding and had not been repaid. In my view the 2008 Facility Letter did not "replace" the original loan under the 2007 Facility Letter. Thus I do not accept that the defendant can rely upon the decision in *Triodos Bank NV v. Dobbs.*

26. Though the guarantee defines the "Facility Letter" as being the 2007 Facility Letter, it is clear to me that other terms of the guarantee expressly cover the liability of the defendant. In particular I refer to clause 3.1 and clause 5.1.(b) and (d), which I have set out at para. 16 (ii) and (iii) above.

27. It is not disputed that the defendant agreed or assented to the change in the terms of the loan. I refer to *Danske Bank A/S (t/a National Irish Bank) v McFadden* [2010] IEHC 116, where Clarke J. (as he then was) stated:-

> "6.1 The entitlement of a guarantor to be discharged as a result of a change in the underlying contract which is guaranteed derives from equity. In order to be able to place reliance on the discharge, the guarantor must himself do equity. In follows that a guarantor who agrees or assents to such a change will not be able to claim discharge. However, it does appear on all the authorities that knowledge alone of the change is insufficient…"

and

> "6.5 It would seem, therefore, that at the level of principle a guarantor will not be discharged where the guarantor actually agrees or assents to a change which might otherwise give rise to a discharge. In addition, a guarantor will not be discharged where that guarantor is an active participant in arranging the alteration concerned, albeit not in the capacity of guarantor but rather as a significant player in the entity that is the principal debtor…"

28. These passages clearly set out the legal implications for the defendant in agreeing and assenting to the changes in the loan as a result of the 2008 Facility Letter. The defendant is not discharged from the Guarantee.

29. Though it is not necessary to reach a conclusion for the purposes of this decision, I also do not accept the defendant's submission that Mr. Michael Ormonde did not have authority to sign the "Guarantor's Acceptance" on his behalf. It is clear to me that the wording of clause 9.2(ii) of the partnership agreement referred to above gave clear authority to Mr. Ormonde to sign the said document on the defendant's behalf. Mr. Ormonde was clearly authorised to execute contracts, documents and agreements in connection with the business of the Borrower. The 2008 Facility Letter and the appended Guarantor's Acceptance are clearly a "contract" for the purposes of clause 9.2(ii).

Conclusion

30. Having regard to the above and on the application of the relevant test, I am satisfied that this action should not be remitted to plenary hearing and that the plaintiff is entitled to judgment for the sum sought.