Neutral Citation: [2015] IEHC 712

THE HIGH COURT

2013 No. 1179 P

BETWEEN

DOLORES MCGRATH

PLAINTIFF

AND

DANSKE BANK

DEFENDANT

AND

MICHAEL MCGRATH AND JOHN MCRATH

NOTICE PARTIES

JUDGMENT of Ms. Justice Murphy delivered on the 17th day of November, 2015.

1. In this case the Court is called upon to determine the proper construction of a contract of guarantee executed by the plaintiff in favour of the defendant on 16th February, 2005. The plaintiff contends that the said guarantee was a "demand guarantee" which was validly terminated by letter dated 4th May, 2011 in accordance with clause 3 of the guarantee and that, as a consequence, her liability to the defendant thereunder was terminated. It is contended on behalf of the defendant that any purported termination, if found to be valid, does not have the effect of terminating the plaintiff's liability under the guarantee but merely relieves her of liability in respect of future borrowings by the principal and crystallises the sum due on foot of the guarantee at the date of termination.

Background

2. By letter dated 15th February, 2005 the defendant bank, which was then National Irish Bank, offered a bridging loan to Michael and John McGrath, the husband and son of the plaintiff, in the amount of €1,320,000.00. This loan was to fund the purchase of a proposed development at Monksfield, Athlone, Co. Westmeath. The facility letter in respect of the bridging loan required the provision of certain securities for the borrowing. Some of the properties and assets required by way of security were co-owned by the plaintiff who was not a party to the loan agreement. The facility letter specifically required that she should provide a guarantee *"to attach her interest in security offered".*

3. On 16th February, 2005 the plaintiff executed a contract of guarantee in respect of the borrowings of her husband and son. There are eighteen clauses in the guarantee. The following are the terms which the Court considers relevant to the decision which it must make and which were referred to and/or relied on by the parties in the course of argument before the Court.

> *"1. In consideration of National Irish Bank Limited (hereinafter called "the Bank") from time to time making or continuing advances or otherwise giving credit or affording banking facilities or granting time for as long as the Bank may think fit to John McGrath and Michael McGrath of Curramore, Kiltoom, Athlone, Co. Westmeath (hereinafter called "the Principal") I the undersigned Dolores McGrath HEREBY AGREE to pay and satisfy to the Bank on demand all and every the sum and sums of money which are now 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 or from any firm in which the Principal may be a partner including the amount of notes or bills discounted or paid and other loans credits or advances made to or for the accommodation or at the request either of the Principal solely or jointly or of any such firm as aforesaid or for any moneys for which the Principal maybe liable as surety or in any other way whatsoever together with in all the cases aforesaid all interest discount and other Bankers' charges including legal charges occasioned by or incidental to this or any other security held by or offered to the Bank for the same indebtedness or by or to the enforcement of any such security.*
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> *PROVIDED ALWAYS that the total liability ultimately enforceable against me under this Guarantee shall not exceed the sum of €1,320,000.00 together with interest thereon (as well after as before any judgment) from the date of demand by the Bank upon me for payment such interest to be calculated at the same rate or rates of interest at which interest is calculated from time to time on the Principal's indebtedness to the Bank on any such account as hereinbefore mentioned.*
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> *2. This Guarantee shall not be considered as satisfied by any intermediate payment or satisfaction of the whole or any part of any sum or sums of money owing as aforesaid but shall be continuing security and shall extend to cover and 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 hereinbefore mentioned.*
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> *3. This Guarantee shall be binding as a continuing security on me my executors administrators and legal representatives until the expiration of three calendar months after I or in the case of my dying or becoming under a disability my executors administrators or legal representatives shall have given to the Bank notice in writing to discontinue and determine the same.*
>
> *4. In the event of this Guarantee ceasing from any cause whatsoever to be binding as a continuing security on me or my legal representatives the Bank shall be at liberty without thereby affecting their rights hereunder to open a fresh account or accounts and to continue any then existing account with the Principal and no moneys paid from time to time into any such account or accounts by or on behalf of the Principal and subsequently drawn out by the Principal shall on settlement of, any claim in respect of this Guarantee be appropriated towards or have the effect of payment of any part of the moneys due from the Principal at the time of this Guarantee ceasing to be so binding as a continuing security*

or of the interest thereon unless the person or persons paying in such monies shall at the time in writing direct the banks specially to appropriate the same to that purpose.

5. Any admission or acknowledgement in writing by the Principal or by any person authorised by the Principal of the amount of the indebtedness of the Principal to the Bank and any judgment recovered by the Bank against the Principal in respect of such indebtedness shall be binding and conclusive on and against me my executors and administrators in all Courts of Law and elsewhere.

6. The Bank shall be at liberty without thereby affecting their rights against me hereunder at any time:

(a) to determine enlarge or vary any credit to the Principal;

(b) to vary exchange abstain from perfecting or release any other securities held or to be held by the Bank for or on account of the moneys intended to be hereby secured or any part thereof;

(c) to renew bills and promissory notes in any manner

(d) to compound with give time for payment to accept compositions from and make any other arrangements with the Principal or any obligants on bills notes or other securities held or to be held by the Bank for and on behalf of the Principal.

7. The Bank may enforce or have recourse to all remedies or means for recovering the moneys for the time being due upon any such account as is referred to in Paragraph 1 hereof whether under this Guarantee or under any other security or otherwise at such time and in such order and manner as the Bank may think fit and as to any security (other than this Guarantee) without notice or demand to or from me or my representatives and shall be at liberty to require payment from me of any sum or sums for the time being due or payable under this Guarantee when and as the Bank think proper without requiring or enforcing payment from the Principal or the Estate of the Principal or from any collateral securities.

8. This Guarantee shall be in addition to and shall not be in anyway prejudiced or affected by any collateral or other security now or hereafter held by the Bank for all or and any part of the moneys hereby guaranteed nor shall such collateral or other security or any lien to which the Bank may be otherwise entitled or the liability of any person or persons not parties hereto for all or any part of the monies hereby secured be in anywise prejudice or affected by this present guarantee. And the Bank shall have full power at their discretion to give time for payment to or make any other arrangement with any such other person or persons without prejudice to this present guarantee or any liability hereunder. And all moneys received by the Bank from me or the principal or any person or persons liable to pay the same may be applied by the Bank to any account or item of account or to any transaction to which the same may be applicable.

[…]

10. I have not taken in respect of the liability hereby undertaken by me on behalf of the Principal and I will not take from the Principal either directly or indirectly without the consent of the Bank any promissory note bill of exchange mortgage charge or other counter security whether merely personnel or involving a charge on any property whatsoever of the Principal whereby I or any person claiming through me by endorsement assignment or otherwise would or might on the bankruptcy or insolvency of the Principal and to the prejudice of the Bank increase the proofs in such bankruptcy or insolvency or diminish the property distributable amongst the creditors of the Principal. And as regards any such counter-security as aforesaid which I may have taken or may take with such consent as aforesaid the same shall be security to the Bank for the fulfilment of my obligations hereunder and shall be forthwith deposited by me with them for that purpose.

11. The Bank shall so long as any moneys remain owing hereunder have a lien therefore on all moneys now or hereafter standing to my credit with the Bank whether on any current or other account.

[….]

14. This Guarantee shall be in addition to and not in substitution for any other Guarantee for the Principal given by me to the Bank.

15. As a separate and independent stipulation I agree that any sum or sums of money which may not be recoverable from me as guarantor under the foregoing provisions hereof by reason of any defect informality or insufficiency in the borrowing powers of the Principal or in the exercise thereof or by reason of any disability on or of the Principal (whether such defect informality or other where known to the Bank or not) shall nevertheless be recoverable from me as a sole or principal debtor in respect thereof and shall be paid by me to the Bank upon demand: Provided however that the total liability ultimately and forcible against me, whether as guarantor or under this stipulation, shall not exceed the sum (with interest) hereinbefore specified.

16. The Bank may retain this Guarantee in their custody as evidence of its contents notwithstanding payment by me of all or any part of the moneys hereby guaranteed or made payable.

17. Any demand hereunder shall be sufficiently made upon me if sent by post to or left at my last known address and a demand so made shall be deemed to be made on the day following that on which it was posted or on the day it was left as the case maybe.

18. The expression "the Bank" where ever used herein includes and extends to their successors and assigns.

4. Following the execution of the guarantee by the plaintiff, the principals, Michael and John McGrath, drew down the funds. On 4th May, 2011 a solicitor on behalf of the plaintiff, Dolores McGrath,wrote to the defendant via registered post and DX. The letter reads as follows:

"Re: Dolores McGrath,

Dear Sirs,

We are in receipt of a copy of the personal guarantee of Dolores McGrath dated the 16th February 2005. It has always been our clients understanding that this personal guarantee related to the original transaction as set out in letter of loan offer dated the 15th of February 2005.

As the monies due and owing under the terms of the above mentioned transaction were discharged this personal guarantee is no longer valid, however for the avoidance of any doubt we hereby formally notify you that the personal guarantee is terminated.

We trust you note the position accordingly."

5. While there was some initial disagreement about the matter, it was accepted at the date of hearing that this letter had been sent by the plaintiff's solicitor and had been received by the defendants on the 5th May, 2011. On 7th November, 2012, 18 months later, the defendant sent a letter of demand to the plaintiff seeking payment of a sum in excess of €1,000,000.00 on foot of the plaintiff's guarantee of the 16th February, 2005. Some further correspondence ensued between the parties which led ultimately to the issuing by the plaintiff of a plenary summons on the 5th February, 2013 in which *inter alia* a declaration was sought that the guarantee had been determined and discontinued by the notice in writing dated 4th May, 2011 and a further declaration that by virtue of that notice in writing giving to the defendant the guarantee was no longer binding on the plaintiff.

6. There are therefore two issues for the Court to decide. Firstly, whether the letter of 4th May, 2011, is sufficient to invoke clause 3 of the guarantee and if so, what is the effect of such invocation?

Rules of Construction

7. The parties were virtually ad idem on the general principles to be applied to the construction of a contract of guarantee. The plaintiff pointed to the principles derived from the dicta of Lord Hoffman in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR at para 4.9 as applied in this jurisdiction in *Analog Devices (Ireland) Limited v Zurich Insurance* [2005] 1IR 274. Those principles include:

(a) that the contract should be construed as a whole;

(b) that one must take the natural and ordinary meaning of the words;

(c) that one must have regard to the commercial context and the factual matrix.

The parties agreed that a guiding principal in the construction of contracts of suretyship is that they must be strictly construed so that no liability is imposed upon the surety which is not clearly and distinctly covered by the terms of the agreement. It follows from the requirement of strict instruction that any ambiguities in the document must be resolved against the bank, as stated by Bayley B in *Nicholson v. Paggett* (1832) 1 C & M 48 at 52 quoted in Andrews & Millett *'Law of Guarantees'* 5th Ed. (London, 2008) at page 102:

"a contract of guarantee is a contract of a peculiar description: for it is not a contract which a party is entering into for the payment of his own debt, or on his own behalf… we think it is the duty of the party who takes such a security to see that it is couched in such words as that the party so giving it may distinctly understand what extent he is binding himself."

8. Of course, as has been pointed out by Clarke J, in *Danske Bank A/S Trading as National Irish Bank v. McFadden* [2010] IEHC 119 at para 4.1:

"The so called, contra proferentem rule, is, of course, only to be applied in cases of ambiguity and where other rules of construction fail. As such, the rule can only come into play if the Court finds itself unable to reach a sure conclusion on the construction of the provision in question, St Edmundsbury and Ipswich Diocesan Board of Finance v. Clark (No.2) [1975] 1 W.L.R. 468."

The rule cannot be used to generate an ambiguity were none exists.

9. The Court proposes to deal with the dispute between the parties on the following, issue by issue, basis. The first question that arises is, what was the intended and actual effect of the letter of 4th May 2011 by reference to clause 3 of the guarantee?

Is the letter of the 4th May, 2011 sufficient to invoke clause 3 and terminate the guarantee?

10. Clause 3 of the guarantee states:

"This Guarantee shall be binding as a continuing security on me my executors administrators and legal representatives until the expiration of three calendar months after I or in the case of my dying or becoming under disability my executors administrators or legal representatives shall have given to the Bank notice in writing to discontinue and determine the same."

11. The plaintiff submits that clause 3 of the contract of guarantee provided that revocation could be effected by giving notice in writing to the defendant. The plaintiff argues that she lawfully, pursuant to clause 3 of the guarantee, gave notice in writing to the defendant to determine and terminate the guarantee by letter dated 4th May, 2011. No specific form of notice was set out clause 3 other than that same should be in writing and therefore the plaintiff submits that clause 3 was complied with.

12. The defendant notes that the letter of 4th May, 2011 begins by setting out that *"it has always been our clients understanding that this personal guarantee related to the original transaction as set out in letter of loan offer dated the 15th of February 2005."* Thus the defendant contends that such letter is based on the entirely erroneous proposition, clearly unsupported by the wording of the guarantee itself, that the liability of the plaintiff as guarantor is limited to a liability under the facility letter of 15th February, 2005. According to the defendant, that is plainly incorrect because it is said, in terms at Paragraph 3, to be a continuing security, and it provides on its face that the guarantor agrees to pay to the Bank *"..all and every the sum and sums of money which are now or shall at any time be owing to the Bank anywhere on any account whatsoever."*

13. The letter then goes on to provide that *"as the monies due and owing under the terms of the above mentioned transaction were discharged this personal guarantee is no longer valid, however for the avoidance of any doubt we hereby formally notify you that*

the personal guarantee is terminated." The defendant submits that the first premise of this sentence is plainly incorrect. It is the defendant's position that, quite apart from the fact that the monies due and owing were not repaid, and are still outstanding, the proposition that *"this personal guarantee is no longer valid"* simply because one tranche of monies were repaid when others remained outstanding does not follow.

14. The defendant further argues that it is clear that the letter of 4th May 2011 does not *"track"* the language of clause 3 of the guarantee. Clause 3 provides that the guarantor may *"discontinue and determine"* the guarantee. However, the language used in the letter of 4th May, 2011 is that the guarantor asks the Bank to take note that it is *"terminated"*. The use of the word *"terminated"*, according to the defendant, is much easier to reconcile with the intention and effect of limiting the guarantor's liability to those monies already borrowed. It is a different concept to *"determining"* the liability of the guarantor, which implies an attempt to ascertain or calculate the liability of the guarantor.

15. The plaintiff, in response, submits that the only issue for consideration in the within proceedings is the wording "for the avoidance of doubt we hereby formally notify you that the personal guarantee is terminated". The plaintiff contends that the said wording invokes clause 3 in the guarantee and that there is no doubt that it does so.

Decision of the Court
16. The Court is satisfied that the only requirement contained in clause 3 is that the notice be in writing and that the intention of the party to be no longer bound by the Guarantee be clear therefrom. It seems irrelevant to the Court that the writer of the letter may have misunderstood the extent of the guarantee, in circumstances where it is clear that the guarantee referred to is the guarantee of 16th February, 2005 and that the writer's intention is to give notice of termination of that guarantee. To terminate something is to bring it to an end. To discontinue something is to cease doing or providing it.

What is the effect of the notice of termination?
17. The defendant notes that the only aspect of the letter that is now relied upon is the portion which provides that: *"for the avoidance of any doubt we hereby formally notify you that the personal guarantee is terminated."* The defendant submits that there are two things that this can mean. Firstly, it can mean that the liability of the guarantor is terminated in respect of future borrowings. Alternatively, it can mean that the liability of the guarantor is terminated in respect of existing, historic borrowings. The defendant contends that, as a matter of construction, the letter of 4th May, 2011, has the effect of terminating the guarantee in the sense of terminating any liability on the part of Mrs. McGrath in respect of future borrowings. It appears to the Court that this construction is more consistent with a "discontinuation" than a termination.

18. The defendant submits that on the expiry of three months from the date of 4th May, 2011 (4th August, 2011) the notice served by the plaintiff was effective to terminate her status as guarantor of any future, fresh, new or additional borrowings that arise after that date. If that is correct, then that is the end of the case. The case that is made on behalf of the plaintiff, however, is something very different. The case that is made is that the letter of 4th May, 2011 has the effect of discontinuing and determining the guarantee in respect of the existing, historic borrowings.

19. The plaintiff argues that under clause 3 the guarantee remained in force for three calendar months after the date of the notice in writing, i.e. until 4th August, 2011. After that date the guarantee ceased to be effective. The plaintiff submits that if the defendant wished to call in the security provided for by the guarantee by way of demand upon the plaintiff, it had until 4th August, 2011 to do so. The defendant did not call in the said security by 4th August, 2011 and it is the plaintiff's position that any attempt to do so by purported demand upon the plaintiff made after 4th August, 2011, is invalid.

Nature of the Guarantee
20. As the defendant notes, the basic legal rule is that the revocation or cancellation of a guarantee only relieves the guarantor of liability in respect of future borrowings but does not relieve a guarantor of liability in respect of existing debt or borrowings. This contention is supported by two leading texts on the subject of contracts of surety. Andrews & Millett states at p. 322:

> *"If the surety is entitled to revoke or cancel a guarantee on giving notice to the creditor, the revocation will not affect rights which have accrued prior to the date of termination. Thus, in the case of a guarantee of an overdraft, the guarantor's liability does not remain static at the date of termination. He will remain liable for the principal amount outstanding at that date, together with any interest which has already accrued on it or which may accrue thereafter, and he is only exonerated in respect of any future advances of further principal sums."*

Similarly, O'Donovan & Phillips 'The Modern Contract of Guarantee', 2nd Ed. (London, 2003) state at p.562:

> *"The general effect of revocation is that the guarantor will be relieved of future liabilities but will remain liable in respect of accrued liabilities."*

21. However, this general principle does not apply in the case of a demand guarantee, i.e. a guarantee which is expressed to be payable on demand by the creditor. Andrews and Millett note at para 8.007, that under a demand guarantee, the liability of the surety to pay is contingent upon demand, and the creditor has no cause of action against him until such time as the demand has been made. The learned authors continue by stating that if, at the time at which the notice of termination expires, no demand has been made, then at least prima facie there is no accrued liability capable of surviving the termination even if the principal has defaulted.

22. The effect of revocation in the case of demand guarantees was first considered by Goff J in *Thomas v. Nottingham Inc Football Club* [1972] Ch. 596. However, the decision in that case was that the surety remained liable in respect of his guarantee but could seek *quia timet* relief.

23. The most detailed exposition of the matter is set out by the Court of Appeal in *National Westminster Bank v. Hardman* [1988] FLR 302. The headnote in that case summarises the decision therein as follows:

> *"(a) The defendant was only liable to pay the plaintiffs for sums under the guarantee which the plaintiffs had demanded before the date on which notice for determination of the guarantee had expired and since there had been no such demand, the plaintiff was not liable to pay anything. Clause 3 of the guarantee dealt with the power to determine and with what rights the plaintiffs were to preserve despite determination, while cl. 7 was to be construed as saving the plaintiffs not from the effect of determination but dealing with the debtor. Further, since the wording of cl. 7 created an ambiguity in cl.3 by mentioning determination as an alternative to calling in by demand from the plaintiffs – because if there was no demand, there would never be any liability on determination – the ambiguous words should be construed in*

the sense for which the defendant had contended.

(b) Further commercial impracticalities need not necessarily arise if similarly-worded guarantees were construed in this way. A bank would still be able to ensure that an individual surety did not escape liability since it would have three months between the notice of determination and its expiration in which to decide what to do and, if necessary, to negotiate a replacement guarantee. If it failed to secure a replacement, it could make a demand a few days before the end of the three-month period and then refrain from making any further advances during those few days. Consequently it would then have a cause of action for the whole amount of the debt due at the expiration date."

24. The relevant clause 3 in Hardman reads as follows:

"[T]his guarantee shall be a continuing security and shall remain in force notwithstanding any disability or death of the guarantor until determined by three months notice in writing from the Guarantor or the Personal Representatives of the Guarantor.

[…]

But such determination shall not affect the liability of the Guarantor for the amount due hereunder at the date of expiration of the notice with interest as herein provided until payment in full."

The court held that the proviso in the second part of the clause did not affect the liability issue. Moreover, a subsequent clause 4 provided that:

"[I]n case this guarantee shall be determined…the bank may continue its account with the debtor notwithstanding the determination…and the guarantor's liability in respect of the amount due from the debtor at the date when the determination…takes effect along with interest…until payment in full shall remain regardless of any subsequent dealings in the amount."

25. The principles in Hardman were restated by the Court of Appeal in a later case, *Bank of Credit and Commerce International SA (In Liquidation) v. Simjee* [1997] CLC 135.

26. Applying the above principles to the instant case, the plaintiff argues that the contract of guarantee of 16th February, 2005 contained a revocation clause in clause 3 which provided that revocation could be effected by giving notice in writing to the defendant. The plaintiff contends that she lawfully gave notice in writing the defendant to determine and terminate the guarantee by letter dated 4th May, 2011, pursuant to clause 3 of the guarantee. She notes that no specific form of notice was set out clause 3 other than that same should be in writing and therefore submits that clause 3 was complied with.

27. The plaintiff accepts that the delivery of the notice in writing pursuant to clause 3 of the guarantee does not per se determine and terminate the said guarantee. However the plaintiff submits that the initial effect of the said notice in writing was to create a notice period of three calendar months from the date thereof. The guarantee was still in force in that period and it was still open to the defendant in that period to issue a demand to the plaintiff to enforce the guarantee. Since the defendant did not issue any demand to the plaintiff in that period and only issued a purported demand after the expiry of the notice period the plaintiff submits that the said demand was unlawful and without effect after that point.

28. The plaintiff denies that there is any ambiguity in clause 3 of the guarantee. She further argues that if such ambiguity exists it must be construed in favour of the plaintiff. The plaintiff thus contends that when she determined and terminated the guarantee by lawful notice pursuant to clause 3 she was entitled to assume that her obligations in the matter were at an end after the expiry of the three month notice period. The plaintiff submits that the natural and ordinary meaning of the words used in clause 3 of the guarantee means that her obligations terminated after the expiry of the said three month period. Per clause 3 of the guarantee the guarantee was no longer a continuing security after that point.

29. The plaintiff seeks to rely on the decision in Hardman. She argues that the guarantee in the instant case is a demand guarantee which means that the liability thereunder is a contingent liability. The liability under the guarantee can only become actual when and if a demand is made on the plaintiff. No such demand was made on the plaintiff prior to the issue by her of the valid notice of termination. The defendant's rights were preserved during the notice period (which was a relatively extensive period of three months). After the expiration of that period the guarantee ceased to be binding on the plaintiff and the defendant could neither issue a demand nor sue the plaintiff after that point. The plaintiff further submits that the format of the clauses is rather similar in Hardman and in the present case.

30. The defendant argues that properly construed, this is not a "demand" guarantee in the sense of no liability subsisting absent a demand. The defendant contends that there is a vital distinction between making a demand as a precursor to a lawsuit, which arises even where a liability exists, and making a demand as a condition precedent to any liability existing. It submits that here, we are in the former category, and not in the latter. The defendant argues that this is not a contingent liability that may never crystallise. It may well be that a letter of demand will be a necessary precursor to the calling in of that liability. The prevailing facility letter may well provide that one has to repay the loan "on demand". The demand may serve another purpose also, in that it identifies the precise sum that is owing at the time of demand. However the defendant submits that it is not the case that absent the demand, there is no liability to repay the loan.

31. The defendant notes the plaintiff's reliance on the decision of the Court of Appeal in *National Westminster Bank v. Hardman* [1988] FLR 302 and *Bank of Credit and Commerce International SA (In Liquidation) v. Simjee* [1997] CLC 135 as authority for this proposition. It submits, however, that the texts emphasise that it is ultimately a matter of construction of each individual guarantee. In respect of the guarantee at issue, the defendant contends that clause 7 is of very great significance. The defendant argues that in substance, clause 7 means that the guarantor has a co-extensive liability to the Bank as the borrower, because it provides that the Bank can sue the guarantor *"without requiring or enforcing payment from the Principal or the Estate of the Principal."*

32. The defendant argues that clause 7 is, in substance, a principal debtor clause, that upgrades the liability of the guarantor to being not merely contingent, but to being equivalent to that of the actual debtor. In the defendant's view there is no other way to construe the language in clause 7. On that basis, the defendant notes that the law is that in such cases, a demand is not required for the liability to exist, because in basic terms, it already exists from the date of the borrowing. As the principal has a liability to repay from that date, so does the guarantor, as the guarantor's liability is co-extensive with that of the borrower.

33. The defendant further argues that it is not just clause 7 of the guarantee that supports this construction. Clause 9 refers to my *"ultimate liability"* and clause 10 refers to the *"liability hereby undertaken by me on behalf of the Principal."*

34. In this regard, the defendant submits that the commentary at p.613 (par.10-121) of O'Donovan & Phillips is entirely apposite. That reads as follows:

> *"The issue of construing the guarantee to ascertain whether or not a demand is required is not always an easy one. The words "on demand" may not always be decisive. Thus even though the amounts under the guarantee are expressed to be payable "on demand", the inclusion of a "principal debtor" clause in the body of the guarantee may obviate the necessity for the creditor to make a demand. This suggestion stems from the comments of Walton J. in Esso Petroleum Co Ltd v. Alstonbridge Properties Ltd [1975] 1 WLR 1474. There, the guarantee was contained in a mortgage, the principal sum repayable by monthly instalments. If there was default under the mortgage the principal and the sureties jointly and severally covenanted to pay "on demand" as much of the principal sum as at that time should remain unpaid. The guarantee contained a clause which provided that, although the relationship between the principal and the sureties was to be one of suretyship, "as between the Sureties and the Lenders the Sureties shall be considered as principal debtors." Walton J. took the view (without expressly deciding the matter) that such a clause obviated the necessity for a demand because the character of agreement under which payment was sought was no longer strictly collateral. If such a clause is included, therefore, this dictum indicates that the guarantor will be liable without the necessity for a demand, provided that the situation is one where a principal would also be liable without the necessity for a demand to be made, that is, where there is a present debt payable immediately.*
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> *This view was also confirmed in TS&S Global Ltd v. John Fithian-Franks [2007] EWHC 1401 where the guarantors were described as "primary obligors" (in clause 1 of the guarantee) but clause 2 specifically emphasised the need for a demand. Clause 2 stated:*
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> *"2.1 If the Company defaults in payment of the Facility … when due the guarantor shall pay to the Beneficiary on demand, without set off or other deduction, an amount equal to the amount so unpaid together with all reasonable costs and expenses incurred by the Beneficiary in implementing and enforcing the terms of this guarantee.*
>
> *2.2 A demand shall be sufficiently served on the guarantor if made to it at its address set out above by letter, telex or facsimile and shall be effective on receipt."*
>
> *Despite clause 2, referring specifically to the need for a demand and how it should be served, it was held that the guarantor's liability under the guarantee was immediately payable by them without the need for a demand (before the service of the statutory demand).*
>
> *On one view, these decisions turn on the fact that the effect of the principal debtor clause was to turn the contract into one of indemnity, where a demand is not usually required as a condition precedent to the creditor's cause of action. But it is considered that they are also applicable where, despite the presence of a principal debtor clause, the contract cannot be strictly described as one of indemnity."*

35. In this regard, the defendant also relies on the decisions in *Esso Petroleum Co Ltd v. Alstonbridge Properties Ltd and TS&S Global Ltd v. John Fithian-Franks* which are referred to in the above extract.

36. The plaintiff accepts, as Andrews and Millett, indicate at para 1-011, that a guarantee with an on demand clause may not be a demand guarantee if the said guarantee also contains a clause entitling the creditor to treat the guarantor as a principal debtor or primary obliger. This was made clear by Dillon LJ in MS Fashions Ltd v. BCCI SA (In Liquidation) [1993] Ch 425 at page 320:

> *"[T]he effect of this must be to dispense with any need for a demand in the case of [surety 1] since he has made the companies' debts to BCCI his own debts and thus immediately payable out of the deposit without demand. In the case of [surety 2] there must be immediate liability even though the word 'demand' was used, because he accepted liability as principal debtor and the deposit can be appropriated without further notice".*

The plaintiff states that the effect of this interpretation was to align the position of a principal debtor or primary obliger with that of debtor in the old cases of *Bradford Old Bank Ltd v. Sutcliffe* [1918] 2 KB 833 and *In re J. Brown's Estate* [1893] 2 Ch 300 wherein it was held that a demand is unneccesary to make a present debt immediately payable, even if it is expressed to be payable on demand, unless it is a collateral debt. The plaintiff further accepts that such interpretation was applied in the cases of *Esso Petroleum Co Ltd and TS & S Global Limited*, on which the defendant relies.

37. However, the plaintiff submits, and the Court agrees, that in order to determine whether the guarantee in the instant case is a demand guarantee one must construe the clauses of the said guarantee. This principle derives from the general rules for the construction of contracts of guarantee set out above and also the fact that, in the cases cited by the defendant, it was clear that that the guarantors were bound in primary liability for the debts involved.

38. The plaintiff notes that in *Esso Petroleum Co Ltd v. Alstonbridge Properties Ltd* the mortgage deed, which included a guarantee by the company directors stated that *"in consideration of the said sum of £38,000 so advanced as aforesaid … the sureties hereby jointly and severally covenant with the lenders to repay to the lenders the said sum of £38,000 with interest thereon form the date hereof at the rate of £1,314.72 per annum by equal monthly instalments"*. It went on to state that if there was a default in payment *"the company and/or the sureties will pay to the lenders on demand so much of the said sum of £38,000 as shall then be unpaid together with interest thereon…"*. Moreover in a later clause the deed stated that *"as between the sureties and the lenders the sureties shall be considered as principal debtors for all the principle and other monies and/or interest here secured."*

39. With regard to *TS & S Global Limited* the plaintiff notes that clause 1 of the guarantee in that case (quoted at paragraph 10 of the reported decision) states as follows:

> *"[T]he guarantors,, as primary obligers, hereby unconditionally and irrevocably guarantee to the Beneficiary the due payment and discharge by the Company of such amount as is due and owing by the Company to the Beneficiary as at the first anniversary of the date hereof and which is attributable to the Faclity (whether or not the facility has been discharged prior to such date in whole or in part by the Beneficiary)…".*

40. The plaintiff submits that no clause in the guarantee in the instant case contains language which on its face binds the plaintiff in

the explicit fashion set out in TS & S Global Limited. While the phrase *"sole or principle [sic] debtor"* is used in clause 15 of the guarantee it is clear from the clause that its usage is in the specialised context of the borrower being under *"defect informality or insufficiency"* in respect of their borrowing powers. Further clause 15 is described *"[a]s a separate and independent stipulation*" and still provides that demand must be made upon the plaintiff. The plaintiff argues that it would not be necessary for the surety to become the principal debtor in the scenario described if, as the defendant contends, she already was the primary obligor. Accordingly clause 15, despite its use of the phrase sole or principal debtor does not erode and in fact arguably reinforces the true demand character of the guarantee in the instant case.

41. In addition she argues that any clauses in the guarantee which appear in an oblique fashion to bind the plaintiff must be ambiguous and therefore must be construed *contra proferentem*, i.e. against the defendant. The plaintiff must, on the true application of *contra proferentem*, have the guarantee construed in her favour.

42. The plaintiff notes that counsel for the defendant put particular reliance on the words *"and shall be at liberty to require payment…"* at the end clause 7. However, it is the plaintiff's case that clause 7 does not even imply (let alone state explicitly) that the plaintiff is a principal debtor or primary obliger and it is clear that the clause refers to the enforcement by the defendant of the moneys due on the *"account"* referred to in clause 1. The purpose of this part of the clause is to make clear that enforcement of the guarantee is not contingent on the Bank enforcing payment from the principal. That is not incompatible with a demand being required to enforce the guarantee. Clause 7 does refer to actions being taken *"without notice or demand to or from me or my representatives"* but in context this is a reference to *"any security (other than this Guarantee)"* and not the enforcement of the guarantee itself. If that is not the case the usage of this language is both unclear and in conflict with other clauses in the guarantee. It would be in conflict with both clauses 1 and 3 which provide for demand and notice respectively, the latter by the plaintiff. The plaintiff therefore submits that the defendant's interpretation of clause 7 must be rejected. Clause 7 does not on its face make the plaintiff a principal debtor or primary obliger and its language is obscure and in conflict with the balance of the guarantee. Again the plaintiff contends that she is entitled to a *contra proferentem* construction of clause 7, and of the guarantee in its entirety, in her favour.

43. The plaintiff further notes that the defendant also relies on the words *"although my ultimate liability hereunder cannot exceed…"* in clause 9 and the words *"I have not taken in respect of the liability hereby undertaken by me…"* in clause 10. However, she contends that in both cases the liability could equally refer to the potential liability which will crystallise on service of the demand. Moreover, she argues that it is not convincing to highlight phrases the outer clauses of the guarantee which could support the defendant's interpretation when the primary clauses, namely clause 1 and clause 3 are clear and exclude that interpretation.

44. The plaintiff, in support of her argument that she is not a principal debtor or primary obliger, relies also on the terms of the facility letter dated 15th February 2005. She claims that she is entitled to do so by virtue of s. 8 of the Married Women's Status Act 1957. She submits that the wording used in the facility letter shows that the purpose of the guarantee was to ensure that it captured the plaintiff's limited interests in the range of her assets referred to within the facility letter, if and when same were sold and thus means that her liability is contingent on a demand being made of her and further means that her liability is not that of principal debtor or primary obliger.

Decision of the Court

45. The Court is satisfied that on a proper construction of this guarantee as a whole and of its constituent clauses, it is a demand guarantee of the type described in *Hardman*. The guarantee creates a contingent liability which only becomes actual when a demand is made on foot of it. Clause 1 of the guarantee provides for a cap on the sum of the guarantor's liability which would arise from the *"date of demand"* for payment. Clause 2 also refers to monies due from the principal and there is nothing therein that could be construed as denoting the plaintiff as a principal. The Court notes that clause 4 mirrors clause 7 in *Hardman* and has the same effect in that it merely confirms the Bank's entitlement to continue treating with the principal after the determination of the guarantee. Clause 5 similarly draws a distinction between the guarantor and the principal by providing that any admission or acknowledgment by the principal is binding and conclusive against the guarantor *qua* guarantor. Clause 6 again deals with the Bank's entitlement to treat with the principal without affecting its rights against the guarantor again suggesting that the guarantor has a different status to that of the principal debtor. The defendant placed particular reliance on clause 7 as potentially transforming the guarantor into a principal debtor. This reliance placed by the defendant on clause 7 is misplaced. Clause 7 provides a suite of options for the Bank to recover monies due on accounts referred to in clause 1 of the guarantee. The guarantor agrees that the Bank can exercise those options in such order or manner as it thinks fit and specifically provides that the Bank can demand payment on foot of the guarantee without first requiring payment from the principal debtor. If the Bank opts to realise any security held by it, other than the guarantee, it can do so without notice of demand to the guarantor. Crucially however, the clause retains the requirement of a demand if the Bank seeks to make the guarantor liable on foot of the guarantee. The Court can find nothing in this clause which alters the status of guarantor to that of principal debtor. There is nothing equivalent to the phrases in *Esso Petroleum Co Ltd v. Alstonbridge Properties Ltd* in which the guarantee contained a clause which provided that, although the relationship between the principal and the sureties was to be one of suretyship, *"as between the Sureties and the Lenders the Sureties shall be considered as principal debtors"* nor the clause in TS & S Global which specifically described the guarantor as a primary obliger. Clause 10 which was also relied on by the defendant as indicating a status of primary obliger or principal debtor, in fact envisages a distinction between the principal and the guarantor providing that she will not enter into any arrangement with the principal which would diminish the interests of the Bank. This again suggests that she is not a primary obligor.

46. The Court is not persuaded that clause 7 changes the liability of the guarantor from a contingent liability to that of a primary obligor. Any doubt which might exist about the matter is, in the Court's view, fully resolved by the terms of clause 15. That clause provides:

> *As a separate and independent stipulation I agree that any sum or sums of money which may not be recoverable from me as guarantor under the foregoing provisions hereof by reason of any defect informality or insufficiency in the borrowing powers of the principal or in the exercise thereof or by reason of any disability on or of the principal (whether such defect informality or other where known to the bank or not) shall nevertheless be recoverable from me as a sole or principal debtor in respect thereof and shall be paid by me to the bank upon demand: provided however that the total liability ultimately and forcible against me whether as guarantor or under this stipulation shall not exceed the sum (with interest) here and before specified.*

It is only in the circumstances specified in clause 15 that the Bank can pursue the guarantor as principal debtor. It necessarily follows from this that in all other circumstances the guarantor is neither a primary obligor nor a principal debtor and the plaintiff's liability under the guarantee is contingent on a demand.

47. As already set out, all of the clauses of this guarantee suggest that this was a demand guarantee, the liability of the guarantor

thereunder being capable of termination by notice in writing pursuant to clause 3. Such a notice was served on 4th May, 2011, in which there was a clear intention to terminate the *"personal guarantee"*. Thereafter, in accordance with clause 3, the Bank had three months in which to decide what steps to take in respect of the guarantee. Were the guarantee to be construed, as contended for by the defendants, there would be no need for such a lengthy notice period as the debt would crystallise immediately on the giving of notice. The notice period of three months gives the Bank ample opportunity to decide what steps it wishes to take in relation to the guarantee. Failure to act within the three month period leads to the extinguishment of the guarantee and the Bank's entitlement to pursue the plaintiff thereunder. As a matter of law, but also of common sense, any other construction of clause 3 would lead to considerable uncertainty. Take the situation of the administrator or the executor of an estate who serves notice of an intention to discontinue and determine the guarantee and who receives no communication from the Bank within the three month period. Having heard nothing he thereafter distributes the proceeds of the estate. Is he to be liable years later for the sum due under the guarantee at a time when there are no remaining assets in the estate? Such a construction would mean that the distribution of many estates could never be finalised. The Court is fortified in its conclusion by the observation in *Hardman*, that to construe clause 3 in the manner contended for by the defendant would be unfair in that the plaintiff could find her funds in the defendant or indeed her estate plundered at any time to meet debts due by the principals.

48. For these reasons the Court finds that the guarantee in question was a demand guarantee which created a contingent liability and which was validly terminated by notice provided by letter of 4th May, 2011 and received by the defendants on 5th May, 2011. As such the guarantee ceased to be effective as and from 4th August, 2011.