Neutral Citation Number: [2010] IEHC 116

**THE HIGH COURT**

**COMMERCIAL**

**2009 4213 S**

**BETWEEN**

**DANSKE BANK A/S TRADING AS NATIONAL IRISH BANK**

**PLAINTIFFS**

**AND**

**NIALL MCFADDEN**

**DEFENDANT**

**JUDGMENT of Mr. Justice Clarke delivered the 20th of April, 2010**

**1. Introduction**

1.1 This case arises out of a takeover of Buy and Sell Limited ("B&S") from Associated Newspapers Limited. Funding for the takeover was provided by the plaintiffs ("NIB"). One of the loans which was provided for the takeover was guaranteed by the defendant ("Mr. McFadden"). In these proceedings NIB seeks to enforce the guarantee in question.

1.2 The vehicle used for the relevant takeover was a company called Naldin Ltd ("Naldin"). Mr. McFadden was the founder and is currently the chairman of a group of companies known as the Boundary Capital group of companies (collectively "Boundary"). While there was some debate at the hearing before me as to the extent to which Boundary was, in any formal or legal sense, a party to the relevant takeover, there is little doubt but that the takeover, and Naldin as the vehicle for that takeover, was associated with Boundary and Boundary personnel. To the extent that it is necessary in the resolution of the issues which arise in this case, I will return to the precise role of Boundary in due course.

1.3 A series of loans were advanced to Naldin to enable it to takeover B&S. One such loan was in the nature of a bridging loan which, it would appear, was intended to provide temporary finance until such time as equity finance was put in place. The other loans, which are not relevant to this case, were of a different nature and were designed to provide Naldin with ordinary ongoing loan facilities.

1.4 It is only in respect of the so called "bridging facility" that Mr. McFadden gave a personal guarantee. There is no dispute as to the amount now due by Naldin to NIB under that bridging facility. Neither is there any dispute but that a valid guarantee was entered into by Mr. McFadden in respect of the bridging facility. However, on a number of bases, Mr. McFadden now asserts that he no longer has any liability to NIB on foot of the relevant guarantee. In substance, this case turns on whether those assertions on the part of Mr. McFadden are well founded. In that context, it is appropriate to turn briefly to the issues which arise.

**2. The Issues**

2.1 At the time of the execution of the documentation required to put the various arrangements between NIB and Naldin into place, Mr. McFadden executed a guarantee in favour of NIB the text of which would, on the evidence, and subject to one caveat to which I will shortly turn, appear to have been prepared by NIB's solicitors, Messrs. Matheson Ormsby Prentice ("MOP"). No witness was called from NIB or from MOP who was actually present or directly involved in the closing concerned. Likewise, Mr. McFadden was not called to give evidence. I did not, therefore, have the benefit of any witness who was directly involved in the circumstances in which that personal guarantee came to be executed or handed over to MOP on behalf of NIB. However, of particular relevance to these proceedings, is the fact that a handwritten insertion is to be found in the relevant guarantee which adds a new clause 3.3 to same. It will be necessary to turn to the text of that clause in due course. At this stage it is important to note that NIB accepts that the relevant clause would appear to have been inserted in Mr. McFadden's handwriting. No case is made on behalf of NIB that the clause in question does not form part of the guarantee or that the guarantee should not be interpreted in the light of the presence of that clause.

2.2 Furthermore, by way of important background, it is common case that the relevant bridging facility lasted for a much longer period than had been originally envisaged (the original facility was, in substance, for a three month period). The precise circumstances in which that came to pass and the proper characterisation of same by reference to the guarantee, is an important issue in the proceedings.

2.3 It will be necessary to turn to certain of the relevant legal principles in due course. However, in general terms, and in the absence of specific contractual provisions which provide otherwise, a guarantee may well cease to have effect where a material alteration takes place in the contract under which the principal debt is owed, save in circumstances where the guarantor can be said to have assented to that change or where it is clear that the change concerned came about as a result of the active involvement of the guarantor. It will be necessary to deal with the precise extent of those principles in due course.

2.4 However, as pointed out, it is possible to alter that situation by the inclusion of specific terms to the contrary in the relevant contract of guarantee. It is not untypical for banks to include in their standard terms and conditions clauses which seek to give the bank concerned some latitude in dealing with the principal debtor or customer without impairing the bank's entitlement to rely on a guarantee over the debts of that principal debtor or customer. There are some provisions in the guarantee drafted by MOP on behalf of NIB in this case (in particular clause 9.1.2) which seek to achieve such an end. However, it is said on behalf of Mr. McFadden that, on a true construction of the contract of guarantee as a whole, and in particular taking into account the provisions of the handwritten clause 3.3 of the guarantee, to which reference has already been made, the contract of guarantee in this case does not afford the bank any such latitude.

2.5 The first two issues which arise are, therefore, questions concerning the proper construction of the guarantee in the light of what

are, to at least a significant extent, undisputed facts. While it will be necessary to refer to a number of clauses from the guarantee document in due course, clause 3.3 speaks of the guarantee of Mr. McFadden relating only to the original loan "and any amendments agreed in writing to that loan agreement". NIB argues that there were not, in fact, any amendments properly so called to the loan agreement but simply a series of extensions of the term thereof and that, as such, clause 3.3 was not in fact engaged on the facts of this case. Mr. McFadden contests that question which turns on the proper characterisation of the events that occurred in the light of the terminology used in the guarantee.

2.6 In the alternative NIB argues that, even if what occurred amounts, properly speaking, to an amendment of the loan agreement, then it is said that any such amendment was, in fact, in writing sufficient to satisfy clause 3.3. Mr. McFadden contests that issue which again turns on the proper construction of clause 3.3 in the light of the events which, in fact, happened.

2.7 On either of those bases NIB argues that clause 3.3 either does not apply to the facts as happened or, if applying, was complied with. If that be so, it follows that clause 9.1.2 would be unaffected, on the facts of this case, by clause 3.3 and would displace the position in equity which is to the effect that a material alteration in the principal contract discharges a guarantee. However, if NIB are incorrect in the above analysis, a fallback position is asserted. If clause 3.3 prevents, on the facts of this case, clause 9.1.2 operating to permit an alteration in the terms of the principal contract without jeopardising the guarantee then, it is said, Mr. McFadden, in relying on equitable principles to escape from liability on the guarantee, must himself do equity. It is said that Mr. McFadden's involvement in the extensions of time of the bridging facility was such as would make it inequitable for him to be released from his obligations under the guarantee.

2.8 As pointed out the first two issues concern the proper construction to be placed on the contract of guarantee as a whole but, in particular, clause 3.3. However, the issues also involve the application of that contract of guarantee to the circumstances which actually occurred on the facts of this case. In those circumstances it is appropriate to turn to the largely undisputed facts.

**3. The Facts**

3.1 Under the original loan agreement ("the loan agreement") dated 21st May, 2007, NIB agreed to make total facilities available in the amount of €21,300,000 to Naldin. The loan agreement provided for three separate facilities being a term loan facility of €13,000,000, a bridging facility of €6,300,000 and an overdraft facility of €2,000,000. As pointed out earlier, it is the bridging facility which is the relevant facility for the purposes of these proceedings.

3.2 The purpose of the facilities was to finance the consideration payable by Naldin under a share purchase agreement in respect of B&S (the "acquisition agreement"). It was envisaged that the purchase of the shares would ultimately be funded by an equity investment in Naldin. Following events of default, as specified in the loan agreement, NIB issued a letter of demand to Naldin on 29th September, 2009, seeking immediate repayment of the sum of €18,871,911.09 due by Naldin in respect of the loan agreement. Following the default of Naldin, NIB issued a letter of demand dated 29th September, 2009, to Mr. McFadden, as guarantor of the bridging facility, seeking immediate repayment of the sum of €6,350,478.80, being the amount then outstanding in respect of the bridging facility.

3.3 The bridging facility was advanced to part finance the consideration payable by Naldin under the acquisition agreement, pending the receipt of the proceeds of an issue of shares in Naldin, in a minimum amount of €6,300,000. It was a condition of the loan agreement that the bridging facility be secured by the personal guarantee of Mr. McFadden supported by a negative pledge over his assets.

3.4 In consideration of, and as contemplated by, the loan agreement, Mr. McFadden executed a guarantee dated 21st May, 2007 (the "guarantee") whereby Mr. McFadden agreed to guarantee the liabilities of Naldin under the bridging loan to NIB. Mr. McFadden's liability under the guarantee was limited to the amount due (including any unpaid interest) under the bridging facility together with further interest from the date of demand by NIB for payment.

3.5 As pointed out earlier, at the time of the execution of the guarantee, an additional clause 3.3 was added by handwritten insertion into the guarantee. It provided:-

> "This guarantee of Niall McFadden relates only to the Loan Agreement in connection with the acquisition of Buy & Sell by Naldin Ltd (and any amendments agreed in writing to that Loan Agreement) and may not be used for any other purpose now or in the future by the Bank. And this clause overrides any conflicting clause in this guarantee agreement."

3.6 Drawdown on the bridging facility occurred in June, 2007. Clause 6.2 of the loan agreement provided:-

> "Unless otherwise agreed by the Bank and the Borrower, the Borrower shall repay the Bridging Facility in full together with accrued but unpaid interest and any other amounts outstanding under this Agreement in respect of the Bridging Facility) on receipt of the proceeds of the Investor Share Issue and in any event no later than three months after the first Drawdown Date under the Bridging Facility."

3.7 The bridging facility, as previously mentioned, in fact, lasted for a lot longer than the three month maximum period specified in clause 6.2. This continuation (to use for the moment a neutral term) was effected by a series of requests made in correspondence and at meetings, mainly by directors of Naldin being Martin Cole and Mark Buckley to Kenneth Dobson of NIB, where "rollover" and extension of the bridging facility was agreed by Mr. Dobson. For most of this period Mr. McFadden was not a director of Naldin, only becoming such in June, 2009. Mr. McFadden had, however, some direct role in certain of those requests and discussions.

3.8 For example, on 13th March, 2008, Mr. Dobson met with Mr. McFadden and Mr. Cole at Boundary's offices to review the loan agreement and to seek an update on the repayment of the bridging facility. At this meeting a further extension of the bridging facility was requested. NIB confirmed an extension to the bridging facility deadline to 30th June, 2008, in a letter to the directors of Naldin dated the 24th April, 2008. On 25th June, 2008, Mr. Dobson received an updated personal asset statement of Mr. McFadden in a letter from Walter Kent, Mr. McFadden's personal accountant. The context of the forwarding of that asset statement is that it appears to relate principally to a separate matter although internally NIB seems to have regarded its receipt as of relevance to the extension of the bridging loan. There does not seem to be evidence that any request to Mr. McFadden for the relevant asset statement was expressed to be in the context of the Naldin bridging facility. While a note prepared by Mr. Dobson after a meeting with Mr. Cole on the 18th June, 2008, (Mr. McFadden was not present) does mention the asset statement, it is not clear that the asset statement was requested in the context of the extension of Naldin's bridging facility. However, following the receipt and review of the updated personal asset statement and a review of Naldin, NIB agreed to extend the bridging facility to 31st August, 2008. Confirmation of this was sent by letter of 3rd July, 2008, from Mr. Dobson to Naldin.

3.9 Following problems with another entity, which had certain shareholders in common with Naldin, *viz.* Munster Wholefoods Limited, a meeting was requested by NIB with Mr. McFadden and his senior management team at Boundary's premises. This meeting took place on 25th July, 2008, at which Mr. McFadden was present. The bridging facility was then extended again to 30th November, 2008, as confirmed in a letter dated 8th September, 2008, from Mr. Dobson to Naldin.

3.10 In summary the bridging facility was extended five or six times and on the following dates:

a) On 22nd August, 2007, an extension of one month was requested by Naldin. Whether that request was ever formally accepted is not clear;

b) On 5th October, 2007, the bridging facility was extended until 31st October, 2007;

c) On 6th November, 2007, the bridging facility was extended until 31st March 2008;

d) On 24th April, 2008, the bridging facility was extended until 30th June, 2008;

e) On 3rd July, 2008, the bridging facility was extended until 31st August 2008; and

f) On 8th September, 2008, the bridging facility was extended until 30th November, 2008.

3.11 A number of meetings were held in early 2009 between Mr. McFadden and NIB, where the bridging facility was discussed. At one of these meetings, on 2nd February 2009, Mr. McFadden requested that no action be taken by NIB on foot of the guarantee until he had an opportunity to put together a proposal for consideration by NIB. None of Mr. McFadden's proposals proved acceptable to NIB.

3.12 Having been in difficulty for some time, Naldin was put into examinership on 6th June, 2009, and remained in that position until 30th September, 2009. During this time there were no further negotiations with NIB. By 29th September, 2009, when the guarantee was called upon, the bridging facility had been in place for some 27 months.

3.13 Against that general factual background it is possible to put the specific issues which arise into context. I propose turning first to the questions relating to the proper construction of the guarantee. As indicated earlier, two such questions arise. The first is as to whether the fact that the bridging facility continued well beyond the maximum three month period originally envisaged amounts to an "amendment" of the bridging facility in the sense in which that term is used in clause 3.3 of the guarantee. As pointed out, there was a series of extensions of time of the bridging facility, and the question which arises is as to whether those extensions amount, properly speaking, to amendments.

3.14 If those extensions of time of the bridging facility are not, properly speaking, to be considered as amendments then it is clear that clause 3.3 does not apply to the extensions of time of the bridging facility and that the clause does not, therefore, afford Mr. McFadden any basis for being able to deny the continued effectiveness of the guarantee. On the other hand, if the extensions of time of the bridging facility amount to amendments, then a second question arises as to the proper interpretation of the phrase "agreed in writing" as used in clause 3.3. It is argued by Mr. McFadden that "agreed in writing" means agreed by him as guarantor rather than agreed between NIB and Naldin or, indeed, requested by Naldin and agreed in writing by NIB. In addition, a question arises as to the precise meaning of the term "agreed in writing". It will be necessary to return, in this context, to the precise terminology used in the correspondence which passed on the occasions of the various extensions of time. There does not, however, appear to have been a specific agreement signed by both parties providing for an amendment. On the other hand in most cases the alteration occurred as a result of correspondence passing between the parties. The question which arises is as to whether such correspondence (or where the alteration came about as a result of a written acceptance by NIB resulting from discussion, that written acceptance), can be said to amount to an agreement in writing in these sense in which that term is used in clause 3.3.

3.15 In summary, therefore, the two questions, which are each mixed questions of the construction of the guarantee and the facts, are as follows:-

A. Were the extensions of time of the bridging facility agreed between Naldin and NIB "amendments" of the agreement between NIB and Naldin in the sense in which that term is used in clause 3.3 of the guarantee; and

B. If so, by whom had such amendments to be agreed in writing so as to satisfy clause 3.3 – was NIB's agreement (with or without a written request from Naldin) sufficient or did Mr. McFadden also have to agree in writing?

3.16 However, before turning to consider those questions it is important to note that one legal issue of some potential significance arose at the hearing as to the proper approach to the construction of the guarantee. While the general principles to be applied were not in dispute (I will, therefore, touch only briefly on same) there was a significant dispute between counsel as to the extent to which the *contra proferentem* rule might be said to have application to the proper construction of the guarantee in this case, and if so, how it might be said to affect the proper approach of the court to that construction. I, therefore, turn to that question.

**4. The Contra Proferentem Rule**

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 origin and first purpose of the rule is to limit the power of a dominant contractor who is able to deal on his own "take it or leave it" terms with others, *Halsbury's Law* (4th Ed.) paras. 771 and 776. The rationale for the rule is as set out in *Tam Wing Chuen v. Bank of Credit and Commerce Hong Long Ltd* [1996] 2 B.C.L.C. 69, where at p. 77, Lord Mustill states that:-

> "The basis of the *contra proferentem* principle is that the person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests so that if the words leave room for doubt about whether he interned to have a particular benefit there is reason to suppose that he is not."

4.2 The rule can only be applied in cases of genuine ambiguity in interpretation of the agreement. As noted by Clarke: *The Law of Insurance Contracts*, 5th Ed., (London. 2006) at para. 15-5:-

> "In the past some courts were quick to find ambiguity in policies of insurance, in order to apply the canon of construction

> *contra proferentem*, and that raised the suspicion that the canon was being used to create the ambiguity, which then justified the (further) use of the canon: the cart (or the canon) got before the horse in the pursuit of the insurer. Orthodoxy, however, is that *contra proferentem* ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty. The maxim should not be used to create the ambiguity it is then employed to solve. First there must be genuine ambiguity."

4.3 The difficulty which sometimes arises today, especially where there is some degree of equality between the contracting parties and some mutuality in the drafting of the agreement concerned, is identifying which party is the *proferens*. In Lewison's *The Interpretation of Contract,* (4th Ed.) at p. 261, the author states that a *proferens* may be:-

> "(1) the person who prepared the document as a whole;
>
> (2) the person who prepared the particular clause;
>
> (3) the person for whose benefit the clause operates."

As such, each party to an agreement may be a *proferens* in respect of different terms of the agreement or there may be no true *proferens* at all. Cheshire Fifoot and Furmston in *The Law of Contract* (13th Ed.) suggest that the rule is defined as meaning that if there is any doubt as to the interpretation of the excluding or limiting term, the ambiguity should be resolved against the party who inserted it and seeks to rely on it.

4.4 The jurisprudence of the Irish courts seems to lean towards deeming the party who prepared the agreement as being the *proferens*, as per the following passage from *Rohan Construction Limited v. Insurance Corporation of Ireland Limited* [1986] I.L.R.M. 419, a judgment of Keane J. in this Court. The passage reads as follows:-

> "It is clear that policies of insurance, such as those under consideration in the present case, are to be construed like other written instruments. In the present case, the primary task of the court is to ascertain their meaning by adopting the ordinary rules of construction. It is also clear that, if there is any ambiguity in the language used, it is to be construed more strongly against the party who prepared it, *i.e.* in most cases against the insurer. It is also clear that the words used must not be construed with extreme literalism, but with reasonable latitude, keeping always in view the principal object of the contract of insurance."

4.5 There was some discussion at the hearing before me as to whether the *contra proferentem* rule might have a different form of application in the case of contracts of guarantee. It is said that there is authority for the proposition that a contract of guarantee will always be construed in favour of the guarantor. I have to confess that I am resistant to the proposition that different rules of construction, at least at the level of first principle, apply dependent on the nature of the contract whose construction is in question. The fundamental principles of construction are, in my view, the same in all cases and in respect of all types of contract (and indeed other documents having legal effect). Those principles have been explored in many recent cases, most especially the decision of the Supreme Court in *Analog Devices BV & Ors v. Zurich Insurance Company & Anor* [2005] 1 I.R. 274. The requirement is to interpret the intention of the parties from the words which they used to formulate their contract but taking those words in context. That general principle has been applied in many different ways in many different cases. The *contra proferentem* rule is, in my view, simply an aspect of that general principle. To the extent that a party might be expected (particularly if it has a significant degree of control over the drafting of the contract concerned) to make clear any entitlement which it would wish to assert, then the court is likely to assume that the relevant language was not intended to confer a benefit in favour of the party having such control, which the relevant party did not make clear in the text of the contract concerned.

4.6 It may well be that the application of general principles are likely to give rise to particular applications in certain specified types of contract. For example, in a great number of contracts of guarantee it will be the principal creditor who drafts the guarantee concerned which will be presented to the guarantor on a more or less "take it or leave it" basis. It is, therefore, likely that the application of the general principles applicable to the construction of contracts will lead, in the great majority of cases, to it being appropriate to construe a contract of guarantee produced by the principal creditor in a manner which takes as its starting point the fact that, if the principal creditor has not made clear the liability of the guarantor in particular circumstances, it was not intended that the guarantor be liable in those circumstances. However, it does not seem to me that there is any separate rule which suggests that, in all circumstances, a contract of guarantee must necessarily be construed in favour of the guarantor. Where, for example, a contract of guarantee is negotiated in detail with the assistance of legal advice on both sides, it would not seem to me to be appropriate to treat the construction of such a contract of guarantee in any different way from the construction of any other contract negotiated in the same way.

4.7 Passages from authorities implying that contracts of guarantee should be construed against the principal creditor and in favour of the guarantor need to be seen against the background of the fact that the application of general principles is likely, in the vast majority of cases, where the guarantee is produced on a take it or leave it basis by the principal creditor, to lead to such a construction being appropriate.

4.8 In summary, therefore, it is clear that the *contra proferentem* rule operates only as an aid to construction in cases of ambiguity and then only where it can fairly be said that the contract of guarantee, or a relevant section of it, has been proffered by one party (in most cases the principal creditor) such that general principles of construction should lead the court to take the view that that party did not intend the guarantee to extend beyond what is made clear in its wording.

4.9 It is also clear that there have been cases where the application of the rule has been disallowed because the drafting of the term emerged as a result of joint effort. See for example, *Levinson v. Farin* [1978] 2 All E.R. 1149. In *Oxonica Energy Ltd v. Neuftec Ltd* [2008] E.W.H.C. 2127, Prescott Q.C., acting as a deputy judge of the English High Court, held that the rule was not adequate to supply the answer to a case where both parties to the contract had a hand in the negotiation and drafting of the contract. In that case, Neuftec granted an exclusive patent to Oxonica, where the main drafting effort was undertaking by the grantee, Oxonica. However, Prescott Q.C. found that the grantor, Neuftec was not obliged to sign up to the agreement on a "take it or leave it" basis, and that the clause in question was for the benefit of both of the parties. Prescott Q.C. states at paras. 91 and 92 of his decision as follows:-

> "The maxim operates most comfortably in standard form contracts, where one side puts forward the document on take-it-or-leave-it terms. If, for example, an insurance policy contains a clause excluding losses caused by "floods", and damage is caused by water escaping from a burst domestic pipe, we would say; "Well, they should have put it more clearly, if

they wanted to exclude "floods" of that sort".... It is harder to apply the axis to the case of contracts individually negotiated.

The *contra proferentem* maxim is an old one and there is no doubt that is still survives although it is not to be used save as a last resort."

4.10 I am not, however, satisfied that the *contra proferentem* rule is of any significant assistance in the construction of the disputed terms in the guarantee in this case. It would appear that the guarantee in general terms was prepared by NIB's solicitors. It is also clear that clause 3.3 was drafted by Mr. McFadden himself. However, while the focus in this case is on the interpretation of clause 3.3, it is clear that it is not a stand alone clause, for much of the argument centred around the interaction between that clause, clause 9.1.2 and certain other clauses such as the definition clause. In the circumstances, while it might be said that, in its original form, the guarantee was proffered by NIB, the very fact of its amendment by the insertion of clause 3.3 as drafted by Mr. McFadden coupled with the interaction of that clause with other clauses, which were already in place having being drafted by NIB's solicitors, seems to me to place the relevant aspects of the guarantee, which are at issue in these proceedings, in the category where they can properly be described as having resulted from a joint effort being the original drafting of MOP on behalf of NIB coupled with Mr. McFadden's insertion of clause 3.3. Thus the rule cannot be appropriately applied.

4.11 Against that general legal background, it is next necessary to turn to the proper interpretation of clause 3.3 and the guarantee as a whole.

**5. The Interpretation of Clause 3.3**

5.1 The first question which arises is as to whether what in fact occurred on the various occasions when the length of the bridging loan was extended can properly be said to be an "amendment" of the guarantee for the purposes of clause 3.3. In addition to the clauses already cited, it is appropriate to note that, in para. 1.1 of the guarantee, the term "agreement" is defined as including arrangements which can be described by reference to the agreement having been "amended, extended, supplemented, restated or replaced" from time to time. On that basis counsel for NIB argues that the agreement itself contemplates a distinction between an amendment as such, on the one hand, and an extension, on the other hand, with the latter applying to circumstances where the only alteration in the terms was such as elongated the period of the loan.

5.2 Counsel for Mr. McFadden suggests, however, that the terms to which I have just referred could not be taken to be necessarily mutually exclusive. For example, it is said that the inclusion of an additional term might well give rise to the agreement being properly said to have been "supplemented", but that that would not preclude the agreement from having being "amended" at the same time.

5.3 It seems to me that there is much merit in this approach. It does not seem that the five words used in clause 1.1 in the definition of an agreement are necessarily mutually exclusive. The use of so many words may well be little more than an example of lawyers rarely using one word when five will do. Be that as it may, it would seem a very strained construction to derive from the use of those five terms to suggest that it was intended that each of those five terms, insofar as such terms might come to be used elsewhere in the agreement, must be taken to mean something separate and mutually exclusive from the others. The fact, therefore, that the word "extended" appears in addition to the word "amended" does not, it seems to me, imply that the same act might not be both an amendment and an extension at the same time.

5.4 While far from decisive, it is also of relevance to note that, in each of the letters written on behalf of NIB confirming its agreement to the relevant extension of time, the letter concerned includes a redrafted form of clause 6.2. It will be recalled that clause 6.2 in its original form required that the bridging facility was to be repaid on receipt of the proceeds of the contemplated investor share issue, but in any event, no later than three months from the first draw down date. The letters confirming agreement to the relevant change set out a redrafted form of clause 6.2 which typically deleted reference to the investor share issue but specified a new date by which the bridging facility was to be repaid. While the fact that NIB approached the extensions in that way (that is by setting out a new text for clause 6.2 changed in the way in which I have indicated) is not decisive as to whether the change can properly be characterised as an amendment for the purposes of clause 3.3, it is, in my view, indicative of the fact that there was, in truth, an amendment of the agreement. The reference to the investor share issue is dropped and the reference to a three month period is altered by specifying a specific date by which the bridging loan is to be repaid.

5.5 In substance, therefore, it seems to me that those alterations were "amendments" for the purposes of clause 3.3 of the guarantee.

5.6 That leads to the second set of questions which concern the issue as to whether clause 3.3 was, in fact, complied with. The first question concerns the identity of the person or body who had to be involved in the "agreement in writing" required by clause 3.3. It is obvious that any agreement to change the terms of the bridging facility necessarily would have to involve NIB, for without NIB's agreement there could be no change. In addition, it is clear that any agreement to change the terms of the bridging loan would have to have at least involved Naldin in some capacity. The first question raised on behalf of Mr. McFadden is as to whether, on the proper construction of clause 3.3, he also had to agree in writing to any such change in order that the change could be operative for the purposes of effecting his obligation to guarantee the loan. I am not satisfied that the proper construction of clause 3.3 required Mr. McFadden's agreement in writing to any relevant amendment. Clause 3.3 refers to the "Loan Agreement (and any amendments agreed in writing to that loan agreement)". The clause is, in its terms, therefore, referable to an amendment to the loan agreement. The obvious parties who have to agree to an amendment to the loan agreement are the parties to that loan agreement itself, being NIB and Naldin. If it was considered necessary, in order that clause 3.3 be complied with, that Mr. McFadden should also have to agree with any such amendment and express that agreement in writing, then the clause could have said so. It did not. I am, therefore, satisfied that, in order for clause 3.3 to be complied with, it is not necessary that there be an amendment agreed in writing by Mr. McFadden.

5.7 The second question of construction which arises under this heading is as to the form that any such agreement in writing would necessarily have to take in order that it meet the requirements of clause 3.3. In other words, what is an "agreement in writing" for the purposes of clause 3.3. It does not seem to me that an agreement in writing requires a single document signed by both parties. In order that a concluded contract of any sort take place, then there must necessarily be an offer and acceptance. Parties can choose to incorporate the result of an accepted offer into a single document signed by both of them. However, if the offer be in writing and it be accepted in writing, then it seems to me that same constitutes an agreement in writing in the ordinary sense in which that term might be used. I should emphasise, in that context, that there is a difference between an agreement which may be evidenced in writing, on the one hand, and an agreement which can be said to be in writing, on the other hand. An oral agreement may be evidenced in writing by a document which is prepared by one of the parties and transmitted to a third party. For example, a letter by a vendor to his solicitor setting out the terms on which he has agreed to sell a piece of property may, provided it contains the necessary details, be a sufficient note or memorandum to satisfy the Statute of Frauds. However, it could not be said that any such

agreement was in writing. However, a series of correspondence between the same vendor and the purchaser leading to a concluded agreement would, in my view, properly be said to give rise to an agreement in writing even though a sequence of documents might be needed in order to determine the terms of that agreement.

5.8 In those circumstances, it is necessary to consider, on the sequence of events in this case, whether there were, in fact, agreements in writing which had the effect of amending the bridging loan. I have pointed out at para. 3.10 above, that five or six extensions in the bridging facility in fact occurred.

5.9 It is necessary to say something of the sequence of events in each case. On the first occasion a letter of request for the relevant extension was sent by Martin Cole on behalf of Naldin to NIB on the 22nd August, 2007. While the bridging loan was expressed to be repayable within three months from draw down and while there was some minor lack of clarity as to the precise day of draw down, it would appear that the parties operated on the basis that the original loan was repayable as of the 31st August, 2007. No written confirmation of that first extension was put in evidence and there does not seem to be any basis for suggesting that there was a written confirmation of the extension then requested. Precisely what happened on that occasion is far from clear due to the absence of evidence. A clear request to extend to the 31st October, 2008, was, however, accepted in writing by NIB on the 5th October, 2008.

5.10 In addition, a request for a further extension was sent by Naldin on the 25th October, 2007, which sought to extend the facility to the 31st March, 2008. That request was accepted in writing by letter dated the 31st October, 2007. It would seem that the relevant letter was not sent to Naldin until the 6th November, 2007, when a covering letter enclosing what is described as a "facility amendment letter" was sent to Naldin. The precise sequence of events varied on the occasion of each of the subsequent amendments. In some cases there was a formal written request. On other occasions there was a meeting between representatives of Naldin and NIB at which a request was made, followed by a written confirmation on the part of NIB of the extension concerned.

5.11 I am satisfied on the evidence that there was no occasion when NIB sought to introduce a unilateral change in the length of the bridging facility. On each occasion a request was made, sometimes in writing sometimes at a meeting, by Naldin for the extension concerned. On each occasion with the exception, it would appear, of the first, the acceptance of NIB of the relevant extension to the term of the facility was notified in writing. The question which arises is, therefore, as to whether the further extensions of the bridging facility can be said to have been agreements in writing for the purposes of clause 3.3.

5.12 In that context, it is of some relevance to commence by analysing what the situation would be in respect of any intermediate extension (*i.e*. any extension other than the final one) not conforming with clause 3.3. The important question insofar as the continuing validity of a guarantee is concerned stems from the position of the guarantor in circumstances where a legally binding agreement to give time to the principal debtor is put in place. As pointed out by Andrews & Millett in the 5th Ed. of *Law of Guarantees* at para. 9-029:-

> "The basis of this rule is that an extension of time deprives the surety of his right at any time to pay the debt and sue the principal in the name of the creditor: the creditor is unable to place his remedies at the disposal of the surety without breaching the agreement as to the extension of time, and so since the surety's right or remedy is suspended, he is discharged altogether. Otherwise, if the surety were able to claim against the principal, this would nullify the effect of the extension of time, and if he were unable to claim, but remained liable to the creditor, it would put the principal in a better position than the surety, which would offend the co-extensiveness principle."

5.13 Likewise, the rationale for the rule is as set out by Cockburn C.J. in *Swire v. Redman* (1876) 1 Q.B.D. 536 at 541 in the following terms:-

> "The relation of principal and surety gives to the surety certain rights. Amongst others the surety has a right at any time to apply to the creditor and pay him off, and then (on giving proper indemnity for costs) to sue the principal in the creditor's name. We are not aware of any instance in which a surety ever in practice exercised this right; certainly the cases in which a surety uses it must be very rare. Still the surety has this right. And if the creditor binds himself not to sue the principal debtor, for however short a time, he does interfere with the surety's theoretical right to sue in his name during such period. It has been settled by decisions that there is an equity to say that such an interference with the rights of the surety, - in the immense majority of cases not damaging him to the extent even of a shilling, - must operate to deprive the creditor of his right of recourse against the surety, though it may be for thousands of pounds."

5.14 The reasons why, at the level of principle, a surety/guarantor will be discharged where the principal creditor is given time results, therefore, from the fact that the guarantor's position is impaired. A guarantor is exposed to pay on the guarantee but has an entitlement to attempt to enforce the principal debt by whatever means are at his disposal. If the principal creditor is to call on the guarantor to pay on foot of the guarantee then he must, of course, give the guarantor the benefit of attempting to enforce the principal debt. If the principal creditor ties his hands (and thus the hands of the guarantor), by giving a legally enforceable extension of time, then he has impaired the guarantor's position and cannot rely on the guarantee because of that.

5.15 However, it is clear that it is only a legally enforceable extension of time that matters. Provided that the principal creditor has not given the principal debtor a legally enforceable extension of time, then there is no impairment of the guarantor's position for he can pay up on the guarantee at any time he wishes and will have all of the rights of enforcement against the principal debtor that may be available to him. In those circumstances it follows that the mere fact that matters are let lie after a date by which a sum becomes due, is not of any significance in the context of the continuing validity of a relevant guarantee. What is of significance is if, at any stage, whether prior to or subsequent to the sum becoming due, the principal creditor enters into a legally binding arrangement to give time to the principal debtor to pay. The fact that there may have been periods during the sequence of events with which I am concerned when there was not in force a legally binding extension of time (because, for example, on some occasions the bank document agreeing to the extension of time post-dated the expiry of the previous term of the bridging loan) is neither here nor there. The fact that there were such periods does not affect the guarantor's position. Mr. McFadden would not have been under any legal disability to have paid off the guarantee and enforced his rights against Naldin in whatever way he wished during any such period. Gaps in the sequence are not, therefore, relevant.

5.16 While the existence of a gap in the extensions of time is not, in my view, for those reasons, of any relevance, that does not mean that the earlier extensions of time are irrelevant. In that context it is necessary to analyse the legal consequences of any particular extension of time. For the reasons which I have already sought to analyse any such extension of time was an amendment for the purposes of clause 3.3. Clause 3.3 in its terms, overrides any other inconsistent provision of the guarantee. In those circumstances it clearly overrides clause 9.1.2. It seems to me to follow that, in the event that there was a legally binding extension of time which was not in writing, then clause 9.1.2 could have no application so as to save NIB from the application of the ordinary

principles of equity which would discharge the guarantee. The default position is that, in equity, Mr. McFadden would be discharged in the event that there was any material change in the terms of the principal contract subject to the sort of exceptions which it will be necessary to address in the context of the final issue which arises in these proceedings. Leaving any such exceptions aside, it is clear that the giving, by means of a legally binding arrangement, of time to the principal debtor amounts to such a material change. Therefore, *prima facie*, the giving of a legally binding extension of time to Naldin by NIB would, in equity, discharge Mr. McFadden's liabilities on the guarantee. The only basis on which NIB could escape from that consequence is by placing reliance on clause 9.1.2. However, clause 3.3 is stated to override clause 9.1.2 and it seems to me to follow that any legally binding extension of time which was an amendment but which was not in writing, could not be said to bind Mr. McFadden. It seems to me to follow, therefore, that NIB cannot call clause 9.1.2 in aid in circumstances where the extension of time concerned did not comply with clause 3.3. It follows, in turn, that, in the event that there was any extension of time which did not comply with clause 3.3 but which was legally binding, then Mr. McFadden's guarantee was thereby extinguished. It would only be in circumstances where the subsequent conduct of Mr. McFadden, in relation to any later extension of time, was such as could be said to amount to a reaffirmation of his guarantee or an acceptance of the continuing existence of the guarantee concerned, that a guarantee once extinguished could be said to have been revived.

5.17 Against that background it is necessary to look at each of the extensions of time for the purposes of determining whether in each case it can be said that there was compliance with clause 3.3. As pointed out earlier in some cases there was a written request by Naldin followed by a written acceptance of that request by NIB. That seems to me to clearly constitute an agreement in writing for the purposes of clause 3.3. For the reasons which I have also set out it does not seem to me to be material as to whether NIB's acceptance came before or after any previous period of an extension of time had expired. The more difficult question arises in those cases (of which there were undoubtedly some) where there was no request in writing by Naldin but rather meetings took place at which Naldin indicated an inability to discharge the bridging facility within its then current term, and sought an extension. Where such meeting occurred, a written agreement by NIB to the extension sought invariably followed. The question which arises is as to whether the extensions which occurred in those circumstances (*i.e.* where there was no written document on the Naldin side) can nonetheless be regarded as an agreement in writing for the purposes of clause 3.3. In passing I should recall that there was a complete lack of evidence as to what, in fact, happened in relation to the first written request by Naldin. Whether that request was the subject of any formal extension of time by NIB is not clear. I am not, therefore, satisfied on the evidence that it has been established that there was a legally binding extension of time in respect of that first request and, therefore, for the reasons which I have already analysed, it does not seem to me that that request and its consequences are of any materiality to the issues which I have to decide. What I am, however, concerned with is those occasions when Naldin's request occurred verbally at a meeting but was responded to by a written agreement on the part of NIB. Can such an arrangement be said to amount to an agreement in writing for the purposes of clause 3.3?

5.18 It is important in that context to look at clause 3.3 as whole. The purpose of the clause is clearly to impose restrictions on the type of alterations in the underlying bridging facility between NIB and Naldin, which can bind Mr. McFadden as guarantor as well as to confine the guarantee to the bridging facility rather than any other indebtedness that companies associated with Mr. McFadden might have with NIB. So far as the amendment provision is concerned, same could have no other purpose than to confine Mr. McFadden's guarantee to the original contract together with amendments which met the "agreed in writing" provisions of the clause. It seems to me to clearly follow, therefore, that Mr. McFadden, by introducing clause 3.3, sought to exclude any liability under the bridging facility which derived from an amendment which was not agreed in writing. While it is true to say that Mr. McFadden had a limited formal role in Naldin, it is clear on all the evidence that Naldin was a Boundary project (whatever Boundary's formal legal relationship might have been) in that it was promoted by Boundary personnel and, from time to time, some of the measures proposed for taking out the bridging loan involved the sale or possible sale of Boundary assets. While it true to state that, for a portion of the period in question, Mr. McFadden was unwell, it should also be noted that, at the time when the loan agreement and guarantee was put in place, he was the principal behind Boundary and would, therefore, clearly have expected and been expected to have had access to any relevant information relating to Naldin. In those circumstances it seems to me to follow that the purpose of clause 3.3 was to ensure that Mr. McFadden would only be bound, so far as his guarantee was concerned, with alterations in the bridging facility terms which were agreed in writing so that there would be a suitable formality about the changes concerned which would apparent from the books and records of Naldin. There might well, for example, be circumstances where, because of actions taken by Naldin, Naldin itself might be estopped from taking certain positions in relation to its contractual relations with NIB on foot of the bridging loan. However, clause 3.3 makes clear that Mr. McFadden would not be caught by any alteration in the legal rights and obligations arising between Naldin and NIB unless that alteration was the subject of a formal agreement in writing. Save for the first brief possible extension, there is a formal written response from the bank agreeing in writing to the extension concerned. Each of those letters amount to a response by the bank to a request by Naldin for the extension concerned. The only question which seems to me to arise is as to whether the fact that the requests were, in some cases, verbal rather than in writing could render the written acceptance in writing by NIB of the request concerned to be other than an agreement in writing.

5.19 From first principles it is clear that a contract can only come into existence where there is offer and acceptance. A change or amendment to a contract requires the same formalities. It is clear that, in each case with which I am concerned, the relevant amendment commenced from an offer on the part of Naldin which sought the extension amendment concerned. The agreement was concluded when NIB accepted that offer and communicated that acceptance to Naldin. The amendment (being in itself a contract) therefore, came into existence when NIB sent its written letter of acceptance of Naldin's proposal. As pointed out earlier, I have no doubt but that a written request for a variation followed by a written agreement to that variation constitutes an agreement in writing for whatever amendment might be required to give effect to the variation concerned. It is not so clear where there is a verbal request for a variation followed by a written agreement.

5.20 What seems to have occurred is that there were discussions at which various proposals for taking out the bridging facility were put forward on behalf of Naldin. Those discussions led to NIB setting out its agreement in writing to extend the term of the bridging facility. At the end of the day, on balance, I am satisfied that such written confirmation amounts to an agreement in writing for the purposes of clause 3.3. This was not a situation where there were a range of terms being considered on both sides. Rather what was sought was a unilateral change (*i.e.* the extension of time) for the benefit solely of Naldin (whatever about Mr. McFadden's impairment, Naldin was not itself suffering anything other than an advantage by the extension of time). Naldin had nothing to agree to (save for an arrangement fee which, in the context of the sums involved in the bridging facility, was not material). The only party who had something to agree to was NIB. NIB agreed in writing. Naldin's books and records would, therefore, have included a written record of the agreement by NIB to the extension concerned. I am, therefore, satisfied that each of the extensions which included a legally binding arrangement were agreed to in writing, for the purposes of clause 3.3.

5.21 It follows that I am satisfied that, on the facts that happened, clause 3.3 does not displace clause 9.1.2 and that the guarantee is effective as against Mr. McFadden notwithstanding the various extensions of time.

5.22 Lest I be wrong in that conclusion I should also touch on the question of the involvement of Mr. McFadden in the events which led to the various extensions of time being given.

**6 Mr. McFadden's Involvement**

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.

6.2 For example, in *Wittmann (UK) Limited v. Willdav Engineering S.A.* [2007] EWCA Civ 824, Moore-Bick L.J. stated the following at para. 27:-

> "Moreover, I think it is at least arguable, even in relation to a variation of the underlying contract which does not alter the obligation guaranteed, that when Cotton L.J. said that "the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged", he had in mind that the surety must in some way communicate his consent to the creditor before he can be held to the guarantee under the changed circumstances. That would be consistent wit the remarks of Blackburn J. in *Polak v. Everett* (1876) 1 Q.B.D. 669, 673 drawing a distinction between knowledge of a variation and assent to it, and indeed if he has not done so, it is difficult to see why as a matter or principles he should be held to his contract or how in practice the creditor can know where he stands. In the present case, although Willdav, through Mr. Keech, clearly did privately consent to the restructuring of the contractual arrangements, there is no finding that it communicated to Wittman its willingness to remain liable under the guarantee. However, this question does not arise for decision in the present case and on the whole I prefer not to express a concluded view on it."

6.3 Similarly, Buxton L.J. stated, in a concurring judgment, at para. 33-34:-

> "The right of a surety to discharge if the terms of or obligations under the principal contract are altered is founded in equity: see per Blackburn J. in *Polak v. Everett* (1876) 1 Q.B.D. 669 at p. 673. The surety therefore cannot assert that right in circumstances where it would be inequitable for him to do so: most obviously, where he has assented to the alteration. In the present case the alteration is substantial; but provided that new terms fall within the matrix or general ambit of the obligation guaranteed the guarantor will continue to be bound if he has assented to those terms.
>
> It is assent to, and not merely knowledge of, the new terms that is required: so emphasised by Blackburn J. in the passage already referred to."

6.4 It does not appear that it is necessary that there be a formal assent by the guarantor to the relevant change. A guarantor who is a principal or significant player in a corporate entity whose liabilities are guaranteed may be taken to assent by virtue of active participation in the relevant changes. In *Grubbs v. Bouwhuis* [2007] BCSC 887, and *High Mountain Feed Distributors Limited v. Paw Pleasers Limited* [2004] NBQB 220, the Canadian Courts refused to discharge a guarantor from liabilities in circumstances where, in the case of *Grubbs*, the guarantor was "the managing director of (the debtor) and had full knowledge of the deviation from the contract… and acquiesced in and consented to the business relationship that grew up ..." while, in *High Mountain Feed*, the guarantor was president of the defendant corporation and in the words of the court "must have not only known of… but actively participated" in the relevant variations.

6.5 It would seem, therefore, that the 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.

6.6 Against that background, it is necessary to assess Mr. McFadden's role. At all material times Mr. McFadden was not a director of Naldin. However, it is clear that whatever the legal niceties there was a significant connection between Naldin and Boundary. Mr. McFadden was a significant (perhaps the most significant) player in Boundary. There was no evidence that Boundary had any legal commitment to Naldin. Rather it would appear that Boundary personnel hoped to procure an equity investment in Naldin (perhaps including Boundary itself or Boundary personnel as investors but also including third parties introduced into the project). There is no doubt on the evidence that the Buy & Sell project was considered by all concerned (including Boundary) to be a Boundary project and was regularly discussed at Boundary meetings as well as Naldin meetings.

6.7 On the other hand, most of the arrangements for the extensions of time which are at the heart of this case were negotiated between Naldin personnel and NIB and did not directly involve Mr. McFadden. In the absence of any evidence to the contrary from Mr. McFadden, it would seem to me to be reasonable to infer, given Boundary's involvement, that Mr. McFadden would have been aware of the extensions of time. However, on the authorities it is clear that mere awareness is insufficient. I am not, therefore, satisfied that those extensions of time which did not directly involve Mr. McFadden could be characterised in a manner which would bring them within the authorities so as to exclude Mr. McFadden from an entitlement to discharge which he would otherwise have. Mr. McFadden did, however, play a greater role in some of the later extensions. For example, the final extension of time stemmed from a request on the part of Naldin put forward during discussions with NIB. The relevant meeting took place on the 25th July, 2008, and was attended by Mr. McFadden on the Naldin side. The extension of time up to 30th November, 2008 was sought by Naldin at that meeting. In those circumstances it seems to me that Mr. McFadden was an active participant in those later amendments or extensions in the sense that he was at the very meeting at which Naldin requested the relevant extensions.

6.8 Given my finding that Mr. McFadden was not an active participant, in the sense in which that term is used in the authorities, in many of the earlier extensions of time but was an active participant in some of the later extensions of time, it is necessary to analyse the consequences of that finding for the continued validity of the guarantee. It should be emphasised that this part of this judgment is concerned with the situation that would have obtained in the event that I came to a different view on the question of whether there had, in fact, been an agreement in writing to the extensions of time concerned. However, that hypothesis could only apply, in my view, to those occasions where there was not a request in writing by Naldin for the extension concerned. For reasons which I have already analysed, it seems to me clear that a case where there was a written request by Naldin followed by a written agreement by NIB, amounts to an agreement in writing. However, one of the extensions of time which appears to have occurred as a result of a verbal request on the part of Naldin was an extension to the 31st August, 2008 which is the subject of an NIB letter of agreement of the 3rd July, 2008. That extension appears to have stemmed from a request made at a meeting on the 18th June, 2008 between NIB and Mr. Cole for Naldin. Mr. McFadden was not at that meeting. The only evidence of an involvement on the part of Mr. McFadden in that particular request, is the furnishing, at that time, of the updated personal asset statement of Mr. McFadden to which I have already referred. I am not satisfied on the evidence, as I have pointed out, that it was made clear to Mr. McFadden that the updated asset statement sought from him was in the context of or was required in relation to NIB's review of the appropriateness of affording Naldin extra time. Rather it seems that the primary focus of the relevant asset statement related to other borrowings.

6.9 In those circumstances, it seems to me that, if I be wrong in the interpretation of "agreed in writing", the extension to the 31st August, 2008 is one of those extensions which could not be said to have been agreed in writing. In those circumstances, the position would be that NIB had afforded, on that occasion, Naldin with a legally binding extension of time in circumstances where the agreement giving rise to that extension of time did not comply with clause 3.3. In those circumstances, NIB would not, for the reasons which I have already analysed, have the benefit of clause 9.1.2 so that, in turn, Mr. McFadden would *prima facie* be entitled to a discharge on that occasion from the guarantee. As Mr. McFadden was not, in my view, involved to the extent necessary to meet the test identified in the jurisprudence in respect of that extension, then it follows that, on the hypothesis on which all of this analyses is conducted, Mr. McFadden would be entitled to treat the guarantee as having been discharged on that occasion.

6.10 The further question which arises is as to whether Mr. McFadden's active involvement in the subsequent further and final extension of the bridging facility to the 30th November, 2008 could reactivate the guarantee in circumstances where it had previously been discharged.

6.11 It seems to me that the circumstances that would be required for a reactivation of a guarantee which had already been discharged are different from the circumstances which would prevent a guarantee from being discharged in the first place. The reason why the involvement of the guarantor in the circumstances leading to a change in the principal contract can deprive the guarantor of an entitlement to treat the guarantee as at an end are obvious. The guarantor invokes equitable principles to suggest that he should not be liable on the guarantee because of a change in the principal contract. Where he is an active participant in making the arrangements for that change, then it would be inequitable to allow him to rely on any such alterations as a means for escaping from his liability. However, it seems to me that a guarantor would need to go further and would require to act in a manner consistent only with their being a continuing guarantee in order that his actions could reasonably be said to reactivate a guarantee which had already been discharged. Mere participation in further negotiations for further alterations to the principal contract would not, in my view, be sufficient to reactivate a guarantee which had already been discharged. There is nothing in the evidence to suggest that, on the occasion of the meeting which led to the request for the final extension of time to November 2008, Mr. McFadden did anything which would amount to an express or necessarily implied representation that the guarantee was still in force. The guarantee does not appear to have been an issue at that meeting

6.12 If, therefore, I am wrong in the view that a verbal request by Naldin followed by a written agreement by NIB to that request, in respect of any particular extension of time, amounts to an agreement in writing for the purposes of clause 3.3, then the following consequences seem to me to follow. First, any such verbally requested extension cannot be said to be an amendment agreed in writing for the purposes of clause of 3.3. It would follow that clause 3.3, overriding as it does clause 9.1.2, places NIB in a position where it could not, in those circumstances, rely on clause 9.1.2 to displace the ordinary position in equity. It follows that the extension to August 2008 would not have been agreed to in writing by NIB but would nonetheless be legally binding. For the reasons which I have analysed, I am not satisfied that Mr. McFadden participated in that extension in the sense in which that term is used in the authorities. It would follow, in those circumstances, that Mr. McFadden's contract of guarantee was discharged on that occasion. For the reasons which I have also analysed, I am not satisfied that anything that happened subsequently could have reinstated the guarantee in circumstances where it was so discharged. It follows that, if I am wrong in the view which I have taken as to the proper interpretation of the term "agreed in writing", NIB are not entitled to debar Mr. McFadden from relying on the extension of time to August 2008 as having discharged the guarantee.

6.13 There is one further issue to which I should turn. It was asserted by NIB in the course of evidence that Mr. McFadden had attended meetings, subsequent to NIB seeking to call in the Naldin loan, at which Mr. McFadden did not in any way seek to assert that his guarantee was no longer enforceable. It is factually correct on the evidence that that is so. However, it does not seem to me that the fact that Mr. McFadden may not have been aware of any entitlement which he might have had to treat the guarantee as being unenforceable, affects his legal entitlements. There is no evidence that NIB changed its position as a result of those meetings. If Mr. McFadden had an entitlement to be discharged from the guarantee, it does not seem to me that he could be estopped from relying on that entitlement because he did not assert it at those meetings. The situation might well be different in circumstances where NIB changed its position as a result of such a meeting. However, there is no evidence of any such action in this case.

**7. Conclusions**

7.1 In summary I have, therefore, come to the following views. The various extensions of time agreed between Naldin and NIB were amendments to the bridging facility for the purposes of clause 3.3. Clause 3.3, on its proper construction, required that any such amendments be agreed to in writing. However, that requirement did not mean that Mr. McFadden had to agree in writing to any such amendments. On the facts of this case, all such extensions were agreed to in writing and thus, clause 3.3 was complied with. Clause 3.3 does not, therefore, overrule clause 9.1.2 so that NIB is not debarred from enforcing the guarantee by virtue of giving Naldin time.

7.2 If I am wrong in my interpretation of clause 3.3, so that clause 3.3 was not complied with, Mr. McFadden's role in the negotiation of the extension of time to August 2008 was not such as would render it inequitable for him to now seek to rely on that extension of time as a basis for discharge of his obligations under the guarantee. Nothing in Mr. McFadden's subsequent conduct could be said to have reactivated the guarantee if it had been discharged on that occasion.

7.3 However, for the reasons set out at para. 7.1 above, it seems to me that Mr. McFadden remains liable under the guarantee. I will request from counsel an up to date figure for inclusion in the judgment against Mr. McFadden.