Neutral Citation [2016] IEHC 628

THE HIGH COURT

[RECORD NO. 2013\7927 P]

BETWEEN

JAMES J.M. MEAGHER

PLAINTIFF

AND

ULSTER BANK IRELAND LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 3rd day of November, 2016.

Introduction

1. This judgment concerns the effect of the termination of a guarantee for a deceased person's estate on the proceeds of a life policy. The schedule to the policy identified the deceased as the "Policy Owner" but the premia for same were discharged by a debtor in respect of which the deceased was a limited guarantor. A question arises as to whether the provisions of the guarantee were triggered successfully to allow for the operation of the assignment by the deceased of the life policy.

Reliefs Sought

2. In summary, the plaintiff as the personal representative of the late Mr. Matthew Cahill of Thurles, Co. Tipperary ("**the deceased**") seeks the following declarations that:-

> (i) He is legally and beneficially entitled to the proceeds of a life policy which was the subject of an assignment by way of a mortgage dated 25th August 1988, ("**the Assignment**") between the deceased and the defendant ("**the Bank**").
>
> (ii) The plaintiff lawfully terminated the continuing guarantees dated 5th September 1985, ("**the 1985 guarantee**") and 11th June 1991, ("**the 1991 guarantee**") between the deceased as guarantor and the Bank.

The plaintiff also seeks an injunction directing the return of the life policy which is the subject of the Assignment.

Chronology

3. 05.09.1985 – The deceased executed the 1985 guarantee which was a continuing joint guarantee with two other then directors, of MacLochlainn Ltd ("**the Company**") for "payment to the Bank of all present or future actual or contingent liabilities" of the Company "provided the total amount recoverable under the guarantee shall not exceed IR£130,000".

25.08.1988 – The deceased executed the Assignment by way of a mortgage over the Shield Life policy issued on 24th March 1988, which assured IR£55,000 on the death of the deceased ("**the 1988 policy**").

08.02.1989 – Shield Life confirmed notification of the Assignment to the Bank.

11.06.1991 – The deceased with the two same directors of the Company executed the 1991 guarantee which was a further continuing guarantee for the Bank in terms similar to the 1985 guarantee with a limit of IR£97,000.

29.06.1998 – The Bank's facility letter to the Company identified the 1998 guarantee and the 1991 guarantee ("the Guarantees") as security.

23.09.2011 – The Bank issued a facility letter ("**the 2011 facility**") to the Company which did not include the Guarantees as items of security. The 2011 facility included a clause that it superseded "all prior agreements, arrangements or correspondence between the bank and the borrower in relation to the facilities" provided by the Bank to the Company.

21.03.2012 – The deceased died.

13.07.2012 – Grant of probate issued to the plaintiff for the estate of the deceased.

27.11.2012 – The bank issued a facility letter ("**the 2012 facility**") to the Company which identified the Guarantees as security held together with the 1988 assignment. The 2012 facility repeated that it superseded all prior agreements between the Bank and the Company.

05.12.2012 – The plaintiff's solicitors advised the Bank of the plaintiff's 30 day notice to determine the 1985 guarantee while noting that the Company's group accounts did not disclose any bank borrowing.

12.12.2012 – The Bank's solicitors replied to the effect that the Bank was considering whether to call in the Guarantees and enforce the Assignment by encashment of the life policy.

21.12.2012 – The Company's solicitors requested the Bank to encash the 1988 policy and to apply the proceeds which would reduce the Company's borrowings from the Bank.

25.04.2013 – The plaintiff's solicitors gave one month's notice to the Bank pursuant to clause 3 of the 1991 guarantee of his termination of the 1991 guarantee.

29.05.2013 – The Bank wrote to the Company demanding repayment by close of business on Thursday, 30th May 2013, of a sum due in respect of an account. The Company was advised that failure to discharge would allow the Bank to exercise its rights under the 2012 facility letter. This necessarily included the calling in of the guarantees.

30.05.2013 – The Bank wrote to the plaintiff and after referring to the Guarantees demanded €266,645.00 being the sum total in euro covered by both guarantees.

05.06.2013 – The plaintiff's solicitors replied to the Bank and asserted that the Guarantees had been terminated and requested the release of the Assignment of the 1988 policy to the estate of the deceased.

18.06.2013 – A cheque for €218,188.99 was issued by the life assurer in favour of the Bank which became due on the death of the deceased.

28.06.2013 – The Bank's solicitors asserted that termination of the Guarantees did not release the deceased from the liability of the Company "prior to the date of termination" [notice had been given by the letters dated 21st December 2012, and 25th April 2013, in respect of the 1985 guarantee and the 1991 guarantee respectively].

29.07.2013 – These proceedings were commenced by way of Summary Summons.

14.11.2013 – The Defence was delivered which denied that the deceased did not owe any liability to the defendant and pleaded specifically that the effect of the termination notices merely limited the liability of the deceased's estate to sums which were due and owing as at the date of termination.

03.07.2015 – These proceedings were set down for hearing.

Emphasis by the Plaintiff
4. There was no controversy between the parties at the trial of this action on 21st and 22nd October 2016 about the facts, other than that the plaintiff emphasised:-

> (i) That there was no mention of the Guarantees or the 1988 policy in the facility letters addressed to the Company which prevailed at the time of the deceased's death in March 2012;
>
> (ii) The plaintiff was at a disadvantage in only learning during the course of these proceedings about the entire circumstances of the issue and maintenance of the 1988 policy to the date of death, the Guarantees in 1988 and 1991, the 1988 assignment or the indebtedness of the Company to the Bank on any particular date due to the lack of instructions or notes left by the deceased concerning these issues.

Further facts
5. Therefore, I accept the following facts which I was assured could have been established by witnesses available to the Bank when the trial commenced. Counsel for the parties agreed that such evidence was not necessary which shortened the duration of the trial.

> (i) The Company rather than the deceased paid for the annual premia in respect of the policy from 1988 to 2012.
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> (ii) The Company at any relevant time for consideration by the Court was indebted (pursuant to the then applicable facility letter for the Company) to the Bank for a sum greater than €266,645 being the total of the Guarantees or the sum paid by the life assurer to the Bank in June 2013.
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> (iii) There was no evidence available to show that the deceased anticipated that the proceeds of the 1998 policy would be paid to his estate in circumstances where there was no indebtedness due by the Company to the Bank. The height of the plaintiff's position in this regard is that the 1988 policy referred to the deceased as the "policy owner".

Net issue
6. The net question is whether the deceased was indebted to the Bank on foot of the Guarantees because the Assignment allowed the Bank to recover "actual or contingent liabilities" of the deceased from the 1988 policy.

Submissions
7. Counsel on behalf of the plaintiff submitted *inter alia* that:-

> (i) The Bank had not made any demand within a month of the notices of termination for each of the guarantees. Had the Bank served a letter of demand within the notice period of a month, a cause of action could then have subsisted.
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> (ii) No steps had been taken to seek repayment from the Company. Moreover, the letter dated 30th May 2013, to the plaintiff was dated the day on which the Company was requested to discharge its indebtedness. Therefore, a default had not occurred by the time of sending that letter of demand to the plaintiff.

8. Counsel for the defendant stressed that the Court was concerned with a demand guarantee which specifically provided at clause 3 after allowing for determination: "such determination shall not affect the liability of the guarantor or estate of the guarantor for the amount **recoverable** at the date of expiration of the notice" [emphasis added by Counsel and now by the Court].

9. It was submitted that a liability did indeed exist on the expiry of the notice periods which entitled the issuing of a demand to the plaintiff as the representative of the deceased's estate. In other words, termination did not relieve the guarantor of any liability but rather it crystallised the liability as at the expiry date of the termination notices.

10. Counsel for the defendant also replied that liability on foot of the guarantees was not contingent on the wording of the facility letter and particularly because the applicable "general terms and conditions for business lending to companies" of the Bank identified a default as being the death of any guarantor (being an individual).

11. It was also urged upon the Court, with some objection from the plaintiff due to the lack of any pleading in that regard, that the Company had paid the premia for the 1988 policy and it was entitled to the proceeds of the policy to reduce its debt to the Bank. That has now occurred and the debt owed by the Company to the Bank has been reduced as a result of the application of the policy.

The Law
12. The suggested inconsistent application of the law on guarantees in the United Kingdom is more apparent than real for the facts giving rise to this claim when one considers in particular the terms of the Guarantees and the Assignment.

13. The Court has no hesitation in endorsing the view of Murphy J. in *McGrath v. Danske Bank* [2015] IEHC 712 where at para. 20 – 21 she stated:-

> *"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… However, this general principle does not apply in the case of a demand guarantee 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".*

14. The crucial differences between the facts in the case now before the Court and that which was before Murphy J. in 2015 are:-

> (i) Clause 3 of the Guarantees had the proviso: "but such determination shall not affect the liability of the guarantor or the estate of the guarantor for the amount recoverable at the date of the expiration of the notice". This proviso which uses the words "**recoverable** at the date of the expiration of the notice" [emphasis added] did not appear in the guarantees considered in *McGrath v. Danske Bank* or the English Court of Appeal case of *National Westminster Bank PLC v. Hardman* [1988] FLR 302.
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> (ii) The assignment of the 1988 policy by way of mortgage to the bank had not been a factor for consideration by those courts.

Decision

15. The wording of clause 3 which refers to "recoverable" supports the position of the Bank that the determination of the Guarantees crystallised the Bank's entitlement to demand that the estate of the deceased give effect to the arrangements concluded between the Bank, the deceased and his co-guarantors under the Guarantee. The delay of the Bank in issuing the demand until after the expiry of the notice periods did not trigger any ground for a plea that a default had not occurred.

16. It is instructive to quote from Hobhouse L.J. in the English Court of Appeal judgment in *Bank of Credit and Commerce International S.A. (in compulsory liquidation) v. Simjee and another* [1997] CLC 135 where at p. 4 he summarised as follows:-

> *"A continuing guarantee is prima facie open ended. The surety will normally require some mechanism whereby he can bring this state of affairs to an end. Commercially, there is more than one way in which he can do this. One is by including in the guarantee a provision which enables the surety to give notice of termination of the guarantee contract so that the creditor is given a period of time within which he may if he chooses make a demand upon the surety; if he does not do so, the contract then wholly comes to an end. This was held to be the effect of the guarantee in the Hardman case. Another is by having a provision which enables the surety by the service of a notice to bring to an end the continuing character of the guarantee so that from the expiry of the notice its subject matter becomes the obligations of the principal to the creditor at that time…*
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> *If the provisions of the guarantee are of the latter kind, the guarantee remains in force but only as a guarantee of the performance of identified obligations. It remains a demand guarantee so that, although the notice crystallises the subject matter of the guarantee, it leaves open whether there will be any liability of the surety under the guarantee. No cause of action against the surety will arise until a demand is made upon him. But the demand can only relate to such of the obligations of the principal at the time of the expiry of the notice and still remain unperformed at the time of the demand on the surety".*

17. There is no uncertainty in the presenting facts as existed in *Hardman*. On 21st March 2012, when the deceased died, an event of default had occurred for the facility available to the Company by reason of the reference to the general conditions of the Bank in all of the facility letters. Those conditions identified the death of a guarantor as an event of default.

18. There is no merit in the plaintiff relying on the absence of a mention to the Guarantees or Assignment in the 2011 letter which contains the terms of the facility available to the Company at the time of the deceased's death. The deceased had executed the Guarantees and the Assignment. The Bank copper-fastened its position by issuing the letter dated 29th May 2013, which advised the Company of an imminent default unless all of the facilities on demand were repaid. Those facilities were not repaid and the letter of demand dated 30th May2013, sought to finalise matters beyond any doubt. Therefore, even if the Court is incorrect in some way by relying on the general terms and conditions of the Bank, I believe that the Bank was entitled to send the letter dated 30th May, 2013 thereby requiring the plaintiff to honour the obligations of the deceased under the Guarantee. The Company having not repaid the subject of the facilities on 30th May 2013, entitled the Bank to receive the proceeds of the 1988 policy from the life assurer later that month, as happened.

19. The crux of this case boils down to the use of the word "recoverable". It was agreed that there was no necessity for the Bank to call evidence to establish that the Company was indebted to the Bank at all times material to the Court's consideration of the accrual of the liability of the Company which was the subject of the guarantees.

20. It is indeed true to state that the purpose of a notice period is to allow for the determination of a guarantee. The plaintiff as the personal representative of the deceased is entitled to identify the liabilities of the deceased. However, the Court takes the opportunity of emphasising again that there was a debt due by the Company to the Bank which was covered by the guarantees at the date of death. The parties, the Company and the co-guarantors all signed up to an arrangement whereby the proceeds of the 1988 policy could be used to discharge any liability of the Company to the Bank at the date of death of the deceased when the Bank called for same. It was never asserted until these proceedings issued by anyone that the deceased as the policy holder was beneficially entitled to the proceeds of that policy, the premia for which were discharged by the Company.

21. In deference to the objection made on behalf of the plaintiff that the formal defence of the Bank did not include a plea that the Company was entitled to the proceeds of the life policy in any event and given the other findings of the Court, the Court finds it unnecessary to consider that submission on behalf of the defendant which relies on the opinions of the House of Lords in *Foskett v. McKeown and Ors.* [2001] 1 AC 102. Nevertheless, the Court acknowledges that the factual matrix giving rise to the Guarantees, the 1988 policy, the Assignment, the knowledge available to all of the parties through the exchange of pleadings and discovery in these proceedings has emboldened the Court's view as expressed during exchanges in oral submissions that the estate of the deceased would enjoy an unexpected windfall if the Court found in any way other than it has so found.

22. In the circumstances, the Court dismisses the claims seeking declarations, an order by way of injunction and damages.