

Neutral Citation No: [2014] NIQB 65

Ref: WEA 9188

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 31/01/14

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN:

ANGLO IRISH BANK CORPORATION LIMITED

Plaintiff

v

JOHN PATRICK CONWAY

Defendant

WEATHERUP I

[1] The plaintiff claims £177,928.80 on the defendant's guarantee of 6 June 2008 for the debts of the borrower, Meteor Controls (International) Limited ("Meteor"). Mr B Fee QC and Mr Boyle appeared on behalf of the plaintiff and Mr Elliott on behalf of the defendant.

[2] On 23 June 2009, Meteor passed a resolution for voluntary winding up. On 7 January 2011 the plaintiff issued a letter to the defendant calling in the guarantee.

[3] On 2 June 2009, at a creditors' meeting in respect of Meteor, there was an attendance by representatives of the plaintiff and by the defendant. At that meeting, the defendant sought to secure release from various personal guarantees into which he had entered. The guarantees then known to the plaintiff related to the Northern Bank and the First Trust Bank as well as the plaintiff. A discussion ensued between the defendant and the representatives of the plaintiff to the effect that if the defendant were to produce a statement which would confirm that he was not in a

position to meet his financial commitments and if the other banks who held personal guarantees confirmed their willingness to waive their rights against the defendant, the plaintiff would consider doing the same.

[4] As a result, on 29 October 2009, a statement was produced on behalf of the defendant. The statement would later be said to be incomplete. The statement was headed John and Anne Marie Conway, was described as a 'Net worth statement' and showed a net deficit of £3.872 million.

[5] Liabilities were listed. First of all, secured to the First Trust Bank, the assets were stated to be a site in Cookstown, an investment property at the Gasworks in Belfast, a farm in Dungannon, a holiday home in Rosstown and a property belonging to Meteor. In respect of the Northern Bank the secured assets were stated to be a farm and two sites at Cookstown. What was not mentioned in the statement and was later to cause some controversy was any liability in respect of the Bank of Ireland.

[6] Thus the defendant purported to comply with the first condition in respect of the proposed waiver of liability on the personal guarantee. The second condition was that the defendant would obtain waivers from the Northern Bank and the First Trust Bank.

[7] By email of 11 November 2009 from Michael McAllister of ASM Howarth, Chartered Accountants, on behalf of the defendant, it was stated that both the First Trust and Northern Bank had indicated that they would be prepared to waive their legal rights in respect of the personal guarantees provided by the defendant, other than in respect of assets over which security was already held, subject to confirmation that the other banks were prepared to do the same. By email of 2 December 2009, from the plaintiff to Mr McAllister, it was stated that "We are pleased to confirm that subject to both First Trust and Northern Bank waiving their unsecured legal rights under their respective guarantees, we are prepared to take a similar approach." No time limit was agreed within which the conditions for the waiver had to be satisfied.

[8] There followed exchanges between Mr McAllister and the plaintiff from January to November 2010, concerning the agreement of the three banks to the proposed waivers. As early as January, Mr McAllister was stating that the Northern Bank had agreed to the proposal, while it appeared that the First Trust had not confirmed their position. The last communication from Mr McAllister during that period was on 30 June 2010 which stated that there had been "... repeated

assurances from [First Trust] of an imminent decision - the last being that papers went to credit this week with a decision next week - I will call them at the end of this week if I have not heard anything back." There were other messages from the bank but no further communication from Mr McAllister.

[9] In November 2010, Jo Devlin for the plaintiff became responsible for the defendant's account. She reviewed the position in relation to the proposal for waiver of the guarantee and as a result of that review a letter from the plaintiff on 23 November 2010 stated that "... despite numerous attempts by the Bank to bring this matter to a conclusion, the above conditions have never been met and the Bank's senior management have therefore directed that the arrangement has lapsed". There followed on 7 January 2011, demand by the plaintiff for payment by the defendant of the amount due on the guarantee.

[10] On 19 January 2011 the defendant's solicitors wrote to the bank and outlined the position. First of all Northern Bank had agreed to the sale of a farm and sites in Cookstown for the sum of £150,000 and this was accepted in full and final settlement of all security held, including a first charge over the property and a personal guarantee. Northern Bank had waived the remaining indebtedness which was stated to be approximately £400,000. That position was subsequently confirmed by the Northern Bank in writing in December 2012.

[11] As far as the First Trust was concerned the position was more complicated. There were a number of properties over which First Trust held securities. The First Trust had agreed to the sale of the Meteor Building in Cookstown and a property at Drum Road, Cookstown, for a total consideration of £855,000 to release the first charge that the First Trust held over the properties. Further, First Trust had agreed to the sale of the house in Rosstown for £250,000 and to the release of a first charge. The defendant's farm in Dungannon, had been agreed for sale for £280,000 and the First Trust had agreed to release its first charge over the property. Finally, in respect of the buildings at the Gasworks, a fixed-charge receiver had been appointed and the property was on the market. First Trust had agreed not to pursue the defendant on his personal guarantee of £2 million.

[12] Ms Devlin emailed that she had to seek credit approval before corresponding further, which was expected to take 3 weeks. The credit section in the plaintiff bank did not approve any further arrangement in relation to the waiver of the defendant's personal guarantee. A solicitor's letter was issued on behalf of the plaintiff on 14 March 2011, demanding payment of the amount then due on foot of the guarantee.

[13] Ms Devlin's evidence was that credit approval for measurers lasted for six months and so strictly speaking the plaintiff considered the original offer of waiver to have expired after that period. The defendant was not informed of any time limit. However Ms Devlin's evidence was that the credit section of the plaintiff considered in early 2011 whether to continue/renew the offer of conditional waiver, although in the event did not do so.

[14] I return to the issue of the Bank of Ireland which was not included in the statement issued by the defendant to the plaintiff. The defendant's evidence was that he was in dispute with the Bank of Ireland about the balance due. Indeed he said that a balance was due to him and that this arose from what he called 'commercial finance payments'. Debts due to the defendant had been received by the Bank of Ireland and the defendant therefore concluded that, when account was taken of the commercial finance payments, his liability to the Bank of Ireland was zero. That being so he had not included the Bank of Ireland in his statement. The plaintiff, however, contended that the defendant was in breach of the undertaking to provide a statement that set out his liabilities and his assets in not including information about the Bank of Ireland.

[15] I am not satisfied that the omission of the Bank of Ireland from the statement amounted to a breach of the undertaking to provide a statement setting out the assets and liabilities. The position of the Bank of Ireland might be described as neutral and did not impact on the defendant's assets and liabilities.

[16] I am satisfied as follows -

First of all, that there was a conditional waiver of the defendant's guarantee by the plaintiff's email dated 2 December 2009.

Secondly, that it had been a condition of the waiver that the defendant would issue a statement of assets and liabilities and that condition had been satisfied by the statement issued by the defendant on 10 October 2009.

Thirdly, that the condition required by the terms of the waiver dated 2 December 2009 required the Northern Bank and the First Trust Bank to waive their respective personal guarantees held from the defendant, there being no time limit stated for compliance with the condition. However it was an implied term that there would be compliance with the condition within a reasonable time - as to which see below.

Fourthly, the plaintiff purported to cancel the waiver on 23 November 2010. Even though no specific time limit was stated by the plaintiff it was evident from the correspondence between the parties in 2010 that the conditional waiver would not be available for an unlimited period. The plaintiff was entitled to expect an explanation

for the on-going delay in securing the agreement of the other two banks. However there was no contact between the defendant or his representatives and the plaintiff from June 2010 and prior to 23 November 2010 and no explanation was offered for that absence of communication.

Fifthly, from January to March 2011, the plaintiff was prepared to consider reinstating the conditional waiver of the defendant's guarantee. After the defendant finally explained the position in the solicitor's letter of 19 January 2011, the issue was reconsidered by the plaintiff. In the end the plaintiff's credit section did not provide authority for the reinstatement of the conditional waiver.

[17] The plaintiff contends that the conditional waiver lapsed by 23 November 2011 and the defendant is liable for the amount due under the guarantee. The defendant contends that a reasonable time for compliance with the conditions of the waiver has still not elapsed and the defendant should have further time to finalise the waiver from the First Trust.

[18] The plaintiff's proposed waiver was stated to be that the First Trust and the Northern Bank would waive *their unsecured legal rights* under their respective guarantees. The guarantee held by First Trust is attached to certain securities and the form of guarantee states the limit of liability under the guarantee as the lesser of the amounts realised on the sale of specified properties and £1.95 million. The specified properties are the four properties referred to in the plaintiff solicitor's letter of 19 January 2011, but not including Rossnowlagh. The plaintiff's conditional waiver referred to First Trust's waiver of unsecured legal rights, which waiver by First Trust will not take effect until the secured assets have been realised.

[19] No time limit for performance of the condition was specified. Where an agreement is silent as to the time of performance, the law implies an obligation to perform the act within a reasonable time having regard to all the circumstances of the case - *Chitty on Contracts, General Principles* (31st ed.) paragraph 21-021 citing *Peregrine Systems v Steria Ltd* [2005] EWCA Civ 239 where the Court of Appeal approved the formulation of His Honour Judge Richard Seymour QC in *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725, where he said that the question whether a reasonable time has been exceeded is

"a broad consideration, with the benefit of hindsight, and viewed from the time at which one party contends that a reasonable time for performance has been exceeded, of what would, in all the circumstances which are by then known to have happened, have been a reasonable time for performance. That broad consideration is likely to include taking into account any estimate given by the performing party

of how long it would take him to perform; whether that estimate has been exceeded and, if so, in what circumstances; whether the party for whose benefit the relevant obligation was to be performed needed to participate in the performance, actively, in the sense of collaborating in what was needed to be done, or passively, in the sense of being in a position to receive performance, or not at all; whether it was necessary for third parties to collaborate with the performing party in order to enable it to perform; and what exactly was the cause, or were the causes of the delay to performance. The list is not intended to be exhaustive. "

[20] The defendant has not, to date, satisfied the condition for the waiver of the guarantee. The defendant contends that a reasonable time for compliance with the condition has still not expired. He relies on the prevailing difficult conditions in the property market as amounting to reasonable grounds for the delay. The market conditions to which the defendant refers are the effects of the decline in the property market in Northern Ireland in recent years and the defendant's inability to complete the sale of the properties secured to the First Trust. The defendant contends that reasonable time would extend to such period as would permit the defendant to complete the sales of the secured properties in order to obtain the waiver of the defendant's guarantee from First Trust.

[21] I am satisfied that the implied term that the defendant should have reasonable time to comply with the condition could not extend to the present day. A reasonable time would have extended to November 2011, had contact been maintained by the plaintiff and some explanation been offered by the plaintiff for the inability to secure the waiver from First Trust. An explanation was finally offered by the defendant's solicitors letter of 19 January 2011. Had previous contact been maintained by the defendant and had the plaintiff not already withdrawn the conditional waiver a reasonable time for compliance would have remained available to the defendant. In the event the plaintiff considered whether to reinstate the conditional waiver and decided against doing so. In effect the defendant was allowed to March 2011 to satisfy the condition which I am satisfied was a reasonable time in the circumstances.

[22] Whatever was the position in 2011 I am satisfied that, as even now in 2014 the defendant has not achieved the disposal of the secured properties so as to satisfy First Trust, a reasonable time for compliance with the condition could not extend to the present day. There remains no indication of the time within which the condition might be satisfied. The proposed sales of the secured properties have been pending for some time. The particular difficulty in completing each transaction is not apparent.

[23] The result is that the plaintiff is entitled to sue on the guarantee; that the plaintiff withdrew the conditional waiver in November 2010 by reason of the defendant's non-compliance with the condition; that in any event a reasonable time for compliance with the condition had expired when the plaintiff's solicitor wrote the letter of claim on 14 March 2011; that in any event, reliance on the sale of the securities held by First Trust to achieve the waiver by First trust over a period of years to the present day is not a reasonable time.

[24] Accordingly, there will be judgment for the plaintiff in the sum £177,928.80.

[25] An issue arises as to whether there should be a stay on this judgment. This arises because the defendant has raised a challenge to the grounds on which Meteor was liable for the debts in the first place, which challenge is said to have arisen because of the conduct of the banks. The conduct of the banks will become the subject of legal proceedings by the defendant in his capacity as director of Meteor and by Meteor. If that action is successful there will be an issue as to whether the liabilities due on the guarantees are payable. Thus an issue arises as to whether there should be a stay on the present judgment. I grant a stay pending further submissions when the proposed proceedings issue. Each party may review on request.