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Judgment: approved by the Court for handing down | *Delivered:* **16/11/2016**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE FOR NORTHERN IRELAND

QUEEN'S BENCH DIVISION

2009/061625

BETWEEN:

ULSTER BANK (IRELAND) LIMITED
AND
ULSTER BANK LIMITED

Plaintiffs;

-and-

MICHAEL ADRIAN TAGGART
AND
JOHN DESMOND TAGGART

Defendants.

BURGESS J

[1] This judgment is ancillary to a previous judgment of the court ("the Judgment") which dealt with a range of issues arising from the relationship between the plaintiffs and the defendants. The issues were raised in three separate sets of proceedings, one relating to a claim for damages against the plaintiffs, and the remaining two relating to specific guarantees which the plaintiffs sought to enforce - referred to in the Judgment as the 2007 Guarantee and the Second Kinsealy Guarantee.

[2] It was agreed that all three actions would be heard together, and the court should first determine the factual background to the various grounds of claim, and then address, if necessary, any legal submissions that required to be determined within that factual matrix.

[3] In the event, the determination of the facts was sufficient to dispose of the action by the plaintiffs against the defendants in respect of the 2007 Guarantee, and also to dispose of the action by the defendants against the plaintiffs. The court dismissed the claim of the defendants, and gave judgment in favour of the plaintiffs in respect of the 2007 Guarantee.

[4] While the determination of the facts also formed a very substantial context for consideration of the Second Kinsealy Guarantee, and any liability arising under it on the part of the defendants, there were a number of questions of a possible legal nature which required submissions – in accordance with the agreed approach. In the event, in addressing the questions raised by the court, the plaintiffs also raised additional issues which I accept are relevant for the court in order to address the question as to whether the defendants are liable under the Second Kinsealy Guarantee and, if so, to what extent.

[5] Appendix A of the judgment sets out the background and findings of the court as regards the Second Kinsealy Guarantee and the retaking of that Guarantee in substitution for the First Kinsealy Guarantee. The Appendix is incorporated into this judgment, together with any factual matters referred to in the main body of the Judgment relevant to the present issues.

[6] I am grateful for the written submissions from Ms J Simpson QC for the plaintiffs and from Mr Niall Murphy of KWR Solicitors on behalf of the defendants. I have considered these carefully and the relative brevity of this judgment should not give any misleading impression that any part of them have been ignored.

[7] As I said at the outset the Judgment addressed many issues relating to the relationship between the plaintiffs (and its representatives) on the one part and the defendants personally and the Taggart Group (including their nominated representative) on the other hand. It also examined in considerable detail the role of the defendants in the day to day control and operation of the companies within the Taggart Group, and the making of the strategic decisions as to the Group's objectives and aspirations.

[8] I can record for the purposes of this ancillary judgment the following:

(a) The defendants were intimately involved in every aspect of the Taggart Group's day to day business, its financing, its banking arrangements, the position of the Group's bank accounts on a constant and on-going basis, and in particular the position of each and every particular banking facility, including Facility 11 which related to the Kinsealy purchase.

(b) Through Board meetings and meetings with representatives of the plaintiffs over the period relating not just to the First Kinsealy Guarantee and up to the time of the Second Kinsealy Guarantee, but at

all times, the position of each facility would have been known to the defendants, not just through being told by members of staff of the Group but through their own personal knowledge.

(c) That intimate and personal knowledge would have been reinforced by a series of accountants' reports prepared over the relevant period, the aims of which were to identify the extent of the Group's liabilities generally, to the plaintiffs in particular, and the need for additional funding. The detail in those reports, which included Facility 11 (the Kinsealy Facility), was read and understood by the defendants.

(d) As to the knowledge of the position of the Kinsealy loan, it is abundantly clear that the defendants were fully aware that it was outstanding before and at the time of the retaking of the Second Kinsealy Guarantee. Indeed the fact that retaking of the Guarantee raised its head in the Autumn of 2007 when, on the evidence of Michael Taggart it should have been long repaid, is evidence as to his state of knowledge and that of his brother.

(e) The Judgment rejects the allegation that the two brothers were "tricked" into signing the Second Kinsealy Guarantee – they say by the solicitors burying such papers in a pile of documents and failing to tell them that they were included in that pile. A Facility Letter completed by Michael Taggart and Mr McHugh the Group's secretary before the signing of the documents alone gives lie to that assertion.

(f) Contradictory evidence, rehearsed in the Judgment, was given to the American Court and to this court as to how the Kinsealy loan was not to be repaid in accordance with the original terms of the loan, but by the sale of Atlantic Wharf – and that indeed it had been so repaid. As the Judgment points out none of this bears examination.

[9] I now deal with three points relating to my Judgment, informed in part by the plaintiff's submissions for the purpose of this ancillary judgment.

(1) In my Judgment I refer to the "plaintiffs' decision" to amend the terms of repayment of Facility 11. The use of the word "decision" is misleading and I wish to correct it. In fact, reading the Judgment which rehearsed the factual background leading up to the change, it will be clear that this was not a unilateral decision on the part of the plaintiffs, through their representative Mr Barr, but the conclusion arrived at after prolonged discussions between him and the Group Secretary, Mr McHugh. In short it was a mutual agreement reached between the plaintiffs and the duly authorised representative of the Group.

(2) As will be seen in reading the Judgment, the issue of LTV (Loan to Value) and its level was a crucial covenant in the banking arrangements, and one which caused considerable problems for the Taggart Group throughout the relevant period. As set out in the Judgment, the Kinsealy loan (Facility 11) was not to be taken into account in calculating the figure for "Loan" in the "LTV" formula. Therefore no matter how high or low the amount due under Facility 11 was at any one time, it was not a factor in addressing the overall calculation of LTV. However, and this is examined in the Judgment, any repayment of that loan from Group income or disposals meant that such proceeds were not available to be included in the "Value" aspect of the LTV formula. Therefore if an asset was disposed of and instead of being attributed to reducing Facility 11, as provided by its terms, but rather to reduce the other Group loans, this could only have had a beneficial impact for the Group - and given the claim by the defendants that they were effectively the Group, it would have been beneficial to them personally. In addition the amendment to repayment brought with it a reduction, albeit modest, in interest payments, again a beneficial factor for the Group and for the defendants personally.

(3) I comment in the judgment that there is a distinction to be drawn between the relationship between the plaintiffs and the Taggart Group on the one hand, and the plaintiffs and the defendants as parties to the First Kinsealy Guarantee on the other hand. I indicated there was no specific written or oral dialogue relating to the changes as to repayment between the plaintiffs' representative and the defendants - and there should have been. Indeed it was failure to consult or liaise with them personally which triggered my questions as to what, if any, legal considerations required to be addressed as to their continuing responsibility under the First Kinsealy Guarantee. In her submissions Ms Simpson QC addressed these and other issues, including the contractual terms of the Facility Agreement which, she argues, renders the defendants liable even in the absence of any direct communication or indeed "consent" if it were determined that they did not consent. I therefore turn to those submissions which I can address in relatively short form.

The state of knowledge of the defendants

[10] I am satisfied that the defendants knew of the proposed change to the repayment of the Facility 11. The plaintiffs argue that this knowledge would have been acquired through the contact with Mr McHugh and that he, Mr McHugh, had actual and ostensible authority to represent the views of the defendants in relation to all matters financial concerning the group. It was he who acted as conduit between the defendants and the plaintiffs. While I agree with that assertion, I have determined that for the reasons I have given above - namely inter alia through their

intimate knowledge of the Group's affairs – the defendants each knew directly full well of the decision regarding repayment, and did so from the time of the change right through to and including the taking of the Second Kinsealy Guarantee. I also conclude that the plaintiffs had every right to assume that change was known to the defendants and through the absence of any representation from them, which they could have made at any time over the many intervening months from the change until the taking of the Second Kinsealy Guarantee, there was no requirement to give them specific notice.

[11] While the corollary of that position was the on-going personal liability of the defendants for what would be a substantial sum, I am satisfied on the evidence given by Mr Michael Taggart that this would not have been a matter of concern for himself and his brother. Apart from the benefits of the impact on LTV and interest repayments, it has been the constant case of the defendants, expressed in robust and confident terms by Mr Michael Taggart, that at any time during any of the relevant period they could have paid off sums far in excess of the amount secured under the First Kinsealy Guarantee given the extent of their personal assets.

The contractual position

[12] Ms Simpson has helpfully set out in her skeleton argument the relevant clauses in the First Kinsealy Guarantee which, she says, provides that variations, no matter how substantial, could be made by the plaintiffs which would still leave the defendants liable even if notice was not given – unless the relevant clauses required written notice which, in this case they did not.

[13] Clause 2 of the First Kinsealy Guarantee states that:

> "In consideration of the Bank making available or continuing to make available banking facilities or any other accommodation whatsoever to the Principal at the request of the Guarantor, the Guarantor hereby unconditionally and irrevocably guarantees payment to the Bank on demand of all indebtedness and as primary obligator and not merely a surety agrees to indemnify the Bank on demand from and against any loss it may incur as a result of or in connection with its having now or hereafter advanced any monies to the Principal …"

[14] In this case there was a change arranged and agreed between the Bank and the Principal. However the Principal was, on the argument of the defendants, one and the same as the defendants. The agreement was reached between the Bank and the Principal through the Group's nominated representative and for all of the reasons I have stated this was an agreement to which the defendants were party, with full knowledge of everything that was going on and with their consent. I am

therefore satisfied that in the context of the changes that were made, the defendants had a continuing responsibility not only as surety (for the reasons set out below) but as primary obligor.

[15] Clause 5 of the First Kinsealy Guarantee states under the heading "Variations, Waivers etc." that the plaintiffs were entitled "without notice to or consent from the Guarantor and without reducing or extinguishing the Guarantor's liability" to:

(i) "Renew, vary, determine or increase any accommodation or credit given to the Principal ..: or

(ii) Grant time or indulgence or to compound with the Principal: or

(iii) Do or omit to do anything which but for this provision might operate to exonerate or discharge the Guarantor from any of its obligations and this Guarantee shall not be discharged or affected by anything which would have discharged or affected the Guarantor's liability if the Guarantor had been a Principal debtor to the Bank instead of the Guarantor.

[16] Clause 2 imposes the obligation on the defendants to indemnify the plaintiffs not just as guarantors but also as primary obligators. The intention of such clauses is to preserve the liability of the guarantor in the event that the guarantor's liability would be discharged if he was liable only as a surety.

[17] The provisions of Clause 5 reinforce this liability in specifically providing for variations and waivers, "without notice to or consent from the guarantor". The intention is to preserve rights in the context that the guarantee is not a fixed obligation but rather one where the terms and obligations may change (such as under the provisions of Clause 5), but with the guarantor remaining responsible.

[18] I have therefore determined that even if consent had not been given that would be immaterial. In the event, in this case the defendants were fully aware of the changes that were being made and their continuing acceptance of those changes simply reinforces that they accepted that change and through that their continuing liability.

[19] On the basis of the above determination it is not necessary to consider the argument put forward by Ms Simpson as to the effect or otherwise of the rule in Holme v Brunskill [1877] 3 QBD 495. However for the sake of completeness I would record that if it were necessary for me to consider it, for the reasons I have given (a) in relation to LTV, (b) interest reduction, and (c) the proclaimed wealth of the defendants, the changes made could not be regarded as so substantial to argue the original agreement was replaced by a new agreement.

Conclusion

[20] I therefore find that the defendants are liable under the Second Kinsealy Guarantee. However it is clear that the principal amount secured by this Guarantee was higher than the balance then due under the First Kinsealy Guarantee by reason of payments which were credited to Facility 11 before the change. That figure was agreed at the time of the execution of the Second Kinsealy Guarantee at €4.086m – down from €4.3m. This was a mutual mistake on the part of all parties and their representatives and therefore the figure secured by the Second Kinsealy Guarantee should be rectified to provide for the correct sum of €4.086m. This will require a recalculation of interest based on this reduced sum. That rate of interest will be that which I determined in respect of the 2007 Guarantee.

[21] In relation to costs this had been addressed in the context of the decisions made by the court in relation to the other two actions, but which left to one side the additional costs arising by reason of this separate action. I would therefore invite further representations to be made in writing – to be submitted to me within 14 days.