



Corporate Turnaround and Insolvency

All monies guarantees - do what they say on the tin

Last November we reported on the High Court decision on *National Merchant Buying Society Limited v Bellamy and another*. This stated that a personal guarantee for “all sums which are now or may hereafter become owing” remained enforceable despite variations to the underlying commercial contract. The High Court gave the defendant permission to appeal and the long-awaited decision of the Court of Appeal has recently been handed down.

What the High Court decided

The defendants provided all money guarantees to guarantee their business credit facility with a supplier. They sought to avoid liability under the guarantees when the company defaulted on the credit agreement because the company’s credit limit had subsequently increased from £200,000 to £700,000. The guarantors had not consented to the increased credit limit.

The wide wording of the guarantee and the surrounding circumstances were key to deciding the obligations covered by the guarantee. The wording of the guarantee covered future obligations of the borrower and the High Court decided therefore that the guarantee included any future obligations of the borrower even if the guarantors do not, at the point of giving the guarantee, know what those future obligations may be.

The Court of Appeal

Only one defendant appealed. The Court of Appeal refused the appeal and affirmed the decision of the High Court as “unimpeachable”.

The guarantee was “a freestanding, ‘all moneys’ guarantee that was not linked to the credit limit to which (the Company) was then entitled, its language pointing away from any such linking”. The ordinary language of the guarantee could not, as a contract, be construed any other way. There was no logic in the defendant’s argument that the guarantee was limited

to £200,000 or a greater sum if he agreed; “If the parties had intended that his liability should have been so limited, the guarantee would have said so. It did not.”

In practice

This remains good news for lenders and creditors. A guarantor may remain liable despite a change in the underlying contract provided the guarantee is unlimited or anticipates changes to the underlying contract. If a guarantor does not wish to give an open ended guarantee then he needs to agree express terms to limit the liability. However, best practice remains to obtain guarantor consent and reservation of rights letters when altering the underlying liabilities in order to avoid these arguments. Before relying on the terms of any guarantee, it is important to check whether it is an “all monies” guarantee or relates only to a specific contract. There is more risk, where a borrower’s obligations have been increased that guarantors could still successfully argue they have been released from guarantee provisions if the guarantee relates to the performance of a specific underlying contract.

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