

THE HIGH COURT

[2020/141 S]

BETWEEN

ANNAUGH LIMITED, AOIFE COOKE, RAVEN COOKE, TADHG COOKE, COOKEWEN LIMITED, GERARD COSTELLO, SEAMUS MCGABHANN AND NAULSWOOD LIMITED

PLAINTIFF

AND

DUKE CAPITAL LIMITED AND ETHIKA PROPERTIES LIMITED.

DEFENDANT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 18th day of August, 2020.

1. In these proceedings, the Plaintiffs seek summary judgment against the Defendants in the sum of €4,426,004.54 on a joint and several basis.
2. The claim arises from two agreements. The first is an agreement of the 22nd of December 2017 between the first seven Plaintiffs ('the Vendors') and the first Defendant ('Duke'), whereby the Vendors agreed to sell to Duke the entire shareholding in two companies ('the target companies'). By guarantee of the same date, the second Defendant ('Ethika') agreed as follows:-

"In consideration of the Purchasers and the Vendors entering into the SPA and at the request of the Vendors, the Guarantor hereby unconditionally and irrevocably, as a primary and continuing obligation, guarantees to the Vendor that the Purchaser shall in a due, proper and punctual manner perform all of its obligations and duties in accordance with the terms of the Contracts and shall discharge all of its liabilities under the Contracts in accordance with the terms of the Contracts."
3. The second relevant agreement is an amendment to the first. Entered into on the 17th of May 2019, the second agreement required Duke to pay to the Vendors the following sums, within the following times:-
 - 5.1 €6,615,450 upon completion (i.e. 17 May 2019, upon the signing of the Amended SPA).
 - 5.2 €734,550 as soon as was practicable, and in any event within two months, thereafter (the *Additional Consideration*).
 - 5.3 €3,650,000 on or before the first anniversary of completion (i.e. on or before 17 May 2020) (the *Deferred Consideration*)."
[Original *Emphasis*]
4. While the first sum was paid, Duke did not pay the second and third sums due under the second agreement. These latter amounts total €4,384,550. Ethika was not a party to the second agreement, nor was a further guarantee provided by it in respect of the amendment to the first agreement.
5. There was also an agreement that Ethika would discharge legal fees. This oral agreement was made, according to the only evidence before me, in the following way:-

"In approximately July 2017, before the execution of the SPA, David McCabe – one of Duke's incorporators undertook to me and the Vendors that Ethika (or the entity

which would purchase the shares, i.e. Duke) would discharge any legal fees which we might incur in connection with the share purchase transaction. This was agreed verbally by telephone with Gareth O'Connell and was the basis upon which the Vendors engaged Matheson who were recommended by David McCabe."

6. The relevant part of the supporting email, dated the 26th of July and sent by Dave McCabe (a principal of both Ethika and Duke), reads:-

"If you require any help let me know it could be best to have a meeting with the lawyers on the Op Co purchase structure to ensure comfort both sides. A&L Goodbody will represent Ethika. Gareth will recommend MOPS to be appointed by you with Ethika pay the fees cost."

7. No challenge is made on behalf of Duke or Ethika to the reasonableness of the fees payable to the solicitors engaged by the Vendors on foot of this agreement. These legal fees come to €41,454.54.
8. The proceedings commenced by Summary Summons dated the 15th of June 2020. They were admitted into the Commercial List by an Order of Barniville J. made on the 22nd of June. An agreed set of directions, made by Barniville J. on the same day, provided that:-

"The Defendants were to deliver a replying affidavit by the 13th of July 2020.

The Plaintiffs were to deliver any supplemental affidavit by the 20th of July 2020.

The motion seeking summary judgment was to be heard on the 28th of July 2020."

9. The matter was called on in the usual way on the 24th of July 2020. No replying affidavit had been delivered on behalf of the Defendants, and indeed none had been delivered by the time I heard the motion on the 28th of July. No application was made by the Defendants on the 24th of July either for an extension of time to deliver a replying affidavit or for an adjournment of the hearing of the motion.
10. When the motion was called on the 28th of July, Ms. Darcy (of the firm of McEvoy Corporate Law, for the Defendants) sought an adjournment of the hearing. She did so essentially in order to allow settlement discussions to continue. She was frank in accepting that any discussions up to that point in time had not lead to a settlement. She also made it clear that her instructions were not to seek an adjournment in order to permit the Defendants to deliver a replying affidavit on the merits of the claim; inasmuch as there was any question of the Defendants putting anything on affidavit, it was to provide evidence "if required" that certain unspecified "deliverables" had been received by the Plaintiffs.
11. The application for an adjournment was resisted by the Plaintiffs. I decided not to adjourn the hearing of the motion. The application came very late in the day, so much so that even if it had been on consent I would have been most reluctant to grant it. I could see no good reason in adjourning a motion in order to allow further settlement discussions to

take place when the Plaintiffs had no desire to take part in such discussions. In addition, it was notable that the Defendants were not looking for a further opportunity to deliver evidence with which to resist the motion. While there was some suggestion that Gareth O'Connell (who was instructing Ms. Darcy) had not understood the situation in the litigation, this was (understandably) not elaborated upon.

12. As a result of the failure of either Duke or Ethika to put forward evidence, the uncontradicted evidence in respect of this motion is that provided by Mr. Cooke, who swore an affidavit on behalf of all Plaintiffs.
13. I have summarised that evidence earlier in this judgment. On the basis of this testimony, Duke and Ethika are jointly and severally liable to the Plaintiffs for the sum of €4,384,550. Ethika, and it alone, has a further obligation to pay the Plaintiffs the sum of €41,454.54 in respect of legal costs; while the affidavit evidence of Mr. Cooke is that Ethika or Duke would pay the legal fees, the email on which Mr. Cooke relies is clear that the fees will be paid by Ethika only. Mr. Cooke refers to that email as the document which records in writing "[the] agreement to discharge the legal fees.."; the email nowhere suggests that Duke will pay these expenses.
14. While Mr. Walsh, counsel for all Plaintiffs bar the seventh Plaintiff, helpfully referred me to the decision in *IBRC v. McCaughey* [2014] 1 I.R. 750, there was no contest about the applicable principles. Equally, the application of those principles was not disputed by Ms. Darcy (who confirmed that her firm continued to represent the Defendants at the hearing, notwithstanding the refusal of the adjournment application). To use the language of Hardiman J. in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 at 623 (described by Clarke J. in *McCaughey* as the "underlying test") it is very clear that the Defendants have no case; there is simply no issue raised by either defendant to be tried at a plenary hearing.
15. In his submission, Mr. Fitzpatrick, who appeared for the seventh Plaintiff, addressed a specific defence which might have been raised by Ethika had it contested the motion; the potential defence is to the effect that the variation of the first agreement by the second agreement had released Ethika from its obligations as guarantor of the liabilities of Duke.
16. As noted, Ethika agreed "as a primary and continuing obligation" to guarantee that Duke would perform all of its obligations and duties "under the Contracts".
17. The Contracts are defined at recital A of the Guarantee as follows:-

"The Vendors have or are about to enter into a share purchase agreement (the "SPA") with Duke Capital VI Limited (the "Purchaser") for the purchase of the entire issued share capital of Independent Express Cargo Limited and The Pallet Network (Irl) Limited and the Purchaser is to issue a promissory note in favour of the Vendors for €1,500,000 (together, the "Contracts")." [Original *Emphasis*]
18. I have referred to the Contracts collectively as the first agreement. This agreement was varied by the second agreement. Mr. Fitzpatrick submits that Ethika was aware of the

second agreement, as that company's principal (Mr. O'Connell, who instructed Ms. Darcy on behalf of both Defendants) signed both the Guarantee (on behalf of Ethika) and the second agreement (on behalf of Duke). Relying on *Hackney Empire v. Aviva* [2013] 1 WLR 3400, he submits that Ethika cannot claim that it is discharged from its obligations as guarantor in circumstances where its own director was fully aware of (and participated in) the variation of the Contracts.

19. This is not an argument that I can accept, at least at this stage in the proceedings. As I read *Hackney Empire*, the guarantor should be consulted on and agree to the variation (unless the variation is incapable of prejudicing the guarantor, a point to which I will return); if this does not happen, the guarantor stands discharged. There is no evidence before me which suggests that Ethika was consulted, nor that it as an entity agreed to the variation. It may well be that the involvement of Mr. O'Connell in the second agreement has the effect contended for by Mr. Fitzpatrick but it is not "very clear that [Ethika] has no case" on this point.

20. I however, accept the secondary submission on this point, which relates to the lack of prejudice to the guarantor arising from the variation of the first agreement. In *National Merchant v. Bellamy* [2013] 2 All ER (Comm) 674, Rimer L.J. (giving the judgment of the Court of Appeal) set out and disposed of one ground of appeal at paragraphs 28, 30 and 31:-

"28. Mr Miller, in advancing Mr Mallett's appeal, said that the judge had, in paragraph 77 of his judgment, correctly identified the applicable principle (see paragraph 23 above) but had failed to apply it. He submitted that the principle was not a novel one, that it was supported by authority and that it involved no departure from orthodoxy. To restate the proposition a little more fully, it is that if a guarantor gives a guarantee in respect of a principal's obligations to the creditor, and at the time of the giving of the guarantee the guarantor knows of the terms of an existing contract between principal and creditor, the guarantee will be regarded as given on the faith of that contract. The consequence will be that the guarantee will be interpreted as doing no more than imposing upon the guarantor a liability to 'see to' the principal's due performance of his obligations under that contract. If there is a later variation of the contract that would be prejudicial to the guarantor, he will only be answerable for any liability arising under the varied contract if he has consented to the variation. If he has not, the variation will result in his guarantee being automatically discharged.

[...]

30. Is there any authority supporting Mr Miller's proposition? I do not interpret any of the authorities to which we were referred as doing so. In Phillips J's judgment in the *Mystery of Mercers* case, of which we were provided with a transcript, his review of the authorities led him to express this general statement of principle:

'In my judgment the cases demonstrate that the construction of the contract of guarantee is of critical importance. It is vital to identify the precise nature of the obligation or obligations guaranteed. In many cases the obligations will be those arising under a specific contract between debtor and creditor. This may be evident from the terms of the contract of guarantee itself, where specific reference is made to the contract giving rise to the obligations guaranteed, or from a consideration of the circumstances surrounding the conclusion of the contract of guarantee, where these show that a specific contract was the subject matter of the guarantee. In such circumstances the terms of the contract giving rise to the obligations guaranteed will be treated as embodied or incorporated in the contract of guarantee. The rule in *Holme v. Brunskill* will then apply and any variation of the underlying contract which is not manifestly insubstantial or incapable of prejudicing the surety will discharge the surety from his obligations under the contract of guarantee.'

31. Where on the other hand the guarantee is given in respect of obligations arising out of a contemplated course of dealing without reference, express or implied, to any specific contract it will be open to the creditor to vary the terms applying to the course of dealing so long as that course of dealing remains within the scope of the guarantee.'

Those passages show that the resolution of issues such as that raised in these proceedings turns upon the interpretation of the guarantee. If upon its true interpretation it is a guarantee of the due performance of obligations arising under a specific contract, that will be the limit of the guarantee obligations; and, as Holme's case shows, if the parties to that contract vary it in a way that Phillips J summarised in the first paragraph (which drew on what Cotton LJ had said in Holme's case), the guarantor will be released. The reason for his release will be because otherwise the variation would have exposed him to a liability to which he had never agreed."

21. No case of prejudice to the guarantor is made by Ethika, and no evidence of any such prejudice given on behalf of that company. However, given the language used by Phillips J and endorsed by Rimer L.J. (to the effect that the variation must be "manifestly insubstantial or incapable of prejudicing the surety"), I think it appropriate to consider the potential defence as if the burden is on the Plaintiffs to show that the variation has these characteristics.
22. Mr. Fitzpatrick contrasted the two agreements. He identified the following:-
 1. The completion payment is exactly the same;
 2. The deferred consideration is actually less;
 3. While there is an additional payment (of €734,000) to be made under the second agreement, this is more than counterbalanced by the fact that a promissory note

(of €1,500,000) is discharged; Ethika had guaranteed this payment due under the first agreement.

23. On this analysis, which is not disputed, no prejudice whatsoever has been caused to Ethika by the variation of the first agreement.

24. On the claim against Ethika, I therefore find:-

1. Ethika raises no defence that the variation of the first agreement has discharged its liability under the guarantee;
2. The variation of the first agreement is manifestly incapable of prejudicing Ethika.

For each of these reasons, I find that the variation of the first agreement does not prevent the entry of summary judgment against Ethika on foot of the guarantee.

25. On the main issues before me (as between the Plaintiffs and the Defendants) my conclusions are:-

- i) The Defendants are liable to pay the capital sum of €4,384,550.
- ii) The second Defendant, Ethika, is liable for the sum of €41,454.54 in respect of legal fees.
- iii) I will remit for plenary hearing the issue of the liability of the first Defendant, Duke, for the amount of €41,454.54 in legal fees.

The Dispute Between the Plaintiffs

The only live dispute argued before me was, very unusually, between the Plaintiffs.

26. As already noted, the Summary Summons was issued on the 15th of June. At that time, the Plaintiffs were represented by the same solicitors and counsel. Between the 15th of June and the 28th of July, some unspecified issue arose between the 7th Plaintiff and the other Plaintiffs. As a result of this dispute, which both Mr. Walsh and Mr. Fitzpatrick were at pains to stress was something I did not need to know about, the 7th Plaintiff was represented by a separate legal team at the hearing of the motion. A further oddity is that the dispute between the 7th Plaintiff and the other Plaintiffs was not such that the original legal team was in any way hindered from continuing to act for the other Plaintiffs with whom the 7th Plaintiff was now in conflict.

27. The essence of the dispute between the Plaintiffs is as follows. While the Plaintiffs agree that the Defendants are jointly and severally liable for the sums due to the Plaintiffs under the agreements, Mr. Walsh wants judgment to be entered against the Defendants in favour of each Plaintiff in the sum which that Plaintiff was to be paid for the parcel of shares in the target companies being sold by that individual Plaintiff. Mr. Fitzpatrick wants judgment in favour of the Plaintiffs as a whole for the total price to be paid for the entire shareholding in the target companies.

28. Very unhelpfully, this issue is agitated nowhere in the pleadings. Indeed, it is not to my knowledge defined as an issue in this action in any correspondence, nor was it set out in any detail (or, as far as I am aware, at all) to Barniville J. in the appearances before him. It is unclear to me whether the Defendants were given any prior notice of this dispute. Obviously, the Defendants have an interest in the form of any order requiring them to pay to the Plaintiffs sums in excess of €4,000,000.
29. The simple solution is to make an Order in the terms of the Notice of Motion. This is the only form of Order sought in the papers before me; as Mr. Walsh properly accepted, there was no application to amend the reliefs sought in the Summary Summons (or, by extension, the reliefs sought in the Notice of Motion). It would be unfair to the Defendants to allow the Plaintiffs (or one contingent of the Plaintiffs) to obtain, without proper notice to the Defendants, an order in different terms to the order sought in the Notice of Motion. However, I am conscious that the dispute between the Plaintiffs gives rise to a most unusual situation. If this dispute persists, there is likely to be further litigation (this time between the Plaintiffs). If possible, this should be avoided.
30. In the main, I have decided the dispute between the Plaintiffs and the Defendants in favour of the Plaintiffs. There will have to be a separate hearing on matters such as costs and interest. I will at that hearing consider any submissions that the Parties wish to make on the form of the Order, including any submissions that the Defendants wish to make on the dispute between the Plaintiffs and the competing versions of the order contended for by Mr. Walsh and Mr. Fitzpatrick. The solicitors for the seventh Plaintiff and the solicitors for the balance of the Plaintiffs will, at least seven days before the hearing on these outstanding issues, circulate to the Defendants and to each other copies of the form of Order which they propose.
31. I propose that this hearing to dispose of these few outstanding issues will take place at 10.30am on the 3rd of September 2020.