All Moneys Guarantees

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The Court of Appeal in England has considered the effectiveness of "all moneys" guarantees in circumstances where there were material variations to the underlying obligations. In National Merchant Buying Society Ltd v Bellamy and Another ([2013] EWCA Civ 452), the Court of Appeal was asked to consider whether an "all moneys" guarantee given by a former director of a company in respect of that company's obligations remained effective following the increase in the company's credit limit in circumstances where the guarantor was unaware of and did not consent to the variations.

This argument was advanced in reliance on the principle to be found in Holme v Brunskill [(1877] 3 QBD 495). This rule provides that, if a surety guarantees the performance of a particular contract, an alteration of the terms of the contract will have the effect of releasing him from his suretyship if (a) he has not consented to the alteration, and (b) the alteration is such that it is not self-evident that the alteration is unsubstantial or not prejudicial to the surety.

The Court of Appeal confirmed the rule in Holme v Brunskill but decided that, in this case, it did not apply. This is on the principle that such rule applies where (a) the terms of the underlying contract are specifically referred to in the guarantee or (b) the circumstances surrounding the entering into of the guarantee show that the underlying contract was the subject matter of such guarantee. In these circumstances, the terms of the contract giving rise to the guaranteed obligations will be treated as embodied or incorporated in the guarantee itself. However, where 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, the rule does not apply and it is open to the creditor to vary the terms applying to the course of dealing as long as they remain within the scope of the guarantee.

The key issue turned upon the interpretation of the guarantee. In this case, the relevant provisions of the guarantee were "we hereby jointly and severally guarantee the due payment to

you of all sums which are now or may hereafter become owing to you by [the guaranteed entity]." The Court held that a guarantee is a contract which should be interpreted in accordance with generally applicable principles. This meant ascertaining "the meaning which the document would convey to a reasonable person having all of the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract" (Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896). On the interpretation of the guarantee in this case, the Court of Appeal had no hesitation in deciding that, on the face of the document, the guarantee was a free standing "all moneys" guarantee that was not linked to the credit limit made available to the guaranteed company.

The case makes it clear that a well drafted "all moneys" guarantee, in the absence of any evidence linking the guarantee to a specific contract, will remain effective in respect of the underlying obligations owed by the guarantor to the beneficiary, regardless of any subsequent variation of those obligations made without the consent of the guarantor.

This principle was confirmed in Ashwood Enterprises Ltd v Governor and the Company of the Bank of Ireland [2014] EWHC 2624 (Ch). In this case, the “all moneys” clause in a third party legal charge stood up to challenge because it had been expressed in unambiguous terms. The court held that a reasonable person, who had all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time that the legal charge was executed, would have understood the parties to have intended the charge to extend to all the liabilities owed to the bank and not to confine them to the facility.

However, in the case of Dowling v Promontoria (Arrow) Limited Ch D (Bankruptcy Ct) (Registrar Barber) (11 September 2017) the High Court granted an application to set aside a statutory demand against a guarantor. The Court held that the debt fell outside the purview of the first guarantee, despite the "all moneys" wording in the guarantee. In this case, the bank had sought to obtain a second guarantee to cover the new obligations (which did not make any reference to the first guarantee and was also a different type of obligation). This case demonstrates that parties should not necessarily rely on 'all moneys guarantee' drafting to guarantee a significant further debt advanced on different terms at a later date. In such a situation, a new guarantee may instead be required.

There are similarities between the law on guarantees in Jersey and England. One material difference is that Jersey customary law allows (a) a guarantor to require that the creditor exhaust its remedies against the primary obligor before claiming under the guarantee (the "droit de discussion") and (b) a joint guarantor to require that the guarantee obligations are made several as between all of the joint guarantors (the "droit de division"). It is usual for these droits to be excluded expressly by contractual provision in the relevant document.

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Meet the Author

Katrina Edge

Partner

Jersey

E: katrina.edge@ogier.com

T: +44 1534 514192

Key Contacts

Bruce MacNeil

Partner

Jersey

E: bruce.macneil@ogier.com

T: +44 1534 514394

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