

Statutory demand set aside doubting (inter alia) validity of all monies guarantee (High Court)

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In *Dowling v Promontoria (Arrow) Limited Ch D (Bankruptcy Ct) (Registrar Barber) (11 September 2017)*, the High Court considered an application to set aside a statutory demand against a personal guarantor of a debt of more than €6 million. The demand had been served by the assignee of debt originally owned by Anglo Irish Bank and the grounds for set aside included lack of evidence of assignment, limitation and the construction of the guarantee.

The High Court has set aside a statutory demand served on an individual guarantor for a debt of more than €6 million, originally owed to Anglo Irish Bank. The demand had been served by a company (P), which had purportedly taken an assignment of the debt in 2015. The statutory demand was set aside on the following grounds:

- P had not provided sufficient evidence of the assignment and its title to the demanded debt.
- While the guarantee contained wording purporting to secure all monies outstanding between the principal debtor and the guarantee's beneficiary, the court considered there was sufficient ambiguity for it to construe the guarantee as a specific guarantee that related to an earlier debt (not being demanded) under the *contra preferentem* rule.
- Although Anglo Irish Bank had sought a second guarantee (the benefit of which had not been assigned to P) when the facility letter for the demanded debt was entered into, on the facts it was not arguable that this constituted a confirmation that the original guarantee extended to the demanded debt. While there is authority that a guarantor is not discharged if the terms of the principal debt are varied and the guarantor consents to the variation, the obligation as varied must be within the general purview of the guarantee (*Triodos Bank NV v Dobbs [2005] EWCA Civ 630* and *CIMC Raffles Offshore (Singapore) Ltd v Schanhin Holding SA [2013] EWCA Civ 644*).
- In this case, the second guarantee could not be effective as a confirmation of variation of the demanded debt because P had conceded that the demanded debt was not incurred as a result of varying the terms applicable to the earlier debt but was a new "freestanding" obligation. This was not within the purview of the original guarantee.
- Enforcement of the principal debt was statute barred because more than six years had elapsed since its contractual due date. The guarantor could use this as an absolute defence to the enforcement of the guarantee, which was a secondary obligation and therefore fell away with the primary obligation.
- The guarantor's liability to indemnify the beneficiary of the guarantee for loss under the primary obligation could not found a bankruptcy action (the next step following service of a statutory demand). This was because liabilities to indemnify give rise to an action for unliquidated damages, and there was no mechanism in this case for the liability to be converted to a liquidated debt (which would be necessary to found a bankruptcy petition).

While the circumstances of this statutory demand make the court's decision to set aside fairly unarguable (save that the judgment does not entirely explain why its legal analysis of the guarantee documentation, which was governed by Irish law, applied English legal principles), practitioners should note the failure of the all monies guarantee drafting in this case. The full text of the guarantee is not included in the judgment, but the wording that is quoted is fairly standard. It is therefore important not to rely on all monies wording to guarantee significant debt advanced on different terms at later dates, nor necessarily to assume that a guarantee can be varied by consent to include such new debt. Instead, a fresh guarantee may be required.

Case: [Dowling v Promontoria \(Arrow\) Limited Ch D \(Bankruptcy Ct\) \(Registrar Barber\) \(11 September 2017\)](#) (Lawtel).

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