Neutral Citation Number: [2021] EWHC 279 (Ch)

Claim No: BL-2020-001538

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Wednesday, 10 February 2021

Before:

MS. PAT TREACY
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

- -

Between:

NIRRO HOLDINGS SA

Claimant

- and -
PATRICK O'BRIEN

Defendant

- -
- -

HARRIS BOR (instructed by **W Legal Limited)** appeared for the **Claimant**.
RAHUL VARMA (instructed by **Downs Solicitors LLP)** appeared for the **Defendant**.

Hearing date: 9 February 2021

- -

APPROVED JUDGMENT

DEPUTY JUDGE TREACY:

Overview

1. This dispute arises from a series of loans (the "**Loans**") by the Claimant, Nirro Holdings SA **(**"**Nirro**") to a company called Pixel Projects Limited ("**PPL**"). The Defendant, Mr Patrick O'Brien, was a director of PPL when the Loans were granted. Mr O'Brien agreed to guarantee the Loans under a deed of guarantee dated 30 September 2015 ("the **Guarantee**"). The issue is whether Mr O'Brien is liable to Nirro under the Guarantee. If he is, Nirro seeks £1,971,950.98 plus interest and costs.

Procedural history

2. The procedural history is short. In June 2017, Nirro served a statutory demand on Mr O'Brien. A hearing was scheduled before the County Court in Guildford. That hearing was vacated on 1 September 2017 by consent.

3. The Claim Form was issued on 18 September 2020 under CPR Part 8. Nirro's pleaded case is that as a result of the dissolution of PPL, Mr O'Brien ceased to be a member of the board of directors of PPL and this constituted a Significant Event as defined in the Guarantee, entitling Nirro to demand payment from Mr O'Brien.

4. On 21 October 2020, Master Clarke gave directions to trial.

5. No oral evidence was given. Nirro's evidence is contained in the Witness Statements of Mr Grigory Khaldey and Mr O'Brien.

Facts

6. Many of the facts are agreed. So far as relevant, they are summarised below.

7. Nirro is a BVI investment company. It is owned and controlled by Mr Khaldey and his family.

8. Mr O'Brien and his wife are both former company directors of PPL. In 2014, they were 100% shareholders of PPL. PPL's business was the installation of audio visual and conferencing facilities, mainly in boardrooms.

9. In 2014, PPL agreed with Google to install video conferencing facilities in Google's offices in Russia. It was a pre-condition that PPL needed a joint venture partner in Russia. Mr O'Brien entered into an arrangement with FGN Capital Limited ("**FGN**"), a subsidiary of Nirro based in Cobham, with offices in Moscow.

10. PPL's issued share capital was increased to £2,000, with FGN acquiring half of the shareholding. Grigory Khaldey, his father Alexander Khaldey, and Derek Tam (a director of FGN) were appointed directors of PPL.

11. Between 2014 and 2015, Nirro (and related companies) provided loans to PPL.

12. The parties concluded two guarantees: one on 11 September 2015 (the "**11 September Guarantee**"); and the Guarantee on 30 September 2015. On the same day, FGN increased its shareholding in PPL to 80%.

13. On 25 October 2016, having failed to repay any of the Loans, PPL was put into administration by Marketinvoice Limited, a secured creditor. On 4 December 2017 PPL was dissolved and removed from the register.

Key terms of the Guarantee

14. Clause 2.1 provides: "*In consideration of the Creditor entering into the New Loan Agreement, the Guarantor irrevocably and unconditionally guarantees the proper and punctual performance when due by the Company of all of the Guaranteed Obligations now or at anytime due, owing or incurred by the Company to the Creditor under or in relation to the Loan Agreements and New Loan Agreement and further guarantees, that he shall at all times whilst the Guarantee is in force remain as a member of the board of the Company and as a shareholder of the Company.*"

15. Clause 2.2 provides that "*on or after a Significant Event occurring, the Guarantor shall*" among other things:

- fully perform the Guaranteed Obligations as if he were himself a direct obligor;
- be liable to the Claimant for losses, costs, expenses resulting from breach of the Guaranteed Obligations, as defined; and

- indemnify the Claimant against all losses.

16. Clause 4.2.2 provides that liability under the Guarantee "*... shall not be reduced, discharged or otherwise affected affected (sic) by any dissolution, amalgamation, reconstruction, reorganisation, change in status, function, control or ownership, insolvency, bankruptcy, liquidation, administration, winding up, appointment of a receiver, voluntary arrangement or other incapacity, of or affecting the Company, the Creditor, the Guarantors or any other person*".

17. "*Guaranteed Obligations*" is defined as including all liabilities of the Company arising from time to time under agreements including the Loans.

18. "*Significant Event*" is defined as any of the following events:

> "*The Guarantor resigning or otherwise ceasing to be a member of the board of directors of the Company for any reason other than ill-health, death or by mutual agreement in writing between the Creditor and Guarantor;* (referred to below as limb 1)
>
> *The Guarantor committing an act of gross negligence, wilful misconduct or reckless disregard of his respective duties and obligations as director of the Company and/or employment agreement with the Company or otherwise committing an act or omission that has an adverse effect on the business, financial and/or legal position of the Company.*" (referred to below as limb 2)

Issues

19. Mr Bor explained Nirro's case as follows: "*The Loans were never repaid by the Company. Instead, on 25 October 2016, the Company was placed into administration and on 4 December 2017 was dissolved. As a result of the Company's insolvency and dissolution, the Defendant plainly ceased to be a member of the board of directors of the Company and the Guarantee became and remains enforceable*".

20. Mr O'Brien accepts that on the dissolution of PPL he ceased to be a member of its board of directors but denies that this gave rise to a Significant Event.

21. It is agreed that if a Significant Event has occurred, Nirro is entitled to demand payment under the Guarantee.

22. Mr Bor advanced potential alternative cases on behalf of Nirro. During the hearing, however, he acknowledged that Mr Varma had made powerful points against them.

23. I first turn to the main case advanced for Nirro. As summarised in the thoughtful and concise submissions of both counsel, the key legal issues are:

- what is the correct approach to the interpretation of this contract; and
- does it make any difference that it is a deed of guarantee?

24. Various other legal issues were canvassed, such as the effect of dissolution on a company. There was significant agreement as to all the relevant legal principles; the dispute was rather as to their application.

The Law

25. The correct starting point is with the general principles of contractual interpretation. This has been the subject of several Supreme Court judgments over the last decade.

26. The first of those cases was *Kookmin Bank v Rainy Sky SA* [2011] UKSC 50, which dealt with an 'advance payment bond', a form of refund guarantee. Lord Clarke (with whom the other members of the Supreme Court agreed) stated at [21] that:

> "*The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all 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, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is*

> *entitled to prefer the construction which is consistent with business common sense and to reject the other.*"

27. Lord Clarke also confirmed at [23] that: "*Where the parties have used unambiguous language, the court must apply it.*"

28. The most recent of the cases confirming the approach adopted by Lord Clarke in *Rainy Sky* was *Wood v Capita* [2017] UKSC 24 at [10] – [13] per Lord Hodge JSC:

> "*[10] The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning […]*
>
> *[12] This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated […] To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*
>
> *[13] Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court will vary according to the circumstances of the particular agreement or agreements […]*"

29. The second principal legal issue is whether the above approach is appropriate when construing a guarantee or whether a more traditional approach should be adopted. Counsel agreed that in most circumstances the approach to construction described above is the appropriate starting point for the construction of guarantees. This view is supported by among others *Multiplex Construction Europe Ltd v Dunne* [2017] EWHC 3073 (TCC), [2018] BLR 36 at [26] to [34] and *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep. 429 [19] in which, Holman J observed that "*it may be that the concept that a guarantee should be 'strictly construed' now adds nothing*" to the modern approach to interpretation.

Submissions

30. I am grateful to counsel for both parties for their succinct submissions.

31. Nirro's primary position is that the language in the Guarantee is unambiguous and that the words "*ceasing to be a member of the board of directors of the Company for any reason*" are capable of only one meaning, namely that Mr O'Brien has ceased to be a director of PPL for any reason. As this has happened, and is agreed to have happened, Mr Bor argued that on any view a Significant Event has occurred and the obligation under the Guarantee has been triggered.

32. In support of this construction, he submitted that the drafting required a broad interpretation of the circumstances in which a Significant Event would occur. The Guarantee had been professionally drafted. The draftsman chose to define widely when the Guarantee could be triggered while choosing to define the exceptions to enforcement narrowly and by reference to just three specific situations: ill-health, death, or mutual agreement. Mr Bor argued that if the parties had intended to exclude enforcement in a situation where Mr O'Brien ceased to be a director as a result of liquidation or dissolution, this would have been provided for expressly, as was the case with ill-health, death, or mutual agreement.

33. Clause 4.2.2 was also put forward as supporting a broad overall construction of the meaning of Significant Event in its context. It makes clear that once a Significant Event arises subsequent events affecting PPL do not remove the liability. Mr Bor submitted that Clause 4.2.2 demonstrates that the draftsman had such events,

including the possibility of dissolution, in mind but had not chosen to include them in the narrow list of exclusions in the definition of Significant Event.

34. Reflecting the position pleaded in paragraph 11 of the Particulars of Claim, Mr Bor submitted that his argument as to construction was supported also by the (limited) evidence as to the purpose and intent of the parties. This showed, he submitted, that the provision was linked to the success of PPL and to the ability of Mr O'Brien to devote his time and effort to make it a success. Where that was no longer possible, including where PPL has failed, both the evidence (including Mr O'Brien's evidence that "*the purpose and intent of the personal guarantee was affectively to "hand-cuff" me to the Company, and to ensure that I devoted all my time and effort into making the Company a continued success)*", and commercial common sense, indicated that the parties would have intended the Guarantee to be triggered.

35. Finally, Mr Bor relied on differences between the terms of the 11 September Guarantee and the Guarantee to support his construction of Significant Event. The circumstances in which a Significant Event would occur were broader under the latter than under the former. The 11 September Guarantee provided that a Significant Event would arise under limb 1 only if there was a voluntary resignation by Mr O'Brien (other than for reasons of ill-health, death, or by mutual agreement) while the Guarantee expanded the scope of what would be considered to be a Significant Event under limb 1 to include circumstances in which Mr O'Brien ceased to be a director "*for any reason*" (other than for reasons of ill-health, death, or by mutual agreement).

36. In summary, Mr Bor argued that the modern contractual approach to interpretation supported his proffered construction which was based on the clear and unambiguous meaning of the words used, consistent with the overall structure and approach of the document itself, and reflected the objective intentions of the parties, as established by the text itself and the surrounding evidence.

37. Before dealing with the substance of Mr Varma's submissions, I should say something about the admissibility of certain evidence as to the relevant factual matrix.

38. As mentioned above, Mr Bor sought to rely on a textual comparison between the definition of Significant Event in the 11 September Guarantee and that in the Guarantee. Mr Varma submitted that this was not admissible evidence of the

available background or surrounding circumstances but should be treated as part of the parties' pre-contractual negotiations.

39. Relying on *Chartbrook v Persimmon Homes* [2009] UKHL 38 and comments in *Chitty on Contracts (33rd edition)* (at 13-052), Mr Varma submitted that the earlier agreement was not admissible. In response, Mr Bor noted that the 11 September Guarantee had been executed by the parties and did not suffer from the problems which are recognised to affect negotiation documents but was a verifiable fact, and part of the objective background which could assist the Court.

40. I prefer the position put forward by Mr Bor. Distinguishing between materials which are relevant to the factual matrix and admissible and those which are not is not straightforward. The case on which Mr Varma relied dealt with pre-contractual negotiations and provisional documents, identifying a number of the practical difficulties if those were to be admissible. The extract from Chitty to which Mr Varma drew my attention included a brief extract from Lord Wilberforce's summing up of the position in *Prenn v Simmonds* [1971] 1 WLR 1381 as follows: "*evidence of negotiations, or of the parties intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction*."

41. Applying this, I take the view that the executed 11 September Guarantee is a factual aspect of the surrounding circumstances and background known to the parties when the Guarantee was drafted and concluded and that material differences in the drafting between the two executed contracts is admissible as evidence of the objective purpose of the parties in drafting the later contract as they did.

42. Mr Varma accepted that the language of the text provided an appropriate starting point for the analysis. However, he submitted that:

- that language was far from unambiguous;
- the admissible evidence as to the factual matrix suggested not that the Guarantee could be triggered by an event of insolvency, but rather that the parties had intended that it should be triggered where Mr O'Brien was

choosing not to remain focussed on serving PPL and contributing to its success (which would not be possible for an insolvent company); and

- a literal reading of the definition of Significant Event would lead to a result going well beyond common sense.

43. Mr Varma's more detailed submissions fell into three broad categories:

(i) The dissolution of PPL meant that a Significant Event could not occur because (a) the drafter of the contract defined 'Company' as an extant entity (which it could not be post-dissolution); and (b) because dissolution is not referred to in the definition of Significant Event, meaning that the parties must therefore have intended for it to be excluded, particularly as the professional drafter referred to it elsewhere within the Guarantee and could easily have done so within the definition of Significant Event;

(ii) The events triggering liability involve some act and/or omission that could generally be described as Mr O'Brien's fault – e.g.: resignation, "*gross negligence*", "*wilful misconduct or reckless disregard of his duties and obligations as director*", or "*otherwise committing an act or omission that has an adverse effect on the business, financial and/or legal position of the Company;*" and

(iii) That this is consistent with the true purpose of the Guarantee as established by the admissible factual evidence, that being to keep Mr O'Brien focussed on the success of the Company. This means, he submitted, that the Guarantee could not have been intended to bite once it was no longer possible for Mr O'Brien to perform that function, for example, when the Company was no longer in existence.

44. Mr Varma also submitted that if there were any doubt as to the correct interpretation and uncertainty remained, the Court should resolve any doubt in Mr O'Brien's favour as Guarantor.

Assessment

45. The wording used in the definition of Significant Event in the Guarantee is, in my view, clear. It provides that a Significant Event will occur if Mr O'Brien resigns or ceases to be a member of PPL's board for any reason – other than in some narrowly defined circumstances.

46. Mr Varma has put forward a number of arguments by reference to the language of the clause itself, to the wider context of the Guarantee as a whole and to the factual background in which it was concluded to support an alternative and more limited construction. All of these must be considered to help the Court to arrive at the parties' objective meaning.

47. I do not accept that a Significant Event could not occur once PPL became insolvent based on a narrow reading of the definition of 'Company', not least because in other parts of the Guarantee (such as Clause 4.2.2) in which the defined term 'Company' is used it is clear the drafter was dealing with issues of insolvency, dissolution and the demise of the Company.

48. Nirro does not argue that insolvency or dissolution are themselves Significant Events, Nirro's argument is that once PPL was dissolved, at the latest, Mr O'Brien ceased to be a director of PPL and at that point, a Significant Event occurred.

49. Mr O'Brien argues that this cessation of his directorship does not constitute a Significant Event because treating cessation to be a director in circumstances of insolvency as a Significant Event does not reflect the objective purpose of the parties.

50. As to the objective purpose of the provision, the drafting of the Guarantee itself indicates that this was to ensure that Mr O'Brien would be liable to repay the Loans or be in a position where he could enable PPL to do so.

51. Both parties accept that an objective of the Guarantee was to retain Mr O'Brien and his talents within the business.

52. Nirro, however, argues that this was only one aspect of the overall purpose and that it is clear on the face of Clause 2.1 that the intention was to ensure that if PPL was not a success Nirro would have the ability to trigger the Guarantee in the same way as it

would if it considered that Mr O'Brien was not devoting all his time and effort to making PPL a continued success.

53. By way of further support from within the contract itself for a construction reflecting the simple reading of the text, it is helpful to look at the limits to the circumstances in which the Guarantee could be called on.

54. For so long as Mr O'Brien remained involved with the Company (absent some form of misconduct), his liability would not be triggered. Once Mr O'Brien was no longer involved with the Company, because he ceased to be a director 'for any reason' other than ill health, death, or by mutual agreement, a Significant Event had occurred. No degree of 'fault' is required under this limb. It is broadly drafted and takes effect automatically other than in the circumstances set out above. If the parties had intended to exclude enforcement where Mr O'Brien ceased to be a director as a result of liquidation or dissolution, this could easily expressly have been provided for. On the contrary, the drafting of Clause 4.2.2 is strong evidence that once a Significant Event had occurred insolvency would have no effect on the liability of the Guarantor.

55. The differences between the 11 September Guarantee and the Guarantee are also evidence of an objective intent to provide broad enforceability of the Guarantee in circumstances in which Nirro had agreed to advance significant additional sums to PPL. The 11 September Guarantee provides for enforcement (under the first limb) only if there was a voluntary resignation (other than for reasons of ill-health, death, or by mutual agreement). The Guarantee expands the scope of Significant Event under limb 1 to include ceasing to be a director "*for any reason*".

56. In view of all of the above, the contested provision is to be construed and applied on the basis of its simple textual reading. An overall assessment of all the relevant considerations does not require any other construction and there is no basis to suggest that some modification based on the traditional approach to guarantees is required.

57. There is no evidence that any of the specific limitations was a factor in the cessation of Mr O'Brien's directorship. In those circumstances, once Mr O'Brien ceased to be a member of the board of directors of PPL, a Significant Event occurred.

58. Given my conclusion on Nirro's primary case, there is no need for me to consider any of the alternative cases put forward.

59. As a Significant Event has occurred, my Judgment is that Mr O'Brien's liability under Clause 2.2 of the Guarantee has been triggered.