Neutral Citation Number: [2011] EWCA Civ 1286

Case No: A2/2010/2899

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
IN BANKRUPTCY
Mr Justice Briggs
CH/2010/APP/0109
RE: SPENCER ROBERT McGUINNESS

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9th November 2011

Before :

LORD JUSTICE WARD
LORD JUSTICE MOSES
and
LORD JUSTICE PATTEN

- -

Between :

SPENCER ROBERT McGUINNESS	**Appellant**
- and -	
NORWICH AND PETERBOROUGH BUILDING SOCIETY	**Respondent**

- -
- -

Peter Arden QC and **Tim Calland** (instructed by **Moon Beever**) for the **Appellant**
Angharad Start and **Richard Hanke** (instructed by **Rosling King LLP**) for the **Respondent**

Hearing dates : 28th and 29th September 2011

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Approved Judgment

Lord Justice Patten :

Introduction

1. On 24th February 2010 a bankruptcy order was made against Mr McGuinness in the High Court on the petition of the Norwich and Peterborough Building Society ("the Society"). The petition was based on a debt of £1,223,883.26 (including interest) due under a guarantee which Mr McGuinness entered into on 10th September 2008 in respect of a mortgage loan made by the Society to his brother, Mr Craig Ross McGuinness.

2. The background to the giving of the guarantee and its enforcement by the Society is not a matter of dispute. In April 2007 Mr Craig McGuinness obtained a mortgage for a term of 25 years from the Society to assist him in the purchase of a flat in the Docklands area of London. He subsequently acquired an adjoining flat (which is not charged to the Society) and amalgamated both premises into one flat. The Society did not consent to the works and when it discovered what had been done, it became concerned about the value and realisability of its security. It therefore threatened to call in the mortgage loan.

3. In order to avoid this Mr McGuinness provided a guarantee for his brother's mortgage liabilities. Mr Craig McGuinness failed to meet the monthly instalments of interest due from October 2008 onwards and therefore became liable under clause 13(a) of the mortgage conditions to repay the entirety of the loan and any accrued interest.

4. The flat was regarded as unsaleable and, instead of attempting to realise its security, the Society proceeded to enforce the guarantee not by action but by serving on Mr McGuinness a statutory demand and then petitioning for his bankruptcy. The amount of the mortgage debt and interest as of the date of the demand (4th March 2009) was £1,206,867.17. Again this is not in dispute.

5. No application was made by Mr McGuinness to set aside the statutory demand nor was the debt paid. Failure to comply with the statutory demand therefore established Mr McGuinness's inability to pay the debt which is one of the conditions required to be satisfied in the case of a creditor's petition under s.267(2)(c) of the Insolvency Act 1986: see s.268(1)(a). But at the hearing of the bankruptcy petition Mr McGuinness took the point that his liability to the Society under the guarantee was not a debt for a liquidated sum as it is required to be under s.267(2)(b) in order to found a creditor's petition. Counsel for Mr McGuinness (Mr Calland) submitted that on the authority of the decision of the House of Lords in *Moschi v Lep Air Services Ltd* [1973] AC 331 it was a liability in damages of an unliquidated kind. He relied on the decision of Rimer J (as he then was) in *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695 to the effect that a claim in damages or for an account is not a claim for a liquidated sum even though the amount of the alleged liability is readily quantifiable. Therefore the Society could not proceed by way of bankruptcy petition unless and until it had obtained a judgment on its claim.

6. The Society does not accept this argument but its principal submission to the Deputy Registrar, which he accepted, was that, on the true construction of the guarantee, Mr McGuinness's liability to the Society was as a debtor rather than in damages. Mr McGuinness's appeal to Briggs J against the bankruptcy order was dismissed on

the same grounds: see [2010] EWHC 2989 (Ch). I granted permission for a second appeal on the basis that the question whether a liability under a guarantee was a debt for a liquidated sum within the meaning of the Insolvency Act raised an issue of general importance for this court to consider particularly in the light of the doubts expressed by Briggs J about the correctness of Rimer J's decision in *Hope*. But in order to understand how the argument that the appellant's liability in this case did not fall within the provisions of s.267(2)(b) it is necessary to begin by analysing the nature of a guarantor's liability and how that impacts on the provisions of the guarantee in this case.

Liability under a guarantee

7. It is common ground that a guarantee of a loan may impose one or more of the following types of liability on the guarantor. These are:

   (1) a "see to it" obligation: i.e. an undertaking by the guarantor that the principal debtor will perform his own contract with the creditor;

   (2) a conditional payment obligation: i.e. a promise by the guarantor to pay the instalments of principal and interest which fall due if the principal debtor fails to make those payments;

   (3) an indemnity; and

   (4) a concurrent liability with the debtor for what is due under the contract of loan.

8. The obligations in classes (2) and (4) create a liability in debt. But it is well established that an indemnity is enforceable by way of action for unliquidated damages: see *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1 at pages 33-36. The liability arises from the failure of the indemnifier to prevent the person indemnified from suffering the type of loss specified in the contract. A guarantee of the "see to it" type has also been held by the House of Lords to create a liability in damages. The obligation undertaken by the guarantor is not one to pay the debt but consists of a promise that the debt will be paid by the principal debtor: see *Moschi v Lep Air Services Ltd* [1973] AC 331.

9. Mr Moschi guaranteed the performance by a company of its obligation to discharge a pre-existing debt to the respondent at the rate of £6,000 per week subject to a cap on his liability of £40,000. When the company defaulted the creditor treated the contract as repudiated and proceeded to sue on the guarantee. Mr Moschi contended that as the contract had been brought to an end no further contractual instalments were payable and consequently there was no liability to make such payments under the guarantee. Lord Reid rejected this argument for the following reasons:

> "To meet that argument I think that it is necessary to see what in fact the appellant did undertake to do. I would not proceed by saying this is a contract of guarantee and there is a general rule applicable to all guarantees. Parties are free to make any agreement they like and we must I think determine just what this agreement means.

> With regard to making good to the creditor payments of instalments by the principal debtor there are at least two possible forms of agreement. A person might undertake no more than if the principal debtor fails to pay any instalment he will pay it. That would be a conditional agreement. There would be no prestable obligation unless and until the debtor failed to pay. There would then on the debtor's failure arise an obligation to pay. If for any reason the debtor ceased to have any obligation to pay the instalment on the due date then he could not fail to pay it on that date. The condition attached to the undertaking would never be purified and the subsidiary obligation would never arise.
>
> On the other hand, the guarantor's obligation might be of a different kind. He might undertake that the principal debtor will carry out his contract. Then if at any time and for any reason the principal debtor acts or fails to act as required by his contract, he not only breaks his own contract but he also puts the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid instalment but for damages. His contract being that the principal debtor would carry out the principal contract, the damages payable by the guarantor must then be the loss suffered by the creditor due to the principal debtor having failed to do what the guarantor undertook that he would do.
>
> In my view, the appellant's contract is of the latter type. He "personally guaranteed the performance" by the company of its obligation to make the payments at the rate of £6,000 per week'. The rest of the clause does not alter that obligation. So he was in breach of his contract as soon as the company fell into arrears with its payment of the instalments. The guarantor, the appellant, then became liable to the creditor, the respondents, in damages. Those damages were the loss suffered by the respondents by reason of the company's breach. It is not and could not be suggested that by accepting the company's repudiation the respondents in any way increased their loss. The respondents lost more than the maximum which the appellant guaranteed and it appears to me that the whole loss was caused by the company having failed to carry out its contract. That being so, the appellant became liable to pay as damages for his breach of contract of guarantee the whole loss up to the maximum of £40,000."

10. Lord Diplock reached the same conclusion. In his speech he traces the historical treatment of guarantees by the courts of common law not as obligations to pay a sum of money but as obligations to see to it that the debtor performs his own obligations to the creditor. Prior to the Common Law Procedure Acts this had procedural consequences. For a claim in debt the appropriate form of action was *indebitatus*

assumpsit. But an action for compensation for breach of other types of contractual obligations had to be brought by way of special assumpsit: see page 347E-F.

11. Lord Diplock's conclusions about the nature of a guarantor's liability are set out at pages 348H-349B:

> "It follows from the legal nature of the obligation of the guarantor to which a contract of guarantee gives rise that it is not an obligation himself to pay a sum of money to the creditor, but an obligation to see to it that another person, the debtor, does something; and that the creditor's remedy for the guarantor's failure to perform it lies in damages for breach of contract only. That this was so, even where the debtor's own obligation that was the subject of the guarantee was to pay a sum of money, is clear from the fact that formerly the form of action against the guarantor which was available to the creditor was in special assumpsit and not in indebitatus assumpsit *(Mines v Sculthorpe).*"
>
> The legal consequence of this is that whenever the debtor has failed voluntarily to perform an obligation which is the subject of the guarantee the creditor can recover from the guarantor as damages for breach of his contract of guarantee, whatever sum the creditor could have recovered from the debtor himself as a consequence of that failure. The debtor's liability to the creditor is also the measure of the guarantor's."

A debt for a liquidated sum?

12. Subject to compliance with the relevant Insolvency Rules (see IR 6.96-6.114) a creditor may prove in a bankruptcy for any "bankruptcy debt": see s.322(1) IA 1986. "Bankruptcy debt" is defined by s.382 in the following terms:

> "(1) "Bankruptcy debt", in relation to a bankrupt, means (subject to the next subsection) any of the following -
>
> (a) any debt or liability to which he is subject at the commencement of the bankruptcy.
>
> (b) any debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy) by reason of any obligation incurred before the commencement of the bankruptcy,
>
> (c) any amount specified in pursuance of section 39(3)(c) of the Powers of Criminal Courts Act 1973 in any criminal bankruptcy order made against him before the commencement of the bankruptcy, and
>
> (d) any interest provable as mentioned in section 322(2) in Chapter IV of Part IX.

> (2) In determining for the purpose of any provision in this Group of Parts whether any liability in tort is a bankruptcy debt, the bankrupt is deemed to because subject to that liability by reason of an obligation incurred at the time when the cause of action accrued.
>
> (3) For the purposes of references in this Group of Parts to a debt or liability, it is immaterial whether the debt or liability is present or future , whether it is certain or contingent or whether the amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in this Group of Parts to owing a debt are to be read accordingly.
>
> (4) In this Group of Parts, except in so far as the context otherwise requires, "liability" means (subject to subsection (3) above) a liability to pay money or money's worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution."

13. Rule 12.3(1) of the Insolvency Rules also states that:

> "Subject as follows, in both winding up and bankruptcy, all claims by creditors are provable as debts against the company or, as the case may be, the bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages."

14. A bankruptcy debt as defined therefore includes not only a liability in debt properly so-called but any claim for damages whether in contract or in tort including a contingent or future liability. It also does not matter whether the debt or liability is liquidated or remains to be ascertained. The extended definition in s.382(3) includes both.

15. But the qualifications for petitioning as a creditor are more restricted. Section 267 (so far as material) provides that:

> "(1) A creditor's petition must be in respect of one or more debts owed by the debtor, and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or (as the case may be) at least one of the debts is owed.
>
> (2) Subject to the next three sections, a creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented -
>
> (a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level,

> (b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured.
>
> (c) the debt, or each of the debts, is a debt which the debtor appears to be unable to pay or to have no reasonable prospect of being able to pay, and
>
> (d) there is no outstanding application to set aside a statutory demand served (under section 268 below) in respect of the debt or any of the debts.
>
> ……."

16. Section 267 does not refer to a "bankruptcy debt" as such. That defined term appears in s.322 in relation to the proof of debts. The word used by s.267 is "debt" which s.383(1) states is to be construed in accordance with s.382(3). Section 382(3) (unlike s.382(1)) does not define debt as including a liability (as defined in s.382(4)). The two remain distinct. It has a different purpose which is to make it clear that the debts or liabilities referred to in s.382(1) can include debts or liabilities which are future or contingent; liquidated or unascertained. A debt within s.267 would therefore include debts of that kind but for the express provisions of s.267(2) which requires the petition debt to be for a liquidated sum.

17. The possible inclusion of a damages liability as the basis of a good petitioning creditor's debt cannot therefore be based on the extended definition of "bankruptcy debt" in s.382(1) and (4). It has to be found in the practice and decisions of the court as to what constitutes a debt in a liquidated sum for the purposes of a creditor's petition.

18. Mr Arden's case is that a see to it liability of the kind described in *Moschi* does not qualify. Although the guarantor's liability is readily ascertainable by reference to the state of account between the creditor and the principal debtor, it is not fixed or specified in the guarantee itself. The measure of damages is as a matter of law the amount which the debtor has failed to pay. But the creditor's claim remains one for damages in that sum; not for an amount which the guarantor agreed to pay under the terms of the guarantee. It is not therefore a claim for a liquidated sum. The question, however, which also arises from the language of s.267 is whether a claim in damages (as opposed to one in debt) qualifies as a good petitionable debt at all.

19. If Mr Arden is right and a see to it liability under a guarantee does not qualify as a petitionable debt under s.267(2)(b), the consequences are at first glance surprising. Assuming (as I do for the moment) that Mr McGuinness's liability is of this kind, it would mean that the court could make a bankruptcy order on the Society's petition against Mr McGuinness's brother as principal debtor but not against him as guarantor even though the liability of both would be identical in financial terms and as readily calculable in one case as in the other. But experience teaches one in this field as in many other areas of law that views about what might constitute a rational system of law often have to give way to an established practice which cannot be altered except by legislation. The answer to the question posed by s.267(2)(b) has, as I have said, to

be found by examining the practice of the bankruptcy court both before and after the passing of the Bankruptcy Act 1869 when the requirement for a petition debt to be in a liquidated sum first appears.

20. One of the submissions made by Ms Start on behalf of the Society was that an historical examination of this kind was strictly unnecessary because the Insolvency Act 1986 was not a consolidating statute as such and should be interpreted free of the shackles of the past. I reject that submission. Although the 1986 Act did undoubtedly incorporate a number of significant changes in the law and practice of insolvency (including personal insolvency), there is nothing in the *Cork Report* which preceded it (see *Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558*) or in the terms of the Act itself to suggest that any change was intended in relation to the conditions which govern a creditor's petition in bankruptcy.

21. The 1914 Bankruptcy Act did not include the defined term of a "bankruptcy debt" equivalent to s.382. But in substance it made the same distinction between debts which can found a creditor's petition and those which are provable in the bankruptcy. Section 30(3) of the 1914 Act refers to all debts and liabilities (including future and contingent liabilities) being provable with the exception of unliquidated damages in tort: see s.30(1). But s.4 restricted the creditor's right to petition to a "debt" in a liquidated sum. The 1986 Act removed the restrictions on proving for unliquidated damages in tort but s.267 repeated in terms the requirement that there should be a debt in a liquidated sum which was contained in s.4(1)(b) of the 1914 Act.

22. What then does this term mean? It first appears in s.6 of the 1869 Bankruptcy Act. The 1849 Act simply required there to be a single debt of at least £50 due to the creditor. At that time bankruptcy was restricted to traders but this restriction was removed by the Bankruptcy Act 1861. The 1869 Act widened the class of provable debts by including demands for unliquidated damages in contract and for breach of promise. Section 31 also made it clear that these debts and liabilities could be both present and future, certain or contingent. One can therefore trace to the 1869 Act the distinction made in all subsequent bankruptcy statutes between provable and petitionable debts.

23. A "liquidated sum" has never been defined in any of this legislation and appears to be the codification in the 1869 Act of earlier decisions of the courts as to what constituted a good petitioning creditor's debt. So in *Ex p. Broadhurst* (1832) 22 LJ Bank 21 a covenant by the father of two existing partners in favour of an incoming partner to pay any shortfall in the debts due to the firm below a stated sum and to bear the debts of the existing partners in excess of a stated sum was treated not as a contractual liability to pay a stated or liquidated sum but as a liability for unliquidated damages. Maule J said that:

> "The question now before the Court is, whether the debt or alleged debt or demand asserted to be due is one which will be sufficient, as a petitioning creditor's debt, to support an adjudication in bankruptcy. I am of opinion that it is not. It is clear from the recitals in the deed of partnership which contains the covenant in question, that the engagement entered into was one entered into for the benefit of Mr Walker. The covenant was with Mr Walker for the benefit of Mr Walker, and was not

> a covenant with Mr Walker for the benefit and on behalf of Walker, Perry & Broadhurst. They had, in fact, no interest in it, but Mr Walker was alone interested; it was a covenant to pay the difference between the debts due from the old firm stated in the schedule and any further debts; it was to pay the excess of one set of debts–over the amount of debts due to the firm. That being so, it seems to me impossible to turn the covenant into a covenant to pay a liquidated sum, or any sum, to Walker. The covenant could not be performed by doing that; the object of the parties was to put the firm in the same position in which they would be if the debts, active and passive, were to the amount stated in the covenant, and there is no specific sum engaged to be paid to Walker. It cannot be treated at law as a specific sum of money to be received, for the right to receive would be co-extensive only with the demand sustained; and this cannot be so made the subject of computation as to be a fit ground for a petitioning creditor's debt. No action could be framed upon it. I do not mean to say that a covenant to pay to A. for the benefit of A, B. and C. may not make a good petitioning creditor's debt. In the present case there might not be a sufficient damage to constitute the debt; or, even suppose that damage to the amount of 100*l*, was shewn, still it does not follow that the money could have been recovered, as anything to be recovered must be in the shape of damage, and such damage is not of a character to amount to a petitioning creditor's debt."

24. In *Owen v Routh* (1854) LJCP 105 the claim was for breach of an undertaking to deliver some shares on a certain day. The defendant pleaded that he was discharged from the liability by his adjudication in bankruptcy. This applied to the defendants' "debts and sums of money due or claimed to be due" on the date of the vesting order. The issue therefore for the court was whether the liability on the undertaking was a debt or a sum of money due. The submissions made on behalf of the plaintiff included one to the effect that only debts were provable and that a claim in damages was not therefore barred by the vesting order and this was accepted by counsel for the defendant. His argument was that an undertaking to deliver shares on a specified day created a provable debt because the shares would be treated as money's worth in the amount of their value at the date for delivery. The Court of Common Pleas rejected this analysis and treated the claim as one in damages in a sum to be measured by reference to the price of the shares at trial. They were therefore unliquidated.

25. References are made in the argument and the short judgment to the earlier case of *Utterson v Vernon* (1790) 3 Term Reports 539. This concerned an agreement to lend the bankrupt some stock which she undertook to replace. The act of bankruptcy and the declaration of her bankruptcy took place before the stock was replaced. The issue was whether the agreement created a provable debt. It was argued that the agreement did not provide for payment of a sum certain but only for the replacement of the stock at some indefinite point in the future. It was therefore a claim for unliquidated damages.

26. At the trial before Lord Kenyon Ch J the judges expressed different views about what constituted a provable debt. Lord Kenyon thought that there was a provable debt in an amount equal to the value of the stock on the day of bankruptcy. Ashurst J held that the only provable debts were those which could be recovered in the form of an *indebitatus assumpsit*. This would exclude any claim in damages. Buller J said that the form of action was not determinative and the real question was whether the amount of the debt could be ascertained without the intervention of a jury. Grose J also took the view that a creditor could prove for a claim in damages provided that they were in a liquidated sum. The court therefore held by a majority that there was a provable debt.

27. The Lord Chancellor, who had originally sent the case to the court for determination, is reported at 4 Term Reports 570 to have been doubtful about the decision and remitted the case for re-consideration. On this occasion the court held unanimously for the defendant bankrupt. Lord Kenyon CJ said that:

> "The question in this case depends on a simple principle of law, which cannot be doubted. It is clear, that where one person, previous to his bankruptcy, is indebted to another in a precise sum which is ascertained, the latter may prove his debt under the commission: but it is as clear, that where there is only a cause of action existing, where the debt is to arise on a stipulation which has not been broken previous to the time of the bankruptcy, and where the debt remains to be inquired into, there the creditor cannot prove his debt under the commission, and the demand will remain undischarged by the certificate."

28. It will be apparent from the judgments in these cases that during the first half of the nineteenth century no real distinction was made between debts which were provable and those which would found a creditor's petition. Under the Bankrupts (England) Act 1825 the petitioning creditor was required to make an affidavit of the truth of his debt or debts and to prove the relevant act of bankruptcy. The debt had to exceed the minimum sum of £100 but could be payable at a future date. Prior to the 1825 Act contingent or unliquidated claims were not provable on the ground that they were difficult to quantify. Creditors whose debts fell within this category were not therefore able to prove in the bankruptcy. As a consequence, their debts were not extinguished but continued to be enforceable against the bankrupt's after acquired property. The question whether the particular debt had survived the bankruptcy was the issue in both *Owen v Routh* and *Utterson v Vernon*. But the 1825 Act made contingent debts provable and the category of provable debts was gradually expanded through successive Bankruptcy Acts so that by 1869 only claims for unliquidated damages in tort remained unprovable; a restriction now removed by the 1986 Act.

29. Cases after 1869 (and, to a lesser extent, after 1825) as to whether a debt is provable are not therefore entirely reliable guides as to what continued to be a good petitioning creditor's debt. The express requirement in the 1869 Act that it should be in a liquidated sum reflects the earlier practice of not admitting to proof in bankruptcy debts which were not quantified and required to be determined by a jury. But the historical background to the retention of the requirement that a petitionable debt should be in a liquidated sum is, I think, an important guide to what type of debt should qualify.

30. In *Re Dummelow* (1872-2) LR 8 Ch App 997 the issue was whether a creditor could vote at the first creditors' meeting. Section 16(3) of the 1869 Act excluded a right to vote in the case of creditors in respect of "any unliquidated or contingent debt, or any debt the value of which is not ascertained". The Court of Appeal held that a claim for untaxed costs was either unliquidated or ascertained. Mellish LJ said that:

> "The question really is, what is meant by an "unliquidated debt" in the 3rd sub-section. The fair construction of the clause seems to me this: "a contingent debt" refers to a case where there is a doubt if there will be any debt at all; "a debt, the value of which is not ascertained," means a debt the amount of which cannot be estimated until the happening of some future event; and "an unliquidated debt" includes not only all cases of damages to be ascertained by a jury, but beyond that, extends to any debt where the creditor fairly admits that he cannot state the amount. In that case there must be some further inquiry before he can vote."

31. *Ex parte Ward* (1882) 22 Ch D 132 was concerned with whether a creditor could petition in respect of the liability of a broker who failed to settle the sums due on the purchase by him of shares traded on the London Stock Exchange. He was declared a defaulter in accordance with the Stock Exchange rules and under those rules his liability to the vendor firm was assessed at £5,623. They petitioned for his bankruptcy but were met with a plea that their claim was not for a liquidated sum due at law or in equity as required by s.6 of the 1869 Act but was a claim for unliquidated damages.

32. The Court of Appeal held that the claim was for a debt in a liquidated sum because the incorporation of the Stock Exchange rules into the contract meant that the contract itself provided the means of ascertaining the amount due. Cotton LJ said that:

> "Rule 170 in the case of a defaulter really alters the original contract, and provides a new contract as between the defaulter and his creditor, and then the amount of the liability is fixed and ascertained in accordance with that altered contract."

33. In *Re Miller* (1901) 1 QB 51 a prospective partner paid £2,000 to a broker on terms that he should have the option of demanding its repayment if he did not become a partner in the firm by a specified date. The firm was hammered before that date and having given notice to determine the agreement, the prospective partner then petitioned for bankruptcy in that sum. The Court of Appeal held that the alleged debt of £2,000 was not a liquidated sum and could not therefore found a petition because the hammering of the firm was not an event which entitled notice of determination to be served under the agreement. The only remedy for the firm's inability to perform the contract was one in damages which was not a debt in a liquidated sum.

34. In *Re a Debtor; ex parte Berkshire Finance Co Ltd* (1962) 106 Sol Jo 469 a divisional court in bankruptcy had to consider whether a judgment debt in respect of sums due under a hire-purchase agreement was a good petitioning creditor's debt. In most cases the existence of a judgment debt will be conclusive but the judgment sum in this case included the balance of all the remaining hire charges which became payable on the

premature determination of the agreement. Since the judgment was obtained, the House of Lords in *Bridge v Campbell Discount Co Ltd* (1962) 2 WLR 439 had held that provisions of this kind constituted a penalty. The divisional court therefore exercised their power to go behind the judgment and held that the creditor had, on a proper application of the law, no more than a cause of action against the debtor for unliquidated damages. There is, however, nothing in the judgment of Cross J (as he then was) to suggest that had the creditor had a good cause of action for a liquidated sum based on the contract it would not have qualified.

35. Finally in this context I should mention *Truex v Toll* [2009] EWHC 396 (Ch) which concerned an attempt by a solicitor to bankrupt a client who had not paid the solicitor's fees. Although the client had made a belated attempt to have the bills taxed, the registrar held that the sum due must on any view exceed the statutory minimum and that the client had in any event accepted the bills as payable. The debtor's appeal was allowed on the basis that a claim for solicitor's fees not judicially assessed was not a claim for a liquidated sum under s.267 of the 1986 Act and that there had been no binding admission of the debt. Proudman J at paragraphs 36-7 said that:

> "[36] In my judgment whether a sum is liquidated and whether there is a defence to the claim are separate issues and the first must be determined before the second is addressed. Accordingly any admission, acknowledgment or agreement converting the amount claimed from an unliquidated to a liquidated sum must be one from which the client has bound himself not to resile. A mere acknowledgment would be insufficient to bind him to forego judicial assessment or determination.
>
> [37] On this basis it was not possible to say that any part of the work done by Mr Truex had been quantified, or was quantifiable by the bankruptcy court as a mere matter of arithmetic. It seems to me that the Chief Registrar conflated the issue of whether there was a genuine dispute about a liquidated debt with that of whether the sum claimed was liquidated in the first place. The bill as a whole was capable of challenge as to quantum, was thus for an unliquidated sum and did not fulfil the requirement of s 267. The same point applies to the Chief Registrar's alternative finding that there could not be a genuine dispute as to at least £750 of the costs."

36. These authorities indicate and I think establish that a debt for a liquidated sum must be a pre-ascertained liability under the agreement which gives rise to it. This can include a contractual liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery which, when operated, will produce a figure. *Ex parte Ward* is the obvious example of that. Claims in tort are invariably unliquidated because they require the assistance of a judicial process to ascertain the amount due by way of damages. In some cases the calculation of the award will be straightforward and obvious but the unliquidated nature of the claim excludes it from being a good petitioning creditor's debt which satisfies the requirements of s.267.

37. The most obvious use of the term "liquidated" has been in relation to liquidated damages. "Liquidated" has been defined judicially as meaning the sum which the parties have by their contract assessed as the damages to be paid for its breach: see *Wallis v Smith* (1882) 21 Ch D 243 at 267 per Cotton LJ. If a genuine pre-estimate of loss the provision is enforceable according to its terms. I would therefore regard a claim for liquidated damages as one for a liquidated sum within the meaning of s.267 unless a claim in damages is excluded by the use of the word "debt".

38. Another familiar context in which the word "liquidated" appeared was RSC O.13 which governed when a plaintiff could enter final judgment against a defendant who failed to give notice of intention to defend. Final judgment could only be entered when the writ was endorsed with a claim for a liquidated demand: see RSC O.13.r1. Claims in debt or for liquidated damages fell within this rule but it did not include claims in tort where the damages were necessarily unliquidated or those for contractual damages where the measure of liability was not specified in the contract itself.

39. The authorities in the field of bankruptcy as to what constitutes a liquidated sum are consistent with this approach. In *Re Broadhurst* the measure of liability under the contract was readily calculable but that did not make it a liquidated claim. As Maule J put it in his judgment, there was no specific sum engaged to be paid to the creditor.

40. For this reason *Hope v Premierpace (Europe) Ltd* was in my view correctly decided on its facts. The misappropriation by the employee of money from his employer gave rise in that case to an obvious liability either for money had and received or for breach of trust or for deceit. But as Rimer J held, none of those claims is for a liquidated sum properly so-called. They are all claims for monetary compensation in a sum equivalent to the employer's loss. Much of the argument on this appeal centred on a paragraph in the judgment (at page 699) where Rimer J said that:

> "Mr Rainey submits that it follows that none of the company's claims for a remedy is in the nature of an order for payment of a liquidated sum. It is irrelevant that the company claims to be able to identify its claim down to the last penny. It is still faced with the difficulty that its range of alternative claims against the debtor are claims for damages or for an account and payment. A claim for damages is not a claim for a liquidated sum; and nor is a claim whose remedy is that of an account, even though it may be that the taking of the account so ordered could be dealt with in a summary way and a judgment there and then given for a specific sum. I accept that submission."

41. Read in context, the judge was not saying that a claim in damages could not be a debt within the meaning of s.267 regardless of the nature of the claim. All that he was asked to decide was whether the claims on which the petition was based were for a liquidated sum.

42. The issue therefore in relation to guarantees is whether the liability of the guarantor can be treated as one which is reduced to a specified and agreed sum by the guarantee itself. Where the guarantee on its proper construction contains a promise by the guarantor to pay the principal sum due and interest in the event of the debtor failing to

pay no difficulty arises. The claim is one in debt and as such is necessarily in a pre-agreed amount. But guarantees containing a see to it liability give rise on Lord Diplock's analysis in *Moschi v Lep Air Services Ltd* to a claim for unliquidated damages. Although the measure of the guarantor's liability is the amount of the debt, that is not the same as an obligation to pay a sum of money under the contract whether as a debt or agreed damages.

43. Therefore, as a matter of general principle and ordinary language, Mr Arden is, I think, right in his submission that the liability under a guarantee of the see to it type would not constitute a debt for a liquidated sum. The only possible caveat is if the practice of the bankruptcy courts prior to 1869 was to regard such liabilities as debts which would found a creditor's petition and be provable in the bankruptcy. If that is right then it would, I think, support a construction of s.6 of the 1869 Act which accommodated such guarantees.

44. We were referred to a number of decided cases on guarantees starting with *Heyler v Hall* (1622) Palm 325 and with *Denham's Case* which is reported in Montagu's Bankrupt Laws (1805) Vol 2 at page 120 but is undated. Both reports are extremely short and give no details of the nature of the guarantor's liability. But they do indicate that sureties were even then subject to the bankruptcy laws.

45. In *Ex parte Stead* (1823) 1 G&J 301 the issue raised was whether a liability under a guarantee which resulted in a judgment was provable in the bankruptcy of the guarantor where the act of bankruptcy pre-dated the judgment. The Lord Chancellor ordered that the petitioner should be at liberty to take out a future commission against the debtor but no further indication is given in the report of the eventual outcome.

46. Of more assistance is *Atwood v Partridge* (1827) 4 Bing 209 where the defendant had guaranteed the due payment by another of the premiums due under an insurance policy. The benefit of the policy was assigned to the plaintiffs who were compelled to meet the premiums when the insured defaulted. The defendant became bankrupt and the issue once again was whether the liability for breach of covenant was discharged and the debt was provable in the bankruptcy. The court held that the liability was not discharged. Best LJ (at page 750) said that:

> "Robinson owes the Plaintiffs money. The Defendant does not become a surety for that debt; but Robinson having agreed, by way of security, to pay the premium upon a policy of insurance, the Defendant undertakes to guarantee, not the payment of Robinson's debt to the Plaintiffs, but of that premium. There was, therefore, no debt due from the Defendant to the Plaintiffs, contingent or otherwise. Upon Robinson's failing to pay the premium the Plaintiffs were entitled to recover from the Defendant unliquidated damages, the amount of which might have varied, according to circumstances. If Robinson continued alive, as was found by the jury, the amount would have been the premium paid by the Plaintiffs. If Robinson had died, it might have been the whole sum insured. How is it possible, then, to say that this was a debt due from the Defendant."

47. In *Ex parte Myers, Re Sudell* (1833) Mont & Bli 229 the guarantee was for the amount of £12,000 being the sum drawn down by the debtor. The issue was whether it created a provable debt on the basis that contingent debts were now included as a result of the 1825 Act. One of the arguments presented to the court was that there was no debt contracted for and that the guarantee merely created a liability sounding in damages.

48. The court held that there was a liability in debt albeit of a contingent nature and that the debt was therefore provable. The guarantee was therefore treated as falling into the first of Lord Reid's examples in *Moschi* by creating a liability for payment of the debt albeit on a contingent basis. Sir George Rose (at page 241) said that:

> "I never knew it doubted that a debt on a guarantee when the contingency had happened could be proved. I recollect fifty of such cases: it was the constant practice of the commissioners to admit such proofs. In all the cases, from *ex parte Adney* and *ex parte Minett*, no man ever thought of objecting that a guarantee was not a debt; but the difficulty was as to its being a contingency. Suppose the common case of an engagement to replace stock: that engagement is not a debt; yet it was always proveable, and why is it? Because it was a fair equitable engagement, which would be available against assets."

49. The only reason why an agreement to replace stock was held to constitute a provable debt was that the stock was treated as money's worth and if replaced on a specified date created in substance a liability to pay a specified sum which was readily ascertainable: see *Utterson v Vernon* and *Owen v Routh* referred to earlier. The reference in Sir George Rose's judgment to guarantees invariably creating debts has therefore to be read in the context of the guarantee under consideration in that case. This is, I think, confirmed by what he said in the subsequent case of *Ex parte Simpson, Re Sudell* (1834) Mont & Bli 541 which was an application for a re-hearing of the petition considered in *Ex parte Myers*. The earlier decision appears to have been controversial on the question whether liability under a guarantee is ordinarily to be treated as giving rise to a contingent debt. The court overcame this difficulty in *Ex parte Simpson* by emphasising that under the terms of the contract the guarantor had made himself a principal debtor in respect of the sums due. Sir George Rose also re-visited what he had said in *Ex parte Myers*:

> "In *ex parte Myers* I said, that "I never knew it doubted that a debt on a guarantee, when the contingency had happened, could be proved, and that I recollected fifty of such cases".
>
> I now repeat, after consideration, that where a guarantee becomes absolute before the bankruptcy, and was capable of valuation, the practice always has been to consider it proveable. This practice, having been adopted during so long a period without adverse applications, proves the general impression as to the existence of the rule.

To a certain extent it may be laid down as a rule, that so far as guarantees are concerned, a debt proveable and a petitioning creditor's debt are convertible terms.

That Lord Eldon did not supersede in the case of the guarantee is a strong authority, as proving his Lordship was of opinion that it would support the commission.

The meaning of the word "guarantee", when used in any writing, is to be ascertained from the nature of the instrument, and of the transaction in each particular case; and its being used is not conclusive as to whether the party using it be or be not a mere surety.

The undertaking in this case is a direct contract of debt. There is a circumstance, no doubt, as to the mode of payment; but that no further affects the contract than as shewing how the money is to be paid.

Let it be assumed that the document in question as a mere guarantee to be answerable for the debt of another, if that other did not pay; and suppose,

1st, That the contingency happened before bankruptcy,

2d, It happened after.

1st, If the contingency had occurred before the bankruptcy there could have been no difficulty, for the circumstances which had already happened shewed *Lyne and Suddell* to be so completely insolvent as would prove to any commissioner that they were utterly disabled from ever paying.

2d, If the contingency were after the bankruptcy. If any doubt arise whether it then would be proveable, the 135th section of the Bankrupt Act gives the creditors the benefit of that doubt; and certainly the construction made in this case is favourable to the creditors.

The general and leading intent of the bankrupt statutes is, first, legally to distribute the assets; and, second, to release the bankrupt from all demands which depriving him of his property has disabled him from meeting.

…

There are many engagements to pay money, as for the value of goods, which before the bankruptcy would not have been the subject of an action of "debt," but for which an action of assumpsit must have been brought; yet if the only reason of the necessity for the action of assumpsit, instead of debt, was that

> the amount was not ascertained, and the commissioners could ascertain that amount, it would constitute a debt proveable.
>
> I must not, however, be understood to lay down a general rule that all guarantees are proveable; such is not the law."

50. What I take from these passages is that the ability to prove for a liability under a guarantee existed even when the liability which it imposed was not one as principal debtor as such but was an obligation to pay a specified sum on the happening of a contingency. Even that view was not unanimous across the court. Although the Chief Justice took the same view as Sir George Rose, Sir John Cross described the question of whether mere guarantees created contingent debts as one of extreme nicety on which he was not prepared to venture an opinion. But there is nothing in *Ex parte Myers* or *Ex parte Simpson* to support an extension of the principle of what constitutes a contingent debt to a case such as *Atwood v Partridge* where the liability was of the see to it kind and Ms Start was unable to direct us to any case where that had been done. Indeed in *Ex parte Thompson* (1833) Mont & Bli 219 the same court decided that a guarantee to pay an annual sum in the event of default of the principal debtor did not give rise to a provable contingent debt if the act of bankruptcy preceded the debtor's default.

51. I therefore conclude that there is nothing in the practice of the court in relation to liability under guarantees which displaces what I consider to be the correct construction of s.267 of the 1986 Act. It follows that the petition was defective and that the bankruptcy order should not have been made unless the proper construction of Mr McGuinness's guarantee is the one adopted by Briggs J and the Deputy Registrar. Although not necessary for the resolution of this appeal, my view is that "debt" in the earlier Bankruptcy Acts was treated by the courts as wide enough to include a liability in contract for damages in a liquidated sum. That, I think, is evident from the judgment of Mellish LJ in *Re Dummelow* quoted above where he described an unliquidated debt as including a claim in damages and from the court's rejection in cases like *Utterson v Vernon* of the view that the ability to prove for a debt depended upon it being recoverable in the form of an *indebitatus assumpsit*. The better view is that expressed by Grose J in that case (at page 726) that:

> "Where a demand rests merely in damages, and is not capable of a clear certain liquidation, it cannot be proved under a commission of bankrupt: but I consider this as a contract to do a specific act, which the bankrupt is rendered utterly incapable of performing by the bankruptcy; and his incapacity to perform it is attended with a certain damage to the plaintiff. The value of the stock is mixed in the general mass of the bankrupt's property, of which the assignees and the other creditors are possessed; and there is no reason why in substantial justice the plaintiff should not have the same advantage which the rest of the creditors have, especially as the amount of his demand is capable of being ascertained. Several cases have been mentioned, the principles of which fully warrant us in deciding in favour of the plaintiff. I perfectly concur with my Lord Chief Justice in the observations which he has made on the case of *Dutch and Warren*, and in those made by my brother Buller on

> that of *Goodtitle* v. *North*. Much has been said respecting the form of the action: but I do not by any means think it collusive; it may illustrate, but cannot decide, the question. On the whole I am of opinion that this being a case of clear liquidated damages for the not performing a specific act, which the bankruptcy has rendered impossible to be done, the plaintiff may come in under the commission, and the time of the bankruptcy is the time when the amount of is to be ascertained by the price of the stock on that day."

52. Although as explained earlier the court changed its mind as to whether the contract could be construed in that way, there is nothing in its second judgment which casts doubt upon the statement of the law.

53. The decisions in these and other similar cases also, I think, support a meaning of the word "debt" which is evident from the language of s.267(2)(b) and the earlier Bankruptcy Acts in their use of the phrase "debt for a liquidated sum". A debt properly so called is always liquidated even though some arithmetic may be required. The words "for a liquidated sum" therefore add nothing unless a debt can include a liability for damages in contract.

Construction

54. I turn then to the issue of construction which was decided against Mr McGuinness in the courts below. The guarantee is headed "Guarantee and Indemnity" and, after setting out the names of the parties, there is then a maximum liability clause in these terms:

> "THE MAXIMUM AMOUNT WHICH YOU ARE LIABLE TO PAY UNDER THIS GUARANTEE IS £1,115,653.00 (One million, one hundred and fifteen thousand, six hundred and fifty three pounds – the "Maximum Amount") PLUS THE OTHER AMOUNTS SET OUT IN CLAUSE 3."

55. The principal terms of the guarantee are contained in clauses 2-4 and I set them out in full:

> "2. GUARANTEE AND INDEMNITY
>
> 2.1 In return for our lending, agreeing to lend or continuing to lend money, or granting credit facilities, to the Borrower you accept the liabilities set out below. These liabilities are unconditional and you cannot withdraw from them, except as set out in Clause 5.
>
> 2.2 You guarantee that all money and liabilities owing, or becoming owing to us in the future, by the Borrower (whether actual or contingent, whether incurred alone or jointly with another and whether as principal or surety) will be paid and satisfied when due.

2.3 Any amount claimed under the Guarantee is payable by you immediately on demand by us.

2.4 As a separate obligation you agree to make good (in full) any losses or expenses that we may incur if the Borrower fails to pay any money owed to us, or fails to satisfy any other liabilities to us, or if we are unable to enforce any of the Borrower's obligations to us or they are not legally binding on the borrower (whatever the reason).

2.5 You will also make good any losses or expenses which we may incur if we take steps to enforce this Guarantee or if we try to do so.

3. LIMIT ON THE GUARANTEE

This Guarantee is a continuing security, and covers all the liabilities of the Borrower to us. However, if there is a Maximum Amount stated on page 1 of this Guarantee, you will not be liable for more than:-

3.1 the Maximum Amount; plus

3.2 any interest payable by you under Clause 6; plus

3.3 any amounts payable by you under Clause 2.5 and/or Clause 10.

4. OUR PROTECTION

4.1 None of your obligations under this Guarantee will be affected if any of the following happen (even it if would have been if this Clause did not exist):-

4.1.1 we vary, extend, discharge, compromise, review or otherwise deal with any rights we have or may in the future have against the Borrower, or any other person in respect of the Borrower's obligations;

4.1.2 we take, vary, release or otherwise deal with any security or guarantee in respect of the Borrower's liabilities;

4.1.3 we enforce, fail to enforce or release any rights under any security or guarantee;

4.1.4 any other guarantee or arrangement intended or expected to secure the Borrower's liabilities to us is never put in place or is (for whatever reason) unenforceable.

4.1.5 we terminate or vary any contract, relationship or arrangement with the Borrower to enter into any new contract, relationship or arrangement;

4.1.6 we give the Borrower (or any other person) time to pay or any other waiver or concession;

4.1.7 the Borrower or any other person becomes insolvent, bankrupt or subject to liquidation, winding-up or administration;

4.1.8 any obligation of the Borrower is or becomes invalid or unenforceable;

4.1.9 any claim or enforcement of payment is made against the Borrower or any other person;

4.1.10 there are any changes to our, your or the Borrower's name, constitution or membership;

4.1.11 you die or become mentally ill;

4.1.12 the Borrower dies or becomes mentally ill;

4.1.13 we do or fail to do anything else.

4.2 Your obligations under this Guarantee are those of principal, not just as surety. We will not be obliged to make any demand on, or take any steps against, the Borrower or any other person before enforcing this Guarantee.

4.3 Until all the Borrower's liabilities to us are paid in full, you agree that, whether or not you have made any payment under this Guarantee, you will not:

4.3.1 share in any security we hold or any money we receive;

4.3.2 take or receive any money or security from the Borrower or any other person in connection with this Guarantee;

4.3.3 enforce or dispose of, or otherwise deal with, any right or pursue any claim against the Borrower or any other person in respect of the Borrower's liabilities to us;

4.3.4 make any claim in the insolvency of the Borrower or any such person which would compete with our claim.

> If, in breach of the above, you do receive any security, rights or money then you will hold them on trust for us and transfer them to us on demand.
>
> 4.4 This Guarantee is in addition to, and will not be affected by, any other security or right held by us in respect of the liabilities of the Borrower."

56. It is common ground that clause 2.4, which contains an indemnity in respect of loss and expenses caused by the borrower's default, creates a liability in damages. The two issues of construction are essentially whether clauses 2.2-2.3 (which, as clause 2.4 makes clear, are separate from the obligation under that clause) impose either a conditional payment or concurrent liability for the mortgage debt which was the view of the Deputy Registrar; and, if they do not, whether clause 4.2 has the effect of imposing a concurrent liability on Mr McGuinness as a principal debtor which was the construction favoured by Briggs J.

57. Mr Arden's submission is that clause 2.2 contains an obligation of the see to it type which sounds in damages and is unaffected by the provisions of clause 4.2. The latter are solely concerned, he says, with removing the need for a demand under clause 2.3 and did not deprive Mr McGuinness of his status as surety.

58. As Briggs J observed, a guarantee can be drafted (and often is) so as to create liabilities both in debt and for damages. Mr Arden's principal argument is that when read alone, clause 2.2 is clearly framed in terms of a promise that the sums due under the mortgage will be paid and satisfied when due. This, he says, is therefore a promise to see to it that the borrower will perform his own obligations under the mortgage. It is not a promise to pay the mortgage liabilities if the borrower fails to do so.

59. The Deputy Registrar thought that the reference in clause 2.2 to the sums due under the mortgage being paid and satisfied was the language of debt rather than damages. It was also significant he said that the admitted damages obligation under clause 2.4 was stated to be a separate obligation. The statement in clause 2.4 about it being a separate obligation cannot simply be referable to the type of losses it covers because the indemnity extends to any shortfall in the payment by the borrower of the mortgage debt. There is therefore an overlap between the liabilities covered by clause 2.2 and those within clause 2.4. It therefore raises the question as to why an indemnity of this kind was included in clause 2.4 if the primary liability under clause 2.2 was also no more than a covenant to ensure that the mortgage liabilities were met by the borrower.

60. The reference in clause 2.2 to the mortgage liabilities being paid and satisfied cannot be divorced from the context in which it appears: that is an undertaking that they will be paid when they fall due. The real question is paid by whom? If what the guarantor is promising is that he will pay them as they fall due should the borrower fail to do so then one has a conditional payment obligation. But if the concluding words of clause 2.2 mean no more than they will be paid by the borrower when due, one is dealing with a see to it liability in damages.

61. The language of clause 2.2 taken by itself is ambiguous on this point but the balance is tipped in favour of the Society's construction by the features of clause 2.4 which I

have referred to and by clause 2.3 which makes the sums due under the guarantee payable on demand. The requirement for notice is not a pre-requisite to the enforcement of a liability in damages and seems to me more consistent with clause 2.2 being read as a direct promise to pay the mortgage liabilities as they fall due. Although a request for payment of a presently due debt is unnecessary, it can be made a condition of payment and is a requirement where the guarantee is in the nature of a collateral promise to pay on demand if the principal debtor does not: see *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 KB 833 at page 849; *Re Brown's Estate* [1893] 2 Ch 300. The position was explained by Bayley J in *Rowe v Young* [1820] 2 Bli 391 at page 465 in these terms:

> "the rules which the law has laid down as to cases in which a demand is or is not necessary, must be considered. One of these rules I take to be this, that where a man engages to pay upon demand what is to be considered his own debt, he is liable to be sued upon that engagement, without any previous demand; …"

But Bayley J. went on to say:

> "but … if he engage to pay upon demand what was not his debt, what he is under no obligation to pay, what but for such engagement he would never be liable to pay any one, a demand is essential, and part of the plaintiff's title."

62. It is therefore strictly unnecessary to consider clause 4.2 but I propose to deal with it because it figured centrally in the reasoning of the judge. Briggs J held that the effect of clause 4.2 was to make the debt that of the guarantor. He referred in his judgment to the decision of this court in *MS Fashions Ltd v BCCI* [1993] Ch 425 where the issue was whether guarantors of a company's liabilities to BCCI who had charged monies deposited by them with the bank as security for their guarantee obligations could set-off these sums against their liabilities under the guarantees pursuant to rule 4.90 of the Insolvency Rules. The issue turned on whether the liability under the guarantee was a primary one or merely a liability contingent on the making of a demand.

63. The guarantee contained principal debtor clauses similar to the one contained in clause 4.2. Hoffmann LJ (at first instance) said that:

> "In my judgment the "principal debtor" clauses have the effect of creating primary liability for the purposes of the rule that the debt is not contingent upon demand. This was the provisional view of Walton J. in *Esso Petroleum Co. Ltd. v. Alstonbridge Properties Ltd*. [1975] 1 W.L.R. 1474, 1483, and I think it was correct. It is true that for some purposes the courts will look to the underlying reality of the suretyship relationship rather than the formal agreement that liability is to be as principal debtor. But this is only for the purpose of protecting the surety's equitable rights against the principal debtor and giving effect to such consequences as may affect the creditor, such as the surety's right to take over securities and the rule against double proof. Otherwise there is no reason why creditor and surety

> should not make whatever terms they choose. The right to a demand before liability can accrue is not inherent in the nature of suretyship and will not be implied unless expressly provided. There seems accordingly no reason why the parties should not modify the effect of such a provision."

64. In the Court of Appeal Dillon LJ (at page 447G) said that:

> "In the present case in the letters of charge signed by Mr. Amir in respect of Impexbond Ltd. and Tucan Investments Plc. he has expressly agreed that his liabilities thereunder - namely the companies' liabilities charged on his deposits - shall be as that of a principal debtor.
>
> Similarly in the forms setting out the cash deposit security terms which Mr. Ahmed signed in respect of High Street Services Ltd. and its associated companies he accepted that the liabilities of those companies should be recoverable from him as principal debtor and they were thus within the definition of his indebtedness; he also authorised the appropriation of the deposited moneys in satisfaction of his indebtedness without further notice to him.
>
> The effect of that must be to dispense with any need for a demand in the case of Mr. Amir since he has made the companies' debts to B.C.C.I. his own debts and thus immediately payable out of the deposit without demand. In the case of Mr. Ahmed there must be immediate liability even though the word "demand" was used, because he accepted liability as a principal debtor and his deposit can be appropriated without further notice."

65. Mr Arden submits that the purpose of clause 4.2 is to lend weight to the other provisions of clause 4 (contained in clause 4.1) which are designed to protect the Society against any possible release of the guarantee by its dealings with the borrower. Clause 4.2 removes the need to give notice under clause 2.3 but does not alter the nature of the guarantor's liability under clause 2.2.

66. I am not persuaded by this. It seems to me that the first sentence of clause 4.2 has to be given some meaning. If the guarantor's obligations are to be those of a principal and not merely those of a surety then something has to be added to clause 2 by clause 4.2. Clause 4.2 does not refer to the requirement of notice in clause 2.3 and it seems to me to be odd for the draftsman to have introduced a requirement to make a demand under clause 2.3 and then to have taken it away in clause 4.2. The better view is that the second sentence of clause 4.2 reflects the status of the guarantor as principal debtor by making it clear that his liability is concurrent with that of the borrower and not contingent upon it. The Society is entitled to proceed against the guarantor without first exhausting its remedies against the borrower and the guarantor cannot rely on any failure to do so as a failure to mitigate which reduces his own liability.

67. It was said in argument that clause 4.2 could not easily convert clause 2.4 into a principal debtor obligation given that it relates in part to a claim for consequential loss and expenses beyond the non-payment of the mortgage debt. How therefore, it is said, can it have any different effect on clause 2.2? The answer to that question depends upon the premise which one operates from. On my own construction of clause 2.2 the provisions of clause 4.2 operate merely to confirm that clause 2.2 creates a liability in debt. But I cannot see why clause 4.2 should not apply more generally to any of the obligations under clause 2 which are capable of taking effect as a liability in debt. Clause 2.2 is an obvious candidate because the measure of liability is the unpaid mortgage debt and interest which is quantified. It follows that the liability of Mr McGuinness under clause 2.2 of the guarantee did create a liability in debt to the Society which it could petition in bankruptcy.

Conclusion

68. For these reasons I would dismiss this appeal.

Lord Justice Moses :

69. I agree.

Lord Justice Ward :

70. I also agree.