GUARANTEES

Questions and Answers

Comment - Roy O'Brien:

More a comment than a question on a point that David Ipp made about some very interesting words used in that judgment in National Westminster Bank and Morgan; those are the words "a relationship of confidence or trust". It seems to me that one of the problems that has been engendered since the Amadio case, when the lawyers have gone back through the books looking for precedents in the same field, and have come across the cases like Lloyds Bank and Bundy and so forth, is that the lawyers and the bankers have become very concerned to locate the sort of relationship, or what they would like to try to think of as the sort of relationship, that will give rise to the obligation as it were, which defeats the guarantee.

It seems to me that that is a reversal of the natural process, which to my way of thinking is located in the transaction rather than in the relationship itself. And the reason why the words "confidence or trust" were used in the National Westminster case is, of course, because of the law relating to undue influence, which traditionally is split up into two types. One arises out of the relationship between the parties, the relationship between solicitor and client and trustee and beneficiary and so on, and the other arises out of the special facts of the particular situation, into which the court imports certain equitable obligations. Unfortunately, and this has more to do with the history of the English law of equity than anything else, when the court wants to provide for an equitable obligation, which will have the effect of striking down a transaction and putting the parties back into their original position, it tends to use, and particularly the English courts tend to use, words like "confidence or trust", and that I feel is quite confusing. I think that the great benefit of the Amadio case, and it is quite noticeable in this regard, is that it didn't use words of that type.

And that is why I agree with David Ipp and some of the other speakers today, and disagree with Mr Sher yesterday, who one might note is prominent as a barrister for the plaintiff, and that may perhaps reflect upon the comments that he was making last night.

The Amadio case does not depend upon the relationship as such, and it seems to me that it was a very unusual transaction that was being contemplated between the parties. It ought not to be

all that difficult, it seems to me, for bankers to properly prepare the ground internally for their managers to be aware of that kind of situation arising and to guard against it. I am thinking in particular of situations in which the banker is really not seeking security in the ordinary sense of the word, but tabula in naufragio, the literal plank in the storm after the ship has sunk; ironically enough of course, what he often reaches out and grabs is not the tabula, but a pair of lead boots.

Comment - Paul Bear (Baker McEwin & Co):

The case which Frank Caldwell and I were discussing yesterday, McNamara and The Commonwealth Trading Bank, is a case which may well pose some very real problems for bankers. It turned on section 44 of our Consumer Transactions Act, which says that a guarantee is void, unless a certificate from a solicitor has been given, to the effect that he has advised the customer independently of the bank.

In this particular instance, I can't remember whether there were three or four guarantors, but one of them wasn't properly advised, and as I understand the facts of the matter, the solicitor simply signed the form, took his money and the guarantor trotted back, without even having signed in front of him. One of the problems which arose as a result of that was that because that guarantee was held to be void by the court, the other guarantors were discharged from their guarantees, for the simple reason that they couldn't rely on the contribution of the guarantor whose guarantee was void.

Question:

This is a question in relation to corporate guarantees. If we have a situation where there is one company and say a couple of other related companies - not subsidiaries, but related companies - and a guarantee is requested of those related companies, how can it be for the benefit or in the best interests of those related companies, to give a guarantee, when no guarantee fee is paid by the principal debtor in return for the guarantee? In other words, if the guarantee is completely gratuitious?

Answer - David Ipp:

Well, I don't know that one can always just give a plain yes or no answer to that type of question. The way you express it suggests there is no benefit. I'll let you finish your question because I think lest it be feared that what I have said suggests that there can never be a proper guarantee as between them and the parent. I would really like to explain it but I will let you finish your question first.

Question - (continued):

I am having regard to the Rolled Steel case, just decided by a single Judge in England. It is a difficult area - one just goes ahead and gets the guarantee and hopes that it will stand up.

Fortunately I haven't come upon one which hasn't but I dread the day on which that does happen.

Answer - David Ipp:

I think that so far what you have said tends to reinforce what I said. Unless there is a benefit due the subsidiary, and if the trade creditors can establish that there is in fact no benefit to the subsidiary, they will have an excellent chance of perhaps having it invalidated.

The point that I was really trying to make is that so far as banks are concerned, the problem for them is that if trade creditors can demonstrate that there has been an inadequate regard to the interests of the subsidiary in the granting of that guarantee then the guarantee is assailable. Of course the question is one of fact and will depend upon what facts the trade creditors can adduce. It is equally open to the possibility that there will be a benefit to subsidiaries. There may be other benefits flowing as between parent and subsidiary which would justify the granting of the guarantee. All that one can really say is one has to ascertain the facts of each particular case, it certainly is a matter where banks should be on notice.