THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 98
Record No.: 2018/129

Whelan J.
Donnelly J.
Power J.

BETWEEN/

NATIONAL ASSET LOAN MANAGEMENT DESIGNATED ACTIVITY COMPANY

PLAINTIFF/RESPONDENT

-AND-

DAMIAN STAPLETON

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Donnelly delivered on the 9th day of April, 2020

Introduction

1. This is an appeal against an order for summary judgment made by the High Court (Noonan J.) on the 20th March, 2018 for €6,385,044.64 plus interest. The main point in this appeal is whether the respondent is entitled to pursue, at least for summary judgment, the appellant on foot of a Guarantee, in circumstances where a Mortgage signed on the same day and between the same parties, allegedly contains a non-recourse clause thereby superseding the Guarantee.

Factual Background

2. The appellant was the owner of certain lands in Gorey, County Wexford (hereinafter, "the lands"). On the 17th June, 2005, a company called Exito Limited (hereinafter, "Exito") was incorporated for the purpose of purchasing the lands from the appellant and developing same. The appellant was at one time a director of, and shareholder in, Exito.

3. By contracts of sale dated the 11th July, 2005 and the 27th October, 2005, the appellant sold the lands to Exito for a sum of €29,000,000.00. The sale was left "resting in contract" with the appellant retaining a bare legal interest in the lands. The sale was left "resting in contract" for the primary purpose as Noonan J. stated, of "*avoiding the imposition of stamp duty that would in the normal way apply, and there's nothing irregular or improper about that. It is a perfectly standard and normal way of proceeding with a transaction of this nature. Because of that fact, the non-completion of the sale, it required the defendant himself to execute the terms of the mortgage.*"

4. By letter of sanction dated the 24th October, 2005 (hereinafter, "the First Facility Letter"), Allied Irish Banks plc (hereinafter, "the Bank") agreed to provide a facility in the sum of

€21,500,000.00 to Exito to assist with the purchase of the lands from the appellant (hereinafter, "the Facility").

5. By letter of sanction dated the 12th July, 2007 (hereinafter, "the Second Facility Letter"), the Bank extended the Facility and added a further sum of €4,550,000.00 which was stated to be for the purpose of developing the lands. The Mortgage and the Guarantee provided by the appellant continued as security for the Facility.

6. Security for the Facility included a collateral mortgage from the appellant over his legal interest in the lands (hereinafter, "the Mortgage" as referred to above) together with a first legal charge from Exito over its interest in the site. Additional security included five several guarantees and indemnities. These were sought from the shareholders of Exito, *pro rata* as to their shareholding. As a 25% shareholder, the appellant was required by the Bank to provide a guarantee (hereinafter, "the Guarantee"). The Guarantee was for the entirety of the debt of Exito but only 25% of the Facility was said to be recoverable from the appellant.

7. By separate deeds dated the 27th October, 2005, the appellant executed both the Mortgage in favour of the Bank over his interest in the lands and the Guarantee.

8. Pursuant to the National Asset Management Agency Act, 2009, the respondent acquired certain bank assets from the Bank including the above facilities advanced by the Bank to Exito, together with all securities including the Guarantee and the Mortgage.

9. As a result of the downturn in the economy post-2008, the value of the lands declined very significantly. The bank loan was not repaid. The underlying loan was called in on the 29th January, 2016, at which point the sum of €25,540,178.58 was outstanding. On the 10th May, 2016, the Guarantee entered into by the appellant was, in turn, called in following the non-satisfaction of the principal debt by Exito. In 2016, the respondent instituted the present summary judgment proceedings against the appellant in respect of his alleged liability under the Guarantee.

The Mortgage and the Guarantee

10. Clause 3 of the Mortgage specifically limited the Bank's recourse under that deed to the appellant's interest in the lands. The Mortgage provided at clause 3.01 as follows:

> "The mortgagor hereby covenants with the Bank on demand to pay to the bank all moneys and discharge all obligations and liabilities whether actual or contingent now or hereafter due owing or incurred to the Bank by the Principal … PROVIDED HOWEVER the Mortgagor joins in this mortgage to the Bank solely to charge the mortgaged property with the repayment by the Principal of the secured monies. The Bank hereby acknowledges and declares to the Mortgagor that notwithstanding any other provision of this Deed *or any other document*, its recourse against the Mortgagor for all or any part of the secured monies and/or breach of covenant herein contained shall be limited solely to the mortgaged property and the Banks right as Mortgagee in respect thereof. The Bank hereby agrees and acknowledges

that it shall have no further recourse against the Mortgagor or any other assets of the Mortgagor." [*Emphasis* added].

11. Clause 5 of the Mortgage is prefaced with "As continuing security for the payment and discharge to or in favour of the Bank of the Principal's obligations, the Mortgagor hereby:- …"

12. Under the heading "Continuing Security" clause 5.07 of the Mortgage provides as follows:

> "Without any consent from the mortgagor and without affecting the mortgagor's liability under or the validity of this mortgage/charge, the bank may renew, vary or determine any accommodation given to the principal and this mortgage/charge shall be a continuing security, shall extend to the ultimate balance of the secured monies and shall continue in force notwithstanding any intermediate payment or discharge in whole or in part of the secured monies and notwithstanding any settlement of account or other matter whatsoever and is in addition to and shall not merge with or otherwise prejudice or affect any contractual or other right or remedy or any guarantee, lien, pledge, bill, note, mortgage or other security whether created by deposit or documents or otherwise now or hereafter held by or available to the bank".

13. Clause 9.03 provides:

> "This security is in addition to and not in substitution for any other remedy, lien, security or securities now held or which may hereafter be held by the bank for the secured monies or any of them and nothing herein contained is to be deemed or taken in any manner to effect merger of any such remedy, lien, security or securities or to prejudice or affect the right of the bank at any time hereafter to pursue or otherwise proceed against the mortgagor for payment of all monies due or owing and for the time being remaining unpaid by the mortgagor to the bank and so forth."

14. Under the definitions section, clause 1.01(f) states "'the Principal's Obligations' means all monies, obligations and liabilities whether certain or contingent which now are or at any time hereinafter may be due, owing or incurred by the Principal to the Bank anywhere on any current or other account or in any manner whatever (and whether alone or jointly or jointly and severally with any other person or persons and in whatever style or name and whether as principal or surety or otherwise)." At clause, 1.01(l) "'the secured moneys' means all moneys and liability which the Mortgagor covenants to pay to the Bank or discharge under the covenants hereinafter contained."

15. The Guarantee provided as follows:

> "Damian Stapleton hereby unconditionally, guarantees to and indemnities (sic) the Bank the payment on demand by the Bank of all and every sum and sums of money ('the Facility') which now or shall at any time remain due and unpaid to the

Bank pursuant to the Facility Letter between the Bank and Exito Limited dated the 24 day of October 2005 ('the Facility Letter' which expression shall include any amendments variations supplements or substitutions thereto) together with in all the cases aforesaid all interest discount and other bankers charges including legal charges occasioned by or incidental to this or any other security held by or offered to the Bank for the same indebtedness or by or to the enforcement of any such security."

16. The Guarantee further provided that the total amount recoverable from the guarantor would not exceed 25% of the Facility together with costs, expenses and interest.

Clause 6 of the Guarantee provided: -

> "This Guarantee shall be in addition to and *shall not be in any way prejudiced or affected by any collateral or other security* now or hereafter held by the Bank for all or any part of the monies hereby guaranteed nor shall such collateral or other security or any lien to which the Bank may be otherwise entitled or the liability of any person or persons not parties hereto for all or any part of the monies hereby secured be in any wise prejudiced or affected by this present Guarantee…" [*Emphasis* added].

***Ex-tempore* judgment of Noonan J. delivered on the 20th March, 2018**

17. The appellant had argued that the respondent was not entitled to pursue him on foot of the Guarantee as it was bound by the separate provisions of the Mortgage which, in terms, limited the respondent's recourse against him to his interest in the lands.

18. Noonan J. applied the principles of contractual interpretation articulated by O'Donnell J. in the decision of the Supreme Court in *Law Society of Ireland v. Motor Insurers Bureau of Ireland* [2017] IESC 31 i.e. the "text in context" approach. Accordingly, he was required to look at clause 3.01 of the Mortgage not in isolation, but having regard to all the relevant terms within the other documents that were in issue.

19. Noonan J. referred to clauses 5.07 and 9.03 of the Mortgage as well as the terms of the Guarantee itself. In respect of clause 5.07, he found that the following sentence was of particular importance: -

> "…is in addition to and shall not merge with or otherwise prejudice or affect any contractual or other right or remedy or any guarantee, lien, pledge, bill, note, mortgage or other security whether created by deposit or documents or otherwise now or hereafter held by or available to the bank".

In respect of the Guarantee, he noted that clause 6 of same (see above) was especially relevant.

20. Noonan J. held that the contention of the appellant was not supported by the terms of the Mortgage and the Guarantee. He found that the construction contended for by the appellant was a literal and narrow one and would have the effect of rendering the

Guarantee "nugatory" and the security "entirely meaningless". He also held that, when analysed in its proper context, the non-recourse clause in the mortgage only related to the appellant in his capacity as mortgagor and did not "supplant his several personal obligations assumed at the same time as the mortgage was executed by virtue of the terms of the contemporaneous guarantee".

21. Noonan J. indicated that the "*only rational and sensible construction that one can put on these documents as a matter of legal interpretation*" was that the liability under the Guarantee was "*separate, several and freestanding and was undertaken by the [the appellant] in an entirely different capacity from that undertaken by him under the terms of the mortgage.*"

22. Noonan J. was satisfied that the case fell into the category of legal documents that are, to paraphrase the words of Clarke J. (as he then was) in *McGrath v O'Driscoll* [2007] 1 I.L.R.M. 203, "*straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment.*" Accordingly, he found that the appellant had not demonstrated that he had a fair or reasonable probability of having a *bona fide* defence and that the respondent was entitled to judgment in the amount claimed.

Notice of Appeal

23. The notice of appeal encompassed seventeen grounds of appeal. At the hearing of the appeal, the grounds crystallised into a contention that the motion judge erred in law and in fact in construction of the terms of the Guarantee and Mortgage and that while he identified the correct legal principles, he failed to apply them appropriately.

The Applicable Legal Principles

24. In *Law Society of Ireland v. Motor Insurers' Bureau of Ireland*, the Supreme Court identified the method of "text in context" as the correct approach to interpretation. In that case, O'Donnell J. stated that the task of the Court was not merely a question of analysing the words used but to try to understand from all the available information, including the words used, what the parties agreed, or what a reasonable person would consider they had agreed. The Court must consider not just the words used but also the specific context, the broader context, the background law, any prior agreements, the other terms, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement.

25. Clarke C.J. in *Jackie Green Construction Ltd v. Irish Nationwide* [2019] IESC 2 referred to his own dissenting judgment in The Law Society of Ireland v. The Motor Insurers' Bureau of Ireland, where he described the "text in context" method of construction in the following terms:-

> *"The modern approach has sometimes been described as the 'text in context' method of interpretation. It might be said that the older approach in the common law world placed a very high emphasis indeed on textual analysis without sometimes paying sufficient regard to the context or circumstances in which the*

document in question came into existence. On the other hand, it is important not to lose sight of the fact that the document whose interpretation is at issue forms the basis on which legal rights and obligations have been established. That is so whether the document in question is a statute, a contract, the rules of an organisation, a patent or, indeed, any other form of document which is designed, whether by agreement or unilaterally, to impose legal rights and obligations on either specific parties or more generally. To fail to have sufficient regard to the text of such a document is to give insufficient weight to the fact that it is in the form of the document in question that legal rights and obligations have been determined. However, an over dependence on purely textual analysis runs the risk of ignoring the fact that almost all text requires some degree of context for its proper interpretation. Phrases or terminology rarely exist in the abstract. Rather the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence. Perhaps it is fair to say that the main underlying principle is that a document governing legal rights and obligations should be interpreted by the courts in the same way that it would be interpreted by a reasonable and informed member of the public who understands the context of the document in question. Such a person would, necessarily, pay a lot of attention to the text but would also interpret that text in its proper context."

26. Clarke C.J. went on to state: -

> *"As is clear from those authorities, it is important to give due recognition both to the text of any document creating legal rights and obligations and to the context in which the words used in the measure concerned were chosen. To fail to give adequate weight to the words is to ignore, or downplay, the fact that those were the words that were chosen to define the relevant legal arrangement. To fail to give adequate weight to context is to ignore the fact that all language is inevitably interpreted by reasonable persons in the light of the context in which that language is used.*
>
> *In addition, it is clear from the authorities referred to that part of the relevant context is the nature of the document governing legal rights and obligations whose construction is at issue. The more formal the document the less one would expect to find errors or looseness of language. Contractual documents entered into after careful negotiations between experienced lawyers on behalf of the parties may be seen to operate in a different context to, for example, the informal rules of a small association. In all cases the text is important, but part of the context in which that text needs to be considered is the manner in which that text was arrived at, and the circumstances which led to the text being required and/or agreed."*

27. Thus, there is a primacy to be given to the text, but the text must be interpreted in its context. In *Point Village Development Limited (in Receivership) v. Dunnes Stores* [2019] IECA 233, Whelan J. approved the observation of Lord Clark in *Rainy Sky S.A. v. Kookmin*

Bank [2011] U.K.S.C. 50 that "*[w]here the parties have used unambiguous language, the court must apply it.*" Whelan J. quoted with approval, Lord Neuberger, who stated at para. 15 of *Arnold v. Britton* [2015] U.K.S.C. 36 as follows:

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words [...] in their documentary, factual and commercial context. That meaning has to be assessed in the light of; (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."*

28. The applicable test for summary judgment was not in dispute. The principles in *Aer Rianta Cpt v. Ryanair Ltd* [2001] IESC 94 and *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 need no repetition. The test was pithily encapsulated by Hardiman J. in *Aer Rianta Cpt v. Ryanair* when he framed the test as to whether there was a fair or reasonable possibility of the defendant having a real or *bona fide* defence.

29. It is also appropriate to point to the judgment of Clarke J. (as he then was) in the High Court in *McGrath v. O'Driscoll* which was cited with approval by the Supreme Court in *Danske Bank a/s (t/a National Irish Bank) v. Durcan New Homes and Others* [2010] IESC 22, in which he stated: -

> *"So far as questions of law or construction are concerned the court can, on a motion for summary judgment resolve such questions, (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."*

Discussion and Decision

30. The above legal principles were accepted and relied upon by both parties. The issue of contention was in the application of those principles.

31. The appellant submitted that while the Court was entitled to consider the Mortgage and the Guarantee together, as well as all of the background information where plain words were used, the Court should be very slow to impose upon those words its own view of what the parties may have intended. This reluctance to impose a view applied both to the interpretation by way of the implication of additional terms, and under the guise of "business efficacy" (citing *Point Village* and the decision on the Court of England and Wales in *Sinochem International Oil (London) Co Ltd v. Mobil Sales and Supply Corp*

(No.1) [2000] 1 All E.R. (Comm.) 474. Summary disposal of legal proceedings is the exception and the Court should be wary of dealing with complex interpretation of legal documents in the compressed format of summary proceedings.

32. I am satisfied that in these summary judgment proceedings, this Court must abide by the principle that it is only where there is no fair or reasonable possibility of the appellant having an arguable defence that the Court should dismiss the appeal. Moreover, as the construction of documentation is at issue, it is only where they can be construed in a relatively straightforward manner and there is no risk of injustice to the appellant that this Court should uphold the order of the High Court granting summary judgment. The overriding principle of construction is that of "text in context". As Clarke C.J. stated in *Jackie Greene Construction Ltd. v. Irish Nationwide*, the document is to be interpreted as if by a reasonable and informed member of the public who understands the context of the document in question. This means paying a lot of attention to the text but also interpreting that text in its proper context.

33. The appellant submitted that the motion judge had found that this was a situation where there had been corroboration of the claim that this was a non-recourse loan. He pointed to that part of the judgment in which Noonan J. held that this situation was somewhat different to the usual manner in which these claims are made. This was because the wording of the Mortgage "*would appear on its face, when read literally and in isolation, [to] support the [appellant's] case.*" I am satisfied however, that the appellant's interpretation is not correct. Given the requirement to interpret "the text in context", Noonan J. was not making a finding of corroboration, he was merely identifying a starting point for the examination of the claim that this was a non-recourse situation. It is also important to note that although there had been a general, if somewhat vague, claim made by the appellant on affidavit that there had been an understanding between himself and the representatives of the Bank that the non-recourse provisions of the Mortgage would take precedence over the Guarantee, this was not pursued at the High Court or on appeal. I am satisfied that this is a situation where the only matter at issue is the interpretation of the deeds themselves.

34. Relying on *Analog Devices BV v. Zurich Insurance Co.* [2005] 1 I.R. 274, the appellant submitted that where there is ambiguity in an instrument prepared by one party and presented to the other, it is well-settled that the ambiguity should be resolved *contra proferentem*. As these deeds were "bank documents", prepared by the Bank and presented to the appellant for signature, to the extent that there is any ambiguity in them, they fall to be resolved in the manner more favourable to the appellant. The appellant submitted at the very least that this is a matter to go to plenary hearing if the Court is to have adequate regard to the express supremacy of clause 3.01 over inconsistent provisions in the Mortgage itself or in "any other document". I am satisfied that such an argument only has relevance where the Court finds that there is an ambiguity. Most importantly however, if the Court finds that there is no relatively straightforward construction that can be given to the document, it must allow the appeal and send the matter for plenary hearing.

35. I am satisfied that, in so far as the Guarantee and the Mortgage were signed on the same day and concern issues arising from the indebtedness of Exito to the Bank, the First Facility Letter is an appropriate contractual document to which regard should be had as it puts the Mortgage and the Guarantee into context. In that First Facility Letter issued to the directors of Exito, I accept that there was a distinction between the appellant acting as vendor in providing what was in effect a collateral mortgage and the appellant as one of a number of guarantors connected with Exito, who were accepting a personal responsibility to repay a percentage of the Facility. This is apparent from the various security requirements which were provided for in the Facility; the Mortgage from the appellant, a first legal charge from the borrower over all its rights and interest in the site, and several guarantees and indemnities. The fact that those guarantees were pro-rated from the shareholders in Exito was important because the appellant was engaged in two separate roles, *i.e.* as vendor of his bare legal interest and as a shareholder. The requirement in the special conditions also indicate an awareness on the Bank's part in the importance of the Guarantee as the Facility required the Bank to be provided with Certified Net Worth Statements for each of the guarantors.

36. It is of some note that the Guarantee in itself was an unambiguous guarantee and indemnity by the appellant of the debts of Exito to the Bank but which only permitted the total amount recoverable to be 25% of the Facility. A significant feature is that clause 6 of the Guarantee also provides that the Guarantee is in addition to and not prejudiced or affected by any collateral or other security. Clause 3 of the Guarantee also provides that it shall not be considered to be satisfied by any intermediate payment but shall be a continuing security and shall extend to cover any sum or sums of money which for the time being constitutes the balance due from Exito to the Bank. On its face therefore, the Guarantee is enforceable regardless of any other collateral and security and there is no bar to recovery in summary proceedings against the appellant.

37. The crucial issue of course, is the construction of the Mortgage itself. The parties put forward diametrically opposed versions. The appellant put forward a complex interpretation of the Mortgage. His overall contention is that the wording of clause 3.01 of the Mortgage specifically excludes recourse against the appellant (save in respect of the mortgaged property) arising from the provisions of "any other document", which phrase includes the Guarantee.

38. The appellant pointed to the wording in clause 3.01 which is a promise to pay the liability of a third party (Exito). He submitted that the covenant to pay is not actually connected to the charging clause of the Mortgage and points to the opening part of clause 5 of the Mortgage above. He submitted that what is charged is not a liability of the mortgagor to the Bank established by clause 3.01 but rather the liability of Exito to the Bank. In clause 3.01, the proviso states that the mortgagor joins in the Mortgage to the Bank solely to charge the mortgaged property with the repayment by the principal (Exito) of the secured monies. He pointed to clause 1.01 which defines the secure monies as the covenants of the mortgagor to pay the Bank or discharge the covenants. He submitted that if taken literally, there was nothing with which to charge the mortgaged property because Exito

does not itself covenant to pay what the mortgagor covenants to pay under clause 3.01 (by reference to the definition of secured monies). Of course, the mortgagor actually promises to pay the already existing liability of Exito. Clause 5 charges the already existing and direct liability of Exito to the Bank.

39. In referring to clause 3.01 and to the limitation on the Bank's recourse, the appellant submitted that there is a direct link between the secured monies and the covenant contained in the Mortgage in respect of which the Bank's recourse against the appellant is limited and to the direct liability of Exito to the Bank. The appellant pointed also to the Guarantee which he says is not dissimilar to the Mortgage in so far as it is a guarantee of the entirety of Exito's liability to the Bank, but subject to the proviso that only 25% is recoverable. Indeed, the appellant submitted that the liability under each deed is total. In that situation, the appellant submitted that the respondent's contention that there is a distinction between the liability under the Mortgage and the liability under the Guarantee is not watertight. Both instruments have the effect of the appellant assuming a responsibility to pay a debt owed by Exito to the Bank.

40. In those circumstances, the appellant submitted that the justification for constraining the operation of the limitation on recourse contained in the proviso to clause 3.01 breaks down. Therefore, the limitation "notwithstanding any other provision of this deed or any other document" applies.

41. The respondent on the other hand, submitted that clause 3.01 of the Mortgage, is the most important clause and has three component parts to it. The respondent referred to the covenant to pay and disagreed with the appellant who submitted that this did not support the security in the case. In the respondent's submission this is the consideration that underpins the charge.

42. That part of the clause which provides the reason for the mortgagor joining the Mortgage reflects the fact that the appellant as vendor, with bare legal title to the lands is not taking on any direct liability of Exito, but is simply ensuring that the Bank will have security not just over the beneficial interest of the lands because of the Exito charge, but will have security over all the appellant's legal interest over the lands.

43. In relation to the third part, which is the most contentious and which provides that the recourse against the mortgagor is restricted, the respondent pointed to the recourse as being all or any part of the secured monies and/or for breach of covenant. Counsel submitted that the monies secured are those which the mortgagor covenants to pay. This, he submitted, is the covenant referred to at the beginning of clause 3.01. The recourse of the Bank to the appellant is excluded in respect of the covenant to pay and any beach of covenant in the Mortgage. In his submission, this was a self-contained document which was plain on its face. There was an agreement to pay the monies but the appellant was only joining the Mortgage for the purpose of securing the lands in favour of the Bank. Thus, the Mortgage creates a liability and then gives comfort in the liability in respect of the same document. The appellant in reply to this submission said that the respondent had failed to engage with his central contention that what was

charged was not the liability of the mortgagor to the Bank as in clause 3.01, but rather the liability of Exito to the Bank.

44. The respondent argues that the interpretation placed on it by the appellant flew in the face of commercial sense, the arrangements disclosed by the Facility and security documentation and, the fact that the Mortgage limitation was addressing the covenant to pay under the Mortgage. On the other hand, the appellant submitted that it is not necessary or appropriate in an application for summary judgment to speculate on why the Guarantee was entered into. In so far as the Mortgage secured the debt, the provision of the Guarantee could be seen as a 'belt and braces' approach. The Court was reminded that occasionally parties can make bad deals and it was not a part of the Court's function to interfere with a bad deal.

45. The appellant submitted that the situation whereby a Mortgage contains a covenant on the part of the mortgagor to pay the debt of a third party was a somewhat unusual one. I do not accept that it is particularly unusual in the circumstances that occurred here where there was a "resting in contract" situation. It is also true that parties may enter into a bad deal, if so, it is not a part of the Court's function to interfere with what has been agreed between the parties. That is not the same as saying that a court must wilfully blinker itself as to both the specific and broader context, including prior agreements and what might be termed the logic, commercial or otherwise, of the agreement. As stated above, those are among the matters a court is obliged to take into account in the "text in context" approach to construction. I am satisfied therefore that in light of the context of the First Facility Letter, the provision of two separate securities, independently executable, is part of the context that must be taken into account in the construction of the deeds.

46. Turning directly to the Mortgage; clause 3.01 is the covenant by the appellant as mortgagor to pay the Bank all monies and discharge all obligations and liabilities of Exito. That covenant to pay is subject to the proviso that the appellant was only joining the Mortgage solely to charge the mortgaged property with the repayment by Exito of the secured monies. Those secured monies, as earlier defined, were those which the appellant covenanted to pay to the Bank or discharge under the covenants in the Mortgage.

47. The contentious clause limits the Bank's recourse against the appellant for all or part of the secured monies or breach of covenant contained in the Mortgage deed solely to the mortgaged property and the Bank's right as mortgagee in respect thereof, notwithstanding any other provision or any other document. The Bank acknowledged that it shall have no further recourse against the mortgagor or any other assets of the mortgagor.

48. The appellant complains that the respondent's assertion that it is plain on its face does not in fact make the Mortgage plain on its face. In my view, the reality is that when read in a straightforward manner and paying particular attention to the text of the Mortgage, the plain meaning of the Mortgage is that it was designed to deal, in a self-contained

fashion, with the security being provided by the appellant over his bare legal interest in the lands. The three components of clause 3.01 are interlinked and also interplay with the interpretation of "the secured monies" in clause 1.01. The covenant in clause 3.01 does not create an obligation to pay beyond what might be recovered under the Mortgage. The proviso and the limitation on recourse are clearly directed to the position of the appellant in his capacity as mortgagor and not in his capacity as guarantor. This interpretation is further enhanced by the clear contextual background of the terms of the Facility and of the separate Guarantee (executed on the same day). The reference to "any other documents" when considered in context does not have the wide ambit contended for by the appellant.

49. I also agree with the respondent's submission that when one construes clause 3.01 in this light, the subsequent clauses 5.07 and 9.03 make perfect sense. Under 5.07, the covenant to pay the secured monies under the Mortgage is in addition to and shall not merge or otherwise prejudice any separate security held by the Bank including any guarantee. Thus, clause 5.07 is entirely inconsistent with the argument that the Guarantee is unenforceable. The appellant submitted that the motion judge had made inconsistent findings in that although the terms of the Mortgage did not affect the right to recover under the Guarantee, the motion judge had appeared to rely upon clause 9.03 as evidencing a right to proceed against the appellant in his capacity as guarantor. In my view, it is not so apparent from the judgment that the motion judge held that clause 9.03 gave a right to proceed against the appellant in his capacity as guarantor. In any event, I am satisfied that this clause serves the function of preserving rights. It ensures that rights are not lost inadvertently or that the rights under the Mortgage do not distract from existing rights.

50. In relation to the submission of the appellant concerning the interpretation of the charging clause at the beginning of clause 5, I am satisfied that this point must be rejected in light of the true construction of clause 3.01 as set out above. The covenant to pay is set out at the beginning of clause 3.01 and relates to the secured monies which are those obligations of Exito to the Bank which the appellant as mortgagor covenanted to pay under clause 3.01. The proviso makes clear that the appellant/mortgagor joined the Mortgage solely to charge the mortgaged property with the repayment by Exito of the secured monies. The interpretation of these provisions as set out above is entirely consistent with that contained at the outset of clause 5.01.

51. Despite the submissions of the appellant that summary judgment cannot be granted on the Guarantee because of the stated limited recourse in the Mortgage, a considered, careful and straightforward construction of the Mortgage does not have that effect. There is no injustice in permitting the respondent to obtain summary judgment against the appellant. For the reasons set out in this judgment I would dismiss the appeal.

52. As this judgment is to be delivered electronically, it is necessary to add that Whelan J. and Power J. agree with the judgment.

Whelan J:

I have had the opportunity to read the judgment delivered by Donnelly J. and I agree with the conclusions reached therein.

Power J:

I have had the opportunity to read the judgment delivered by Donnelly J. and I also agree with the conclusions reached therein.