THE HIGH COURT

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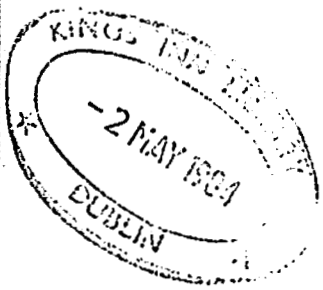
1984 No.706P

BETWEEN:-

HIBERNIA MEATS LIMITED

PLAINTIFFS

AND



MINISTERE de L'AGRICULTURE et de la REVOLUTION AGRAIRE (OFFICE REGIONAL des VIANDES de L'EAST) AND TRINITY BANK LIMITED

DEFENDANTS

JUDGMENT delivered the 16th day of February, 1984 by Keane J.

This is an application for an interlocutory injunction restraining the second-named Defendant ("the Irish Bank") from making payment to the first-named Defendant ("the buyers") and/or the Banque de L'Agriculture et de Development Rural ("the Algerian Bank") under the provisions of a performance guarantee entered into by the Irish Bank and the Algerian Bank on the 21st September 1983.

The circumstances in which the application came before me are as follows. The Plaintiffs ("the sellers") carry on business as meat exporters. In September 1983 they entered into a contract for the sale of meat to the buyers. The amount of meat which they agreed to supply was 1500 tonnes and delivery was to be effected

in Algeria in three shipments on specified dates. Article 18 of the contract required the seller to give a guarantee of "good execution" of the contract in a sum representing five per cent of the total amount of the contract. This was done by means of a guarantee from the Algerian Bank in the required amount (US$118.500) in favour of the buyers. In order to obtain this guarantee, it was necessary for the sellers to procure the issuing by the Irish Bank to the Algerian Bank of a matching performance guarantee

The performance guarantee was issued on the 21st September 1983 and took the form of a telex in French from the Irish Bank to the Algerian Bank, of which the following is a rough translation:

"At the request of our clients (the sellers) please issue your guarantee in favour of (the buyers) in the sum of U.S. dls. 118.500 representing five per cent of the C. and F. value of a contract for about 1,500 tonnes viandes bovine congelee desassee.

"Your guarantee should become operational immediately as detailed below and valid until thirty days after receipt by

"(the buyers) of the last shipment under this contract.

"Funds under the guarantee will be available to the beneficiary within twenty-one days of receipt of your written statement and on the following conditions.

"A. That our total liability will not under any circumstances exceed U.S. dls. 118.500.00

B. Your certification that (the buyers have) demanded from you on foot of your guarantee and that your demand represents the amount of payment you have made to (the buyers) in accordance with your guarantee.

C. That you hold a certificate from (the buyers) evidencing the alleged breach of contract between (the sellers) and (the buyers).

"In the event of litigation as to the scope of the present obligation and in default of settlement there will be recourse to the competent Algerian jurisdiction and the law of Algeria will apply.

"To protect you we hereby open our guarantee number 200 for U.S. dls. 118.500.00 in your favour. Funds under this guarantee are available against your tested telex demand on

us quoting our guarantee number 200.

"Special Instructions

Please advise (the buyers) by telephone of the opening of guarantee. Please advise your guarantee ref: no. by return telex."

Following the receipt of a telex from the Algerian Bank on the 29th September 1983 the Irish Bank sent a telex in French to the Algerian Bank on the 30th September 1983 of which the following is a rough translation.

"We refer to your telex dated 27th September, 1983 and confirm that the guarantee is payable on first written demand without further formality and that paragraphs A and B are deleted. Please advise (the buyers) by telephone of the opening of this guarantee."

It seems curious that the Irish Bank were prepared to accept an unlimited responsibility under their guarantee, when the amount of the Algerian bank guarantee was expressly limited to five per cent of the contract price. It may be that the reference to paragraphs A and B is an error and that the telex should have referred to paragraphs B and C. However, for reasons which will

appear shortly, I do not think anything turns on this.

Under Article 14 (1) of the contract, the meat was to be delivered in the named Algerian ports in the first week of November, the third week of November and the first week of December 1983. Mr Frank Robinson, who is a director of the sellers, in an affidavit grounding the present application refers to a telex dated 26th October 1983 from Mr Moustapha Chabour of the buyers in which the sellers are requested to arrange for a different shipment programme, under which delivery would be made in the third week of November, the second week of December and the third week of December. Mr Robinson says that the shipments were duly made in accordance with this revised schedule. In addition, Mr Oliver Murphy, another director of the Plaintiffs, deposes in a further affidavit that on 18th December 1983 he met Mr. Chabour in Constantine; and that at the meeting Mr. Chabour assured him that there would be no penalties for delay in deliveries under the contract. Despite this, however, the sellers were notified by the Irish Bank on the 18th January 1984 that the guarantee had been called in by the Algerian Bank on the ground of delay and weight shortages in the shipments. Mr Murphy says

that he travelled to Constantine for a meeting with Mr Chabour on 5th February 1984; but that his protestations that the buyers had sought the re-scheduling of the delivery dates and that their calling in of the guarantee amounted to obtaining money by false pretences were ignored.

The present proceedings were instituted on the 6th Feburary 1984 by the sellers claiming injunctions restraining the Irish Bank from making payment to the Algerian Bank under the provisions of the performance guarantee and declarations that they have complied with the terms of the contract between them and the buyers, together with damages for breach of contract. On the same day they applied to me for an interim injunction restraining the Irish Bank from paying on foot of the guarantee to the Algerian Bank. I granted the injunction sought which was to continue until February 13th. At the same time, I gave the sellers liberty to serve notice out of the jurisdiction on the buyers of the issuing of a concurrent summons. Before the 13th February, the Irish Bank applied to Barrington J., who was dealing with the chancery list, for an Order dischaging the interim injunction. He declined to accede to this application as the present motion

for an interlocutory injunction was due to be heard on February 13th.

Performance guarantees of the type entered into by the Irish Bank in the present case have, it would appear, become a recognised feature of international trade today. It has been said in a number of recent English decisions that, in the legal context, they are similar in many respects to the letters of credit with which the courts have been traditionally more familiar. The Irish Bank in the present case rely on those authorities as establishing that, because of the importance of such performance guarantees in international commerce, the Bank's obligation to pay on foot of them cannot be affected by the absence of any contractual default on the part of the seller. The sellers, while conceding that the cases in question undoubtedly establish those general principles, urge that they are also subject to the qualification that the bank is under no obligation to pay on foot of its guarantee where the person in whose favour the guarantee would ultimately operate has been guilty of fraud. They say that the actions of the buyers in the present case in calling in the guarantee on the ground inter alia that the delivery dates had not

been met at a time when they knew that the delivery dates had been re-arranged at their request amounted to such fraud and that, in these circumstances, the Irish Bank was relieved of its obligation to pay on foot of the guarantee. I think it was also implicit in the submissions advanced on behalf of the sellers that, in these circumstances, the Irish Bank would be in breach of their contractual obligations to the sellers if they paid the Algerian Bank on foot of the guarantee; but this matter was not canvassed in any detail and it will be necessary to return to it at a later stage.

The legal principles applicable to circumstances such as the present case were stated as follows by Kerr J in R.D. Harbottle (Mercantile) Limited .v. National Westminster Bank Limited (1978) Q.B. 146:-

> "It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration ... the courts are not

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"concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged."

Lord Denning, M.R., defined the obligations of the bank which issues the performance guarantee in the following terms in Edward Owen Limited .v. Barclays Bank (C.A.) (1978) Q.B. 159 at p. 171:-

"A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice."

The sending of the telex of 26th October 1983 providing for a re-scheduling of the delivery dates makes it very difficult to understand how the buyers could have bona fide sought to call in the guarantee on the grounds of delay. But that is very far from saying that the sellers in the present case have established a clear case of fraud which would entitle the Irish Bank to repudiate

its obligations under the guarantee. It must be borne in mind that the Court has heard only the sellers' side of the dispute as between themselves and the buyers, and that on affidavit only. No doubt the apparently incontestable facts which they put on affidavit are such as to excite suspicion as to the good faith of the buyers; but that is very far from establishing a clear case of fraud which frees the Irish Bank from its serious obligation under the guarantee.

It follows that for these reasons I must refuse the application for an interlocutory injunction against the Irish Bank. One can readily understand the frustration which the sellers may now feel, since under the terms of the contract it may be necessary for them to pursue whatever remedy is open to them in the Algerian courts. It must be said, however, on the other side of the coin, that business firms who enter into contracts of this nature requiring the provision of unconditional guarantees by banks take the risk that they may have no remedy against their overseas customers other than an action in the foreign tribunal; and no remedy at all against the bank because of the unconditional nature of the guarantee.

There are two other matters to which I should refer. The Irish Bank's obligation to pay on foot of the performance guarantee was expressly subject to the Algerian Bank's holding a certificate from the buyers evidencing the alleged breach of contract between the buyers and the sellers. As I have already mentioned, it appears probable that it was intended to delete this clause from the guarantee, having regard to the terms of the subsequent telex. Whether that is correct or not, however, the Irish Bank were informed by the Algerian Bank by a telex of the 18th January 1984 that the guarantee had been called in to meet penalties for delay and sums in respect of weight shortages; so that the requirements of the guarantee were probably met. In any event, I do not think that the point was relied on by the plaintiffs.

I also observe that Kerr J in R.D. Harbottle (Mercantile) Limited .v. National Westminster Bank Limited expressed reservations as to whether the plaintiffs in that case were entitled to injunctive relief at all. These reservations appear to be well founded, because the granting of an injunction to the sellers in such circumstances would appear to pre-suppose the

absence of an adequate remedy in damages. This aspect of the case was not fully canvassed at the hearing, but I am assuming that the Irish Bank, as a pre-condition of issuing the performance guarantee, required the furnishing of counter-indemnities by the sellers. If the sellers are correct in their contention that the Irish Bank are under no obligation to pay on foot of the guarantee, they may well be in a position to resist any demand on foot of the counter-indemnities; or, alternatively, to recover the amount involved from the Irish Bank as damages for breach of the contract which presumably exists between themselves and the Irish Bank as customer and banker. If they are not correct in the contention they have advanced on the application for an interlocutory injunction, it would follow that in any event they are not entitled to the injunctive relief claimed. However, as the matter was not fully explored during the hearing, I prefer to say no more about it.