*507 Lloyds Bank plc v Lampert & Anor.

Court of Appeal (Civil Division)

25 November 1998

[1999] B.C.C. 507

Kennedy and Mummery L JJ.

Judgment delivered 25 November 1998

Administrative receivers—Appointment of receivers—Charge—Bank overdraft—Facility letter—Overdraft payable on demand—Meaning of 'on demand'—Time for payment—Mechanics of payment—Whether company should have reasonable time to raise funds.

The words 'repayable on demand' used by a bank in an overdraft facility letter to a company meant what they said and it was in no way inconsistent for a bank, or any other lender, to grant a facility which it and the borrower both envisaged would last for some time, but with the caveat that the lender retained the right to call for repayment at any time on demand. The bank was therefore entitled to do as it did and to require the company to repay on demand.

Where payment on demand was required, the company should be given a reasonable time necessary to effect the mechanics of payment (Bank of Baroda v Panessar (1986) 2 B.C.C. 99,288; [1987] Ch 335). Although Australian and Canadian authorities might support the view that a company should be given a reasonable time (of up to a few days) to raise the finance to effect payment on demand, there was no evidence here to suggest that the sum could be raised in a few days anyway, and the interesting academic question as to whether the mechanics of payment test should be affirmed or rejected at appellate level could have no bearing on the present facts and receivers could be properly appointed.

The following cases were referred to in the judgment of Kennedy LJ:

Bank of Baroda v Panessar (1986) 2 B.C.C. 99, 288; [1987] Ch 335 .

Titford Property Co Ltd v Cannon Street Acceptances Ltd (unreported, 25 May 1975) .

Whonnock Industries v National Bank of Canada (1988) 42 DLR (4th) 1 .

Williams & Glyn's Bank v Barnes (1981) Com LR 205 .

Representation

Edward Cohen (instructed by Freemans) for the appellant first defendant.

Richard Barraclough (instructed by Camillins) for the applicant second defendant.

Guy Phillips (instructed by Hammond Suddards) for Lloyds Bank plc.

JUDGMENT

Kennedy LJ:

Outline

The appellant, Mr Jeffrey Lampert, was at all material times the chairman of Heritage plc which, from 1981 onwards, was a customer of the respondent bank Heritage required overdraft facilities, and in that connection the bank from time to time involved Mr Lampert, and sometimes his wife as well, with the result that:

(1) In 1983, to secure the Heritage overdraft, Mr and Mrs Lampert gave to the bank a second charge over their home at 22 Neville Drive, London, N2. There was a first charge in favour of a building society.

(2) On or about 21 September 1990, in consideration of the bank making or continuing to

make advances to Heritage plc, Mr Lampert guaranteed payment on demand of all money, etc. owed by Heritage to the bank. The guarantee was limited to £500,000 and originally its terms were qualified in a side letter of 2 October 1990 which, the bank contends, was set aside by agreement during 1991.

(3) In January 1994 the bank offered to release the charge upon the Lamperts' home referred to at (1) above, but in fact at that stage nothing further was done to that end. *508

(4) In August 1995, when the bank was not prepared to lend the company more than £725,000 by way of overdraft, Mr Lampert obtained from the bank - for the benefit of the company - a bridging loan of £250,000. That loan was secured by a further charge on 22 Neville Drive, which again involved Mrs Lampert. £100,000 of the bridging loan was repaid in late 1995, but on 14 March 1996 the bank granted a further bridging loan of £100,000, so that Mr Lampert's liability was once again raised to £250,000.

On 10 July 1996 the bank required the company to pay the sum of £594,832.03 which the company then owed by way of overdraft repayable on demand, and on 11 July 1996, when payment was not forthcoming, the bank appointed as joint administrative receivers Scott Barnes and Simon Morris of Grant Thornton. Two days later the company dispensed with the services of Mr Lampert, and on 23 July 1996 he was asked:

(a) to honour his 1990 guarantee by paying £500,000; and

(b) to repay his bridging loan which, inclusive of interest, then stood at £252,661.48.

Those payments were not forthcoming, so on 10 December 1996 the bank started proceedings in the Queen's Bench Division to enforce the guarantee. On 19 November 1997 Master Trench gave judgment for the bank pursuant to O. 14 of the Rules of the Supreme Court . Mr Lampert appealed, but on 16 December 1997 that appeal was dismissed by Popplewell J, and from the order of Popplewell J he now appeals to this court.

On 23 January 1997, just over one month after the commencement of proceedings in the Queen's Bench Division, the bank commenced proceedings against Mr and Mrs Lampert in the Chancery Division. The originating summons sought:

(1) payment by Mr Lampert of the sum then owing by way of bridging loan, namely £265,108.60 plus interest; and

(2) as against Mr and Mrs Lampert, possession of 22 Neville Drive pursuant to the August 1995 legal charge.

On 18 December 1997 Master Bowman made the orders sought and on 17 June 1998 Neuberger J dismissed Mr and Mrs Lampert's appeal. Mr Lampert's appeal from the decision of Neuberger J is the second matter which is before this court. Mrs Lampert did not seek to appeal from the judge. Her application for leave to appeal was refused by the single Lord Justice, and was renewed before us at the commencement of the hearing on 2 November 1998. We declined to give leave, and said that we would give our reasons for that decision later. Those reasons are to be found at the end of this judgment.

Queen's Bench action

Mr Cohen, on behalf of Mr Lampert, submits, rightly, that in these two actions all that he has to show in order to succeed is an arguable defence - 'an issue or question in dispute which ought to be tried', or some other reason why there should be a trial (see O. 14, r. 3). In relation to the Queen's Bench action Mr Cohen makes four principal submissions, and I propose to look at each in turn.

The demand was premature

The first submission recognises that the 1990 contract of guarantee made between the bank and Mr Lampert expressly entitles the bank to 'payment on demand' and contains in cl. 16 these words:

'It shall not be necessary for the bank before claiming payment hereunder to resort to or seek to enforce any other guarantee or security whether of the Customer or of any other

person.'

*509

Nevertheless Mr Cohen contends that the words of the contract were qualified by the bank's side letter of 2 October 1990, the final paragraph of which reads:

> 'I confirm that in the event of Heritage plc defaulting in its obligations to the bank, the bank will, if and to the extent that it considers it practicable to do so, pursue its remedies against Heritage plc for a period of three months before seeking to recover any moneys from you under the guarantee but this will not apply if, in our opinion, your financial position is deteriorating at that time.'

However, as is clear from the documents, the side letter was reconsidered at a later stage. On 21 March 1991 the bank, represented by Mr Brooks, and Mr Lampert discussed the bank's requirements if it was to continue to support Heritage plc and, according to a letter written by Mr Brooks on the following day, it was agreed that the restrictions placed upon the guarantee by means of the side letter of 2 October 1990 would no longer apply. The letter of 22 March 1991 continues:

> 'Please sign and return the enclosed copy letter as your confirmation that the Side Letter dated 2nd October 1990 is cancelled. In view of the security which is to support your Guarantee your wife's confirmation will also be necessary.'

Mr Cohen submitted that the reference in the letter to Mrs Lampert should raise doubt as to whether there was an agreement made in her absence on 21 March 1991, but that does not seem to me to follow. The fact is that if the side letter was cancelled the position of Mrs Lampert was more exposed in that the bank would be able to resort at an earlier stage to the 1983 charge on the matrimonial home. Mr Cohen also pointed out that in his second affidavit Mr Ball, on behalf of the bank, when he referred to and exhibited the letter of 22 March 1991, did not go on to say that the letter itself referred to an agreement made on the preceding day. That seems to me to be a hopeless point. The letter speaks for itself, and Mr Ball's concern was to produce a highly significant document which Mr Freeman, in his affidavit on behalf of Mr Lampert, had apparently overlooked. Mr Lampert himself swore an affidavit dated 19 September 1997 to which Mr Cohen invited our attention, but that affidavit simply does not address the question of what happened on 21 March 1991.

It seems clear to me that on receipt of the letter dated 22 March 1991 Mr and Mrs Lampert had the good sense to seek legal advice, with the result that on 16 April 1991 McKenna & Co, the solicitors who had been consulted, wrote to the bank. Part of their letter reads:

> 'Having briefly read the terms of the second mortgage dated 21st July 1983 I note that this is a "all monies" security and was executed by both Mr and Mrs Lampert. I suggest that this is sufficient for the bank in respect of Mr Lampert's liabilities under his guarantee and that nothing further needs to be signed. I explained this to Mr and Mrs Lampert.
>
> I note that the Bank also want Mr and Mrs Lampert to confirm that the restrictions upon the guarantee contained in a side letter dated 2nd October 1990 would no longer apply. I understand that the guarantee was always intended to be a "last resort" guarantee of a limited amount and I cannot advise Mr Lampert to extend it so that the Bank can make a demand at any time irrespective of whether or not the Company has exceeded any agreed overdraft limit and whether or not the Bank has first demanded repayment from the Company.'

So, on the face of it, the solicitors were advising Mr Lampert not to provide the evidence which the bank was seeking of the agreement which they said had been made. the solicitors were not saying that no such agreement had been made on 21 March 1991, but Lampert's point of view, must have been that the bank had the whip-hand. If it was to continue to give financial support to Heritage it *510 could lay down its terms. No doubt McKenna's letter of

16 April 1991 did, as Mr Lampert asserts, have the result that in May 1991 there were further discussions between the bank, the financial director of Heritage and Mr Lampert about the cancellation of the side letter. As Mr Phillips, for the bank, points out in his skeleton argument, both sides seem to have a similar recollection of those discussions. Mr Lampert says:

> 'it was agreed that the side letter of 2 October 1991 would be cancelled, but on the understanding that the guarantee was to be one of "last resort".'

Mr Brooks' recollection is as set out in his letter of 1 August 1991 which is quoted below.

Having got what they could by way of further concession from the bank Mr and Mrs Lampert signed a copy of the bank's letter of 22 March 1991 and that copy was returned to the bank by McKenna & Co under cover of their letter of 14 June 1991. Part of that letter reads:

> 'As regards the second letter which refers to the restrictions on the guarantee contained in a side letter dated 2 October 1990 no longer applying, I have also advised Mr and Mrs Lampert in relation to it and they have been prepared to countersign this letter to ensure that the Bank continues to give on-going support to the group. Notwithstanding the "cancellation" of this side letter (which does not specifically address the point) I want to confirm that Mr Lampert has always regarded and still regards his guarantee as one of "last resort" and that the Bank would proceed against the Company for overdue indebtedness before calling the guarantee; I believe that this is also your understanding of the nature of the guarantee as mentioned at a recent meeting with Mr Lampert and the group financial director, Mr George Raynor.'

It is noteworthy that the letter does not call into question the agreement of 21 March 1991 to which the enclosed letter expressly refers. On the contrary it refers to the restrictions in the side letter 'no longer applying' and to Mr Lampert's 'understanding' which the writer believes is also the understanding of the bank. Mr Cohen seeks to rely upon the letter of 14 June 1991 as evidence that as a result of the discussions which took place in May the bank had contractually modified its position. In my judgment there is, in reality, no evidence to that effect. All that can be discerned is the bank offering some re-assurance, falling well short of a contractual obligation, that it would look first to Heritage to pay its debts. If there had been any contractual obligation to that effect I do not doubt that the writer of the letter of 14 June 1991 would have said so in clear terms. According to the bank the final position was as set out in Mr Brooks' letter to Mr and Mrs Lampert of 1 August 1991, the material part of which reads:

> 'With regard to the circumstances where re-payment would be sought under the guarantee, the Bank would look initially to company assets for recovery of indebtedness. If after reasonable efforts full recovery has not been made, the Bank would seek to recover the outstanding indebtedness under the Guarantee of Jeffrey Lampert.
>
> It should be noted however that demand may be made on Jeffrey Lampert under the Guarantee immediately after demand upon the Company to enable interest to run from the date of demand even though recovery under the Guarantee would be in accordance with the preceding paragraph of this letter.'

Mr and Mrs Lampert say that they never received that letter, but there seems to be no reason to doubt its authenticity, and if authentic it does represent a contemporaneous account of the bank's position following the negotiations of May 1991, a position which, as Mr Phillips has pointed out, is substantially in line with Mr Lampert's own recollection of what occurred.

*511

In the light of the evidence which I have carefully reviewed it seems to me that it is quite impossible to contend, as Mr Cohen does, that there was anything left of the side letter after 21 March 1991, or at any rate after 14 June 1991 when the signed copy of the letter of 22 March 1991 was returned by McKenna & Co to the bank. I also reject Mr Cohen's alternative submission that the negotiations which took place during the summer of 1991 resulted in some form of alternative contractual inhibition arising in relation to the bank's entitlement to enforce its rights under the 1990 guarantee. It therefore follows that Mr Cohen's submission that the demand made by the bank on 23 July 1996 was premature must fail. As the judge said, the contractual

situation at that date was governed by cl. 16 of the guarantee.

Overdraft of Heritage not payable on demand?

Mr Cohen's next principal submission is that on 10 July 1996 the bank was not entitled to demand immediate payment from Heritage, so there was no default on the part of Heritage to trigger the demand on the guarantee.

Mr Cohen accepts that the relevant facility letter of 3 April 1996 stated in terms that 'any amounts owing under the facility are repayable on demand' but he submits that the letter has to be considered in the light of all the circumstances known to the parties.

The circumstances which he identifies are as follows:

(1) the facility letter set out limits as to the amount of the overdraft for the period up to and beyond November 1996;

(2) in order to establish the facility the bank charged an arrangement fee of £7,500;

(3) as part of the arrangement it was agreed that the board of the company and the banks' advisers Grant Thornton would carry out a review, that review to be completed by 31 July 1996;

(4) as recorded in the facility letter, the company undertook to sell its premises at Unit 3, Marshgate Lane, Stratford. In that connection it was envisaged that completion might not take place until January 1997; and

(5) the facility letter specified the extent to which at any one time the company's available debtors must exceed in total its borrowing by way of bank overdraft.

Mr Cohen also points out that, as the bank knew, Heritage was a public company and if overdraft facilities were suddenly terminated that would have an adverse effect on shareholders and listed shares. The overdraft facility was, Mr Cohen contends, intended by both sides to be a long-term arrangement under which the bank, as the sole banker of Heritage, was to assist that company through a slack period to reach the busier pre-Christmas trade. The facility letter said that:

> 'it is the bank's present intention to make the facility available until 28 February 1997 or such later date as may from to time be advised in writing by the bank. All monies from time to time owing to the bank under this facility shall be repaid no later than the agreed expiry date.'

That was, Mr Cohen contends, more than a mere expression of the bank's state of mind at the time of granting the facility. It was in reality a clear indication of the duration of the facility, an indication upon which Heritage was entitled to rely, and although it is true that on 10 July 1996 Heritage's overdraft exceeded by £94,000 the level indicated by the facility letter, Popplewell J was right to say, as he did, that because some flexibility had been allowed by the bank in relation to overdraft limits the company's failure to abide by the overdraft limit set out in the facility letter was not the bank's best point.

Mr Cohen pointed out that in Titford Property Co Ltd v Cannon Street Acceptances Ltd (unreported, 25 May 1975) , a case which concerned fixed-term overdrafts, the words 'payable on demand' were held by Goff J to be 'completely repugnant to the whole facility' and that, Mr Cohen submits, is at least arguably the position in the present case. He recognises that in Williams & Glyn's Bank v Barnes (1981) Com LR 205 that line of argument did not prevail, even though the lender knew the purpose for which the money was to be used. As an alternative Mr Cohen submits that 'on demand' should be construed as meaning no more than that the bank was entitled to demand payment if otherwise entitled to it. *512

I am wholly unpersuaded that the words 'repayable on demand' used in the facility letter do not mean what they say. It is in no way inconsistent for a bank, or any other lender to grant a facility which it and the borrower both envisage will last for some time, but with the caveat that the lender retains the right to call for repayment at any time on demand. That is what happened here. As the judge said, the terms of the facility letter and the other circumstances to which Mr Cohen has referred disclose no incompatibility. The bank was therefore entitled to do as it did on 10 July

1996 and to require Heritage to repay on demand.

Time allowed for payment

Mr Cohen's third principal submission is that having made its demand of the company at 3.30 p.m. on 10 July 1997 the bank was not entitled to appoint receivers at 10.30 a.m. on the following day because that did not allow the company sufficient time to arrange for payment. The company should have been given 'a reasonable time' in which to raise money elsewhere. Mr Cohen acknowledges that if Bank of Baroda v Panessar (1986) 2 B.C.C. 99,288; [1987] Ch 335 was rightly decided this point is unarguable. In that case Walton J reviewed the English and Commonwealth authorities, and concluded that in English law the debtor is only entitled to the time necessary for the mechanics of payment, not for time to raise the money if it is not there to be paid. In the present case, Mr Cohen concedes, the company was given the time necessary for the mechanics of payment, but he submits that the approach adopted by Walton J should now be considered at appellate level to see whether or not it would give way to the more liberal approach adopted in Canada and Australia. However the liberality of the Commonwealth approach must not be overstated. In Whonnock Industries v National Bank of Canada (1988) 42 DLR (4th) 1 the British Columbia Court of Appeal reviewed the authorities, and concluded that where the amount owing is very large Canadian law now requires that lenders should give 'at least a few days' in which to meet the demand. Reasonable notice, it was said, may range from a few days to no time at all. In that case seven days had been allowed by the lender, and the judge at first instance held that to be insufficient. On appeal his decision was reversed, the court saying at p. 11:

> 'The Canadian law demonstrated in the decisions does not contemplate more than a few days and cannot encompass anything approaching 30 days. In the decisions noted nothing approaching the seven days permitted here has been classed as unreasonable. The cases in which the requirement for reasonable notice evolved deal with notices of an hour or less. None of them holds that a notice of more than one day was inadequate and none refers to the need for a notice of more than a few days.'

For the bank Mr Phillips submits, and I accept, that even if this court were ultimately to reject the mechanics of payment test in favour of the Canadian and Australian approach - despite the powerful arguments set out by Walton J in favour of his conclusion - that would be of no assistance to Mr Cohen on the facts of this case. There is no evidence to suggest that given a few more days Heritage could have found nearly £600,000. The evidence is to the opposite effect. Mr Lampert's affidavit of 28 March 1997 suggests that at the material time there were 'potential purchasers' of the Heritage Group, but only one has been identified. Mr Cohen invites our attention to a fax of *513 11 July 1996 indicating that on 10 July 1996 the board of SLR Plast Group in Tel Aviv considered the possibility of acquiring or merging with Heritage plc. The sender promised a letter 'which will outline our pre-conditions in order to start negotiations'. Clearly, despite Mr Lampert's indication to the contrary, that approach was in its infancy, and as Mr Phillips points out, when the receivers were appointed the approach was not pursued. Furthermore, even if a buyer for the company had been found that does not of itself indicate that there would have been any payment of the company's debt to the bank. Nowhere is it suggested that there was any other lender available to take over that debt.

In my judgment therefore the interesting academic question as to whether the mechanics of payment test should now be affirmed or rejected at appellate level can have no bearing on the present case because, whatever the test, on the evidence the bank was entitled to appoint receivers when it did.

Other grounds for granting leave to defend

As Mr Cohen points out, O. 14, r. 3 permits the court to grant leave to defend even where it cannot identify a triable issue. Mr Cohen submits that the power should be exercised in this case because it is arguable that the bank behaved harshly and unconscionably and acted with unjustifiable haste towards an established customer. He also points to the fact that the receivers appointed were from Grant Thornton. Mr Lampert objected to their appointment because the firm had previously been advising the bank in relation to the affairs of Heritage. The identity of the receivers seems to me to be irrelevant to the question of whether or not there should be

judgment against Mr Lampert under O. 14 , and I can find nothing in Mr Lampert's complaints against the bank which should entitle him to leave to defend. Accordingly in my judgment Popplewell J was right to find as he did, and so far as the Queen's Bench action is concerned I would dismiss the appeal.

Chancery action

In relation to the decision of Neuberger J Mr Cohen raises one preliminary matter and two substantive points.

Preliminary

The preliminary matter concerns the negotiations in August 1995 leading to the bank's second charge on 22 Neville Drive. It will be recalled that in addition to the building society's first charge the bank had in 1983 been granted a charge which in January 1994 it had offered to release. Mrs Lampert has contended that in August 1995 she was unaware of the existence of the bank's earlier charge, and that if aware of it she would not have agreed to a further charge. Mr Lampert contended that he was led to believe that the earlier charge had been discharged. Initially Mr Croudace, for the bank, thought it most unlikely that he would have given that impression in relation to the earlier charge, but having had a chance to consider his letter to Mr Lampert of 12 January 1994, in which he offered to release the earlier charge, Mr Croudace accepted that he may in August 1995 have said that the bank had released, or would not rely upon, the earlier charge. Mr Cohen accepts that there is therefore no longer a live issue as to the bank's stance in August 1995 in relation to the earlier charge, but he points to Mr Croudace's original reaction as an indication of unreliability on the part of the bank's witnesses, and as an indication of the need for the whole matter to be fully investigated at a trial following full discovery. In my judgment the fact that Mr Croudace corrected his evidence as soon as he had the opportunity to consult the relevant documentation is commendable, and adds nothing to Mr Cohen's case.

*514

Undermining the bridging loan

Mr Cohen's first substantive point in relation to the Chancery action is that the bridging loan of £250,000 which Mr Lampert obtained in August 1995 was intended to be a short-term loan, to be repaid by Heritage as its position improved. It was envisaged that when the overdraft came down to £725,000 and the loan was repaid the bank's charge on 22 Neville Drive, which was entered into to secure the bridging loan, would be released. Mr Cohen contends that by reducing the overdraft facility to Heritage prematurely, during the existence of the bridging loan, the bank rendered it impossible for Heritage to repay that loan and so the bank was in breach of its contractual duty to Mr Lampert.

Undoubtedly the bridging loan was intended to provide short-term relief for Heritage, so that in addition to an overdraft facility of £725,000 that company would have £250,000 available by way of loan from Mr Lampert. Mr Lampert's letter of 10 August 1995 indicates that he expected the need for finance in addition to the overdraft facility to be over by the end of October. Against that background the bank, on 10 August 1995, offered a bridging loan of £250,000. Part of the facility letter reads:

> 'The amount borrowed will be repayable in full on demand, but it is the bank's present intention to make the facility available to you until 30th September 1995 on which date the amount then owing to the bank shall be repaid.'

In a letter to Mr Lampert of the same date Mr Croudace speaks of the bridging loan being repaid by Heritage by late September 1995 or early October, when it was anticipated that the Group borrowing would be reduced to within £725,000. The letter makes it clear that at that time the bank would be prepared to release the charge.

On the same day, 10 August 1995, the bank offered overdraft facilities to Heritage not exceeding £725,000. Part of that facility letter reads:

> 'Any amounts from time to time owing under the facility are repayable on demand but it is the Bank's present intention to make the facility available until 30th September 1995

judgment was given by Neuberger J counsel then appearing for Mrs Lampert said 'I am not requesting leave to appeal'. No application for leave to appeal was ever made to the judge despite the requirements of O. 59, r. 14(4) . Mr Barraclough sought to explain that omission to us by saying that after judgment Mrs Lampert was not legally aided. That cannot be a satisfactory

explanation for the omission. Nevertheless we, like the single Lord Justice, have looked at the merits of Mrs Lampert's notice of appeal. As the single Lord Justice said when refusing leave 'the essential point is whether there was (on the conceded facts) a material representation' in relation to the existence in 1995 of the 1983 charge. In reality, as the judge found, there was no material misrepresentation and so, in my judgment, despite the submissions made to us, Mrs Lampert cannot identify any ground of appeal worthy of the attention of this court.

Mummery LJ:

I agree.

(Appeals and application dismissed with costs)

(c) Sweet & Maxwell Limited

*516

© 2010 Sweet & Maxwell

Westlaw UK