THE HIGH COURT

[2021] IEHC 764

[2018 No. 1159 S]

BETWEEN:

BWG FOODS UNLIMITED COMPANY T/A VALUE CENTRE

PLAINTIFF

– AND –

DONMOUR VENDING LIMITED AND JAMES SEYMOUR

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 2nd December, 2021.

SUMMARY

This is a successful application made by a creditor pursuant to a personal guarantee executed by a company director: (a) in favour of that creditor; (b) in respect of certain liabilities of a debtor company of which he is a director.

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1. This is an application to enter judgment against Mr Seymour in circumstances where Donmour Vending Ltd, a company of which Mr Seymour is a director, has already consented to judgment being issued against it.

2. Donmour's debt arose in respect of goods sold and supplied by BWG to Donmour. Mr Seymour's alleged debt (in truth, as will be seen, the court adjudges it to be an actual debt, not just alleged) arises pursuant to a guarantee in writing given by Mr Seymour whereby he guaranteed the liabilities of Donmour to BWG.

3. By way of further detail, Donmour entered into an agreement with BWG pursuant to a customer registration form of 25th November 2014. In that form Donmour applies for a trade credit account and agrees to abide by the BWG terms and conditions of sale, a copy of which Donmour indicates itself to have received and to have read. Perhaps the most relevant of the terms and conditions for the purposes of this application is cl.6.1 which provides, amongst other matters that "*Payment shall be made by the Buyer* [here Donmour] *to BWG within the period stipulated in BWG's statement of account*".

4. As mentioned above, final judgment has been entered in favour of BWG against Donmour. However, at the time of the swearing of the grounding affidavit in this application (and the court understands this situation to persist) Donmour had/has failed to discharge the amount owing or any part thereof. So BWG has come to court claiming the monies owed, relying in this regard on a personal guarantee executed by Mr Seymour on 25th November 2014, demand having been made under that guarantee and no payment made by Mr Seymour following on that demand being made. In that guarantee, Mr Seymour agrees amongst other matters as follows:

> "*1. I/We shall pay you on demand, and hereby guarantee the repayment to you on demand, all monies which may become due to you from the Principal Debtor for all such goods as you may from time to time supply and/or all capital contributions as you may give from time to time to the Principal Debtor*
> *2. The agreement shall be a continuing guarantee to you for all debts whatsoever and whensoever contracted by the Principal Debtor with you in respect of goods to be supplied and capital contributions given to the Principal Debtor and my liability hereunder shall not be affected by your giving time or any other indulgence.* ".

5. It follows from the just-quoted wording that Mr Seymour agreed to repay on demand all monies "*which may become due*" by Donmour from the moment of execution of the guarantee.

6. By way of initial replying affidavit, Mr Seymour avers, amongst other matters, as follows:

> "4. *I say and believe that following an agreement between the* [parties]…*the sum of €225,664.20 was transferred from* [Donmour's]…*account bearing the account number ——999 and the sum of €1,200 per week was to be paid to reduce this balance to zero. No purchases were to be made on the account. A strict credit limit of €250,000 was to be placed on account bearing the number ——999. It was stated that any purchases about [sic – above?] this limit would have to be paid for in cash bank draft or debit/credit card. Credit terms of 5 weeks were placed on account ——999. I beg to refer to a copy of the said letter of agreement dated 24th November 2014….*[1]
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> *5. I say that the plaintiff's claim pursuant to a personal guarantee dated the 25th November 2014 states on its face at para.1 thereof* 'I/We shall pay you on demand, and hereby guarantee the repayment to you on demand, all monies which may become due to you from the Principal Debtor for all such goods as you may from time to time supply and/or all capital contributions from time to time to the Principal Debtor.' *I therefore say and believe that the Personal Guarantee in its terms captured debt from the date of signing of 25th November 2014 and it did not have a retrospective effect.*
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> [Court Note: The court respectfully agrees with the proposition/reading advanced in the last-quoted sentence.]

[1] That letter (from BWG to Mr Seymour), so far as relevant reads as follows:

> "*I wish to confirm the credit terms and the repayment plan to deal with your balance as follows….The current balance on your account ——999 stands at €540,709.73….€265,614 of your balance on a/c ——999 will be transferred to separate a/c ---345 whereby a payment of €1,200 per week will be paid to reduce this balance to zero. No purchases can be made on this a/c….A strict credit limit of €250,000 will be put in place on a/c ——999….Credit terms of 5 weeks will be put in place on a/c ——999, i.e. purchases made in week 1 will have to be paid for in week 6. Please note if the credit limit of €250,000 is reached before the credit terms of 5 weeks have been reached then any further purchases will have to be paid for by cash, bank draft or debit/credit card….A fully completed Credit Application pack must be held on BWG's file which is to include a personal guarantee signed by yourself on behalf of Donmour*".

6. Similarly, I say that para.2 of the personal guarantee states 'The agreement shall be a continuing guarantee to you for all debts whensoever contracted by the Principal Debtor with you in respect of goods to be supplied and capital contributions given to the Principal Debtor and my liability hereunder shall not be affected by your giving free time or any other indulgence.' *Therefore, I say and believe that the personal guarantee relates only in respect of goods to be supplied and not to goods which pre-dated the guarantee.*

[Court Note: Again, the court respectfully agrees with the proposition/reading advanced in the last-quoted sentence as representing the most natural reading of clauses 1 and 2 of the guarantee.]

7. *I say that any goods purchased by* [Donmour]…*after the date of the Agreement were purchased on a cash and delivery basis. In that regard, I say that this deponent would attend at the plaintiff's premises and pay for the goods. Payment was made prior to the goods being supplied.*

8. In light of the foregoing, I say that [Mr Seymour]*...is not indebted to* [BWG]*...in the amount claimed or at all.*"

7. By way of supplemental affidavit of 11th September 2020, a credit manager at BWG has averred, amongst other matters, as follows:

"*4. By way of background, I say that in or about October 2014,* [Donmour]…*was at the time in some financial difficulty and was not in a position to discharge its debts to* [BWG]….*I say that* [BWG]…*met personally with* [Mr Seymour]…*and ultimately a repayment plan was reached between* [BWG]. [This is the repayment plan described in the footnote previously above.]….

7. I say that…[BWG]…*agrees in general with what is contended by* [Mr Seymour] *at paras. 5 and 6 of the replying affidavit* [as quoted above]….

8. *In response to para.7 of the replying affidavit,* [BWG] *denies that any goods purchased by* [Donmour]…*after the 25th day of November were purchased*

exclusively on a cash on delivery basis. Again, for the avoidance of doubt and as appears from the said repayment plan, only purchases made when the agreed credit limit of €250,000 on trade credit account number ––999 was exceeded were to be paid for on a cash on delivery basis.

[Court Note: As regards the last-quoted sentence, the court respectfully agrees that this is the proper reading of the repayment plan details.]

9. Otherwise I say and believe that trade credit account number ––999 was operated as a normal trade credit account for [Donmour]…*whereby credit terms were agreed that purchases by* [Donmour]…*would have to be paid by* [Donmour]…in week six.

10….I say that [Donmour]…*has already consented to judgment….*

11. [T]*he balance is comprised entirely of invoices raised in 2018, four years after* [Mr Seymour]…*executed the personal guarantee.*

12….[T]*he consequences of the foregoing are twofold. Firstly,* [Mr Seymour]…*is estopped from asserting…that any goods purchased by* [Donmour]…*after the date of the repayment plan were purchased on a cash on delivery basis. I say and believe that this is an absurd assertion where it is the case that* [Donmour] *consented to judgment grounded on an affidavit exhibiting a statement of account showing a balance comprised entirely of invoices raised in 2018.*

[Court Note: Although (i) BWG has triumphed in these proceedings, and (ii) the court can understand why BWG might be vexed by the approach taken by Mr Seymour, given the evidential basis on which Donmour (a company of which Mr Seymour is a director) consented to judgment, the court nonetheless does not see the contended-for estoppel to arise. BWG and Mr Seymour are separate persons and it is perfectly open to Mr Seymour, in all the circumstances presenting, to take a different stance in these proceedings from the stance taken by a company of which he is director in these proceedings. That is but a consequence of companies enjoying separate legal personality from their directors.]

13. Secondly, [Mr Seymour] *has admitted at para.5 of the replying affidavit that the personal guarantee captured debt from the date of signing on the 25th day of November 2014 and consequently must be held to admit that he has personally guaranteed any debt incurred by* [Donmour] *after that date, including the 2018 invoices referred to above.*

[Court Note: With respect, that is to ignore para.7 of the replying affidavit. Mr Seymour in that affidavit is essentially saying is 'Yes, I was liable if one looks to the guarantee alone but the operation of the wider terms agreed between us means that I am not liable'. That is a line of defence that it is open to him to take. The court holds against him in this judgment but that does not mean that it was not open to him, as a matter of logic, to argue as he has argued.]

14. For the sake of completeness, I say that [BWG]…*accepts that cash payments were often made by* [Mr Seymour]…*at* [BWG's] *premises and payments were collected by* [BWG's]…*delivery drivers from* [Mr Seymour]…*at* [Donmour's]…*premises. However, I say that those payments were accepted in discharge of invoices outstanding and which were discharged in chronological order. I say that cash payments were at all times accepted by* [BWG] *in accordance with the terms of payment set out in the terms and conditions of sale….*

15. The repayment plan stated that 'If the credit limit of €250,000 is reached before the credit limit of 5 weeks have been reached then any further purchases will have to be paid for by cash, bank draft or debit/credit card and I say it is not correct that after the date of the repayment plan that goods were purchased on a cash on delivery basis.

16. I say and believe that [Mr Seymour]…*is attempting to mischaracterise the nature and operation of trade credit account number ---999 so as to avoid his obligations and liability thereunder….*

[Court Note: Courtroom battle is like any battle: subject to the applicable laws/rules, including the overriding obligation to tell the truth, the respective parties will

typically do and say what it takes to win. So the court makes no criticism of BWG for advancing the argument that Mr Seymour has sought to engage in mischaracterisation. However, it seems to the court that something rather less insidious is at play: Mr Seymour simply has a different view of events. The court happens not to agree with his view of events but it does not see that in advancing his different view of events Mr Seymour has engaged in anything so untoward as 'mischaracterisation'.]

17....[T]*he account was operated as any other normal credit account with the balance thereunder rising and falling in accordance with the regular payments being made. I say and believe that the contention being made by* [Mr Seymour]…*that a balance of €250,000 would be ignored and left in abeyance for over four years while* [Donmour]…[would] *be permitted to purchase goods on a cash on delivery basis is simply not maintainable and flies in the face of the repayment plan he now exhibits…*

[Court Note: It seems to the court that this is a notable weakness in Mr Seymour's contentions. It requires the court to accept the uncredible as credible.]"

9. In a further affidavit of 9th December 2020 (which refers back to the credit manager's affidavit of 11th September 2020), Mr Seymour avers, amongst other matters as follows:

"5. *In response to para.8 I accept that some of the payments made to* [BWG]*...were by way of cash or cheque and some payments were not paid exactly on the date of delivery, but shortly thereafter. The terms of the guarantee provided that the payments made to goods supplied after 25th November 2014 were made towards the goods presently purchased and not a retrospective payment.*

[Court Note: As stated previously above, the effect of the guarantee was simply that Mr Seymour agreed to repay on demand all monies "*which may become due*" by Donmour from the moment of execution of the guarantee. The guarantee has nothing to say as to the manner of application of payments received.]

6. I say and believe that the €250,000 credit limit was applicable to goods being purchased after the execution of the guarantee and not to old purchases.

[Court Note: Mr Seymour may have believed this. However, it seems to the court that the credit account was operated as one would expect any credit account would be operated (and as it was contemplated here that it would be operated), namely that the balance outstanding rose and fell from time to time depending on whatever payments were made by Donmour. Again, the notion that a balance of €250,000 would be ignored and left in abeyance for over four years while Donmour would be permitted to purchase goods on a cash on delivery basis flies in the face of common-sense and, more importantly, the repayment plan that has been exhibited before the court. The court freely accepts that parties may agree to something that runs counter to common-sense but nothing of the sort has occurred here; and common-sense can of course be a guide when there is a real dispute as to what has been agreed between parties in any one case. Here, in truth, when one has regard to the contractual documentation and facts presenting there can be no real dispute. Mr Seymour's contentions concerning the €250,000, as the court has noted previously above would require the court to accept the uncredible as credible.]

7. In response to para.9, I say [and]*…accept that the account was operating as a normal trade account save and except that what was being paid for during the first six weeks of the operation of that account should have been put towards the current purchases and not retrospectively applied to past purchases.*

8. In response to paras. 10 and 11, I say that the unilateral application by [BWG]*…of payments made by* [Donmour]*…in relation to goods that were purchased shortly after the execution of the guarantee to older debts was not agreed, and furthermore, it was not the basis upon which the guarantee was provided.*

[Court Note: Again, it seems to the court that the credit account was operated as one would expect any business credit account would be operated (and as it was contemplated here that it would be operated), namely that the balance outstanding rose and fell from time to time depending on whatever payments were made by

Donmour. As to the application of payments received, the court would have been surprised if it had been agreed (and it was not agreed) that payments received were to be applied in other than chronological order to amounts drawn down on the credit account. That type of chronological arrangement is common in the business world and typically operates to the benefit of (a) debtors in the event that interest, if chargeable, is sought to be charged (because the earliest debt on which the most interest would typically fall to be charged is the first extinguished) and (b) creditors, as it limits the potential for debt to become stale debt and require additional action (action of a form that debtors would not welcome, so there is something of a mutual benefit in this regard). There is nothing to suggest that any arrangement was reached in this case that payments received were to be applied in other than chronological order to amounts drawn down on the credit account. If the reference in para.8 to "*the unilateral application by the plaintiff of payments*" is intended to suggest that BWG acted in breach of contract, it did not.]

9. I say and believe that the interpretation of [BWG's] *assertion in paras. 10 and 11 is that the guarantee was to effectively cover all liabilities in excess of €500,000 in 2014 when* [BWG]*…was trying to regularise* [Donmour's] *account…*

[Court Note: As the court has noted previously above (and as it understands BWG now to agree), the effect of the guarantee was simply that Mr Seymour agreed to repay on demand all monies "*which may become due*" by Donmour from the moment of execution of the guarantee.]

10. It is entirely unclear on what basis [Mr Seymour]*…is estopped in contesting the application for judgment herein in circumstances where* [Mr Seymour] *refutes that he is wholly liable for the debt allegedly incurred.*

[Court Note: Agreed.]

11. In response to para.13, I say that the basis upon which the guarantee was provided was that the payments made by [Donmour]*…were to be applied to goods presently being purchased and not to old debt.*

12. I say and believe [that] *there is no agreed basis upon which invoices, paid by the second-named defendant* [*sic* – presumably 'by the second-named defendant for and on account of Donmour'] *were to be discharged in chronological order by* [BWG]. *I further say that the guarantee does not specify that the plaintiff would discharge the invoices chronologically and the terms and conditions of same do not contain any such warranty*.]

[Court Note: As regards paras. 11 and 12, the court refers to its observations after paras. 7 and 8 above.]

13. In response to para.15, I say that the account was in debit in the sum of €250,000. Therefore when a purchase was made it would be in excess of the credit limit. Therefore, [BWG] *had a guarantee from* [Mr Seymour]*…in respect of purchases made* [by] *Donmour…after 25th November 2014*.

[Court Note: See the court's observations after 5, 6, and 7 and 8.]

14. I refute that I am attempting to mischaracterize the nature and operation of the trade account….

[Court Note: The court accepts that Mr Seymour, in these proceedings, has simply sought to advance his view of events. That view of events differs from that of BWG. However, the court does not see that Mr Seymour has engaged in anything so untoward as 'mischaracterisation'. Opposing parties come to court all the time with honestly held opposing views as to the truth of matters presenting before the court. That is all that has happened here.]

15. In response to para.17, I say that on the contrary, [BWG]*…failed to enter into an agreement with* [Mr Seymour]*…to discharge the old balance of €250,000 in a similar way as it did with the substantial reduction of account number --- 345….*[BWG] *failed to seek a repayment plan in respect of the old debt and it has accepted…that the guarantee does not apply retrospectively after the date of execution…*[T]*herefore the unilateral application of payments made by*

[Donmour]…*for goods purchased after the date of execution towards the old debt was incorrect.*

[Court Note: See the court's observations after 6, and 7 and 8.]"

10. There was some difficulty with the figures proffered to the court when it first heard this application. So the matter was adjourned to allow BWG to put in a clearer set of figures. This was done by way of an affidavit sworn by a BWG credit manager on 22nd July 2021. A further replying affidavit was sworn by Mr Seymour on 6th October 2021 in which it would be fair to say that he takes issue with all matters of significance averred to by the credit manager. That affidavit has been fully considered and, pursuant to same, the court has elected to disregard Exhibit B to the credit manager's affidavit. Exhibit B contains an undated document that was purportedly sent by BWG to Mr Seymour but Mr Seymour denies that it was ever received and there is nothing by way of objective evidence before the court to suggest that it was sent). The credit manager avers as follows:

"5….*I…have prepared an Excel spreadsheet of account numbers ---999 and ---345….*

6. As appears therefrom, I say that on 26th November 2014 (the date of execution of the guarantee agreement) invoice numbers [the numbers are stated]*…with a cumulative value in the sum of €285,664.20 were transferred from trading account number ——999 to 'sleeper' account number ——445. I say that it was ultimately only feasible to transfer entire invoices as opposed to a part thereof and it was for this reason that the sum of €285,664.20 was transferred instead of the sum of €265,614 as originally agreed under the terms of the repayment plan….*[Mr Seymour] *has already accepted* [Court Note: he certainly has not disputed] [in]… *his first Replying Affidavit that this was ultimately the sum which was agreed to be transferred to the sleeper account.*

[Court Note: The court does not see that anything turns on this issue as BWG is seeking the balance due on the trading account.]

7. *As appears from the said Excel spreadsheet in respect of trading account number ——999, a credit limit of €250,000 was applied and any purchases above this sum was to be paid for in cash, bank draft or debit card.* [Court Note: There follows an attempt to rely on Exhibit B, to which the court, for the reasons stated above, has had no regard.]…

8. [T]*he fact that no remittance advice was ever provided with any payments received meant that* [BWG]…*was entitled to use those payments to discharge old invoices first. In addition to the foregoing,* [BWG's]….*payment allocation policy (of discharging invoices chronologically) was a policy used for years between* [BWG]...*and* [Donmour]…*and not once in the long business relationship did either* [Donmour or Mr Seymour]…*ever take issue with this method of payment allocation. I say that* [Mr Seymour]…*by his conduct must be held to have accepted this policy of payment allocation and cannot now complain in an attempt to escape his liabilities, to say nothing of the fact that it is patently obvious that any business would ordinarily be entitled to operate a trading account by discharging invoices chronologically as is usual.*

[Court Note: The court respectfully does not accept the proposition advanced in the first sentence. Regardless of whether a remittance advice was submitted or not, the obvious and reasonable expectation of Donmour (and of Mr Seymour as director) would have been that BWG would act in compliance with its contractual arrangements with the defendants. The problem for Mr Seymour is that there is nothing to suggest that BWG did not do so. The court respectfully agrees with everything else in the just-quoted paragraph: the history of past dealings seems to it to be a critical point; and as to the "*patently obvious*" point, not only would a business be entitled to do so (absent contrary agreement) but here the history of past dealings and the absence of any contrary agreement suggests to the court that it was right, proper and not in any way in breach of contract for BWG so to do.]

9. *I say and believe that in the event that this…Court disagrees with the foregoing*…[Court Note: The court does not disagree with the foregoing so it sees no need to consider the balance of the averments.]".

11. Save as regards one last point, which the court will now address, the court does not see that there is anything in Mr Seymour's last-filed affidavit that requires to be considered in light of all it has considered in this and the preceding pages. That last point is as follows. Mr Seymour avers, amongst other matters, in his last affidavit as follows:

"*I say and believe that at all times the account bearing the number ——999 operated within the agreed terms of the Guarantee, whereupon* [if] *the credit limit of €250,000 was…exceeded*…[on] *each occasion I brought it within the limit and it was the limit at the time of the issuing of these proceedings and continues to so be.*"

12. It seems implicitly to be suggested in the just-quoted text that if a credit account is brought below its maximum limit then any amounts owing under that capped amount cannot be sued for. If this is contended (and it is not entirely clear that it is), it is, with respect, wrong. Subject to the applicable contractual arrangements (and here there is nothing contrary in the contractual arrangements between the parties) below-cap amounts in such a situation can of course be sued for as credit that has been extended and in respect of which repayment is owed and outstanding.

13. This is a case which turns solely on an interpretation of contract, in particular the guarantee, and on a consideration of the debts owed thereunder by Mr Seymour. For the reasons stated above, it appears to the court that BWG has made out a case for the reduced balance referred to in para.18 of the BWG credit manager's affidavit of 11th September 2020 (assuming this to be the full amount which now remains claimed and outstanding in accordance with this judgment).