SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES AND GALLOWAY AT HAMILTON

[2024] SC HAM 1

A566/22

JUDGMENT OF SHERIFF J SPEIR

in the cause

SCREWFIX DIRECT LIMITED
T/A TRADE UK

Pursuers

against

MR JAMES AKA JAMIE PATERSON

Defender

Pursuers: Shoosmiths, Edinburgh, solicitors
Defender: Whyte Fraser & Co. Ltd, Motherwell, solicitors

Hamilton, 5 December 2023

Introduction

[1] The pursuers are engaged in the supply of building and other materials to trade customers. One of those customers was Paterson Restoration Limited trading as Patersons ("the company"). In the course of 2019 and 2020 the pursuers supplied goods to the company that have not been paid for. There is no prospect of recovery from the company which was wound up on 17 March 2020.

[2] The defender was a director and shareholder of the company. The pursuers seek recovery of the debt from him together with contractual interest and certain fees. The pursuers contend that the defender is liable under and terms of a personal guarantee he gave them for the company's debts. The defender disputes this.

The issue

[3] The company opened an account with the pursuers in terms of a Trade Account Card Agreement dated 11 and 22 April 2014 ("the Agreement").

[4] The issue at debate concerned the interpretation of paragraph f of the Agreement which states "I, the director, agree to guarantee performance of all the company's current and future financial obligations to Trade UK, including any subsequent increase/s in credit limit". On the signing docquet the defender designs himself as "DIRECTOR". The Agreement states *inter alia* that in the case of limited company "the form must be signed by a director".

[5] The pursuers argued that the clause was sufficient to constitute a personal guarantee on the part of the defender for the liabilities of the company to them on the trade account. The wording was clear and unambiguous. The term of the agreement only made sense if construed as a personal obligation as the defender was already binding the company as agent *qua* director. That interpretation was consistent with the approach endorsed by the leading authorities in the area, being the two Inner House cases of *Montgomery Litho Limited* v *Maxwell* 2000 SC 56 and *Brandon Hire plc* v *Russell* [2010] CSIH 76. Accordingly, it was submitted, the averments in answer 2, which disputed personal liability, were irrelevant and should be excluded from probation. There remained, however, a potential issue in relation to quantum that may require a proof to resolve.

[6] For the defender it was argued that the provision did not impose personal liability upon him as an individual. He signed the Agreement solely in his capacity as a director and as such was committing only the company to performance under the agreement. In any event as the provision was not clear and unambiguous and fell to be construed *contra*

proferentem. The case was not one such as *Brandon Hire plc* where it was clear from the terms of the clause that personal liability was being engaged. Reference was made to *Waydale Limited* v *DHL Holdings (UK) Limited (No.2)* ((OH) 2001 SLT 224 for the proposition that cautionary obligations should be construed narrowly rather than broadly. Further it was settled law that the principles of caution in Scotland were the same as those governing surety in England: *Smith* v *Bank of Scotland 1997* SLT 1061. I did not understand either point to be in issue. By way of general background on the area of construction of contracts generally and cautionary obligation in particular extracts from *Gloag and Henderson , The Law of Scotland*, were produced (albeit these were taken from the 13th Edition rather than the current 15th Edition) though no particular proposition was taken from them.

Discussion

[7] In the case of *Montgomery Litho Limited* the court expressly recognised that "It is certainly not unusual for a director to be asked to sign an obligation guaranteeing the company's liability, particularly in the case of a small limited company" (at page 59G). The issue in that case, however, was whether such an obligation could be imported into the contract by way of a reference to certain standard terms and conditions, which were not part of the same contractual document as had been signed. It was held it could not because the imposition of a personal obligation of guarantee was something that was sufficiently unusual or special it was necessary that specific attention be drawn to it. In that case, the form signed by the director did not refer to any personal capacity and accordingly the purported cautionary obligation was determined to be unenforceable.

[8] The issue in the present case is quite different. It is not argued by the defender that there was a want of notice *per se* but rather that as a matter of construction the term in

question should not be found to have imposed any personal liability on the defender. I disagree with that submission having regard to the transactional context of the clause including the other terms of the Agreement in particular paragraph c which states, "You are authorised to bind the account holder to this agreement by signing it." Accordingly, while this clause patently engages the defender in his capacity as a director of the company, clause f is directed towards his discrete capacity as an individual.

[9] The lynchpin of the defender's argument in relation to paragraph f was the inclusion of the words "the director" after the personal pronoun. It was submitted that this should be construed as relating only to the defender *qua* director and not as an individual failing which the meaning was too unclear to support the construction contended for by the pursuers. While the clause may perhaps be criticised for employing somewhat inelegant drafting I consider that it is still patently clear that this was a short hand device to secure a personal guarantee from the director of whichever corporate customer it was that sought to trade on credit with the pursuers. Thus, in the case of a limited company, the agreement required to be signed by a director from whom the intention was also to obtain a personal guarantee. I have arrived at that view employing the narrow approach appropriate to cautionary obligations. In my opinion any other construction would make the clause redundant and bereft of commercial sense. As I do not consider there to be any ambiguity arising the *contra preferentum* rule has no application in the present case.

Disposal

[10] In the first place I shall sustain the pursuers' first plea in law to the extent of excluding from probation answer 2 of the defences and repel the first, second and third pleas in law for the defender. Thereafter it was a matter of agreement between parties that if

I decided the issue in favour of the pursuer there may still require to be a proof in relation to quantum, in particular the claims for contractual interest and certain fees, unless otherwise agreed. The agent for the defender suggested I appoint a procedural hearing to determine if further procedure, namely a proof was still required. I am content to do that and hear parties on any issue of expenses that arises following the outcome of the debate.