

GUARANTORS: DISCHARGE OF LIABILITY

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Associated British Ports – vs- Ferryways [2009]

In Associated British Ports (a company created by statute) v (1) Ferryways NV and (2) MSC Belgium NV [2009] EWCA Civ 206, the Court of Appeal found that a guarantor was not liable on the basis that one of the parties to the underlying contract had given the other additional time to pay and the parties had not included an express provision preventing discharge of the guarantor's liability in such circumstances.

In January 2000, Associated British Ports ("ABP") and Ferryways NV ("Ferryways") entered into an agreement in which ABP provided port services to Ferryways, a company operating a ferry service between England and Belgium.

Following the expansion of Ferryways' business, the original agreement was replaced by an agreement dated 1st September 2003. On the same day, an additional agreement (**the "Letter Agreement"**) was concluded between ABP and Ferryways in which one of Ferryways' major shareholders, MSC Belgium NV ("MSC"), agreed to ensure that Ferryways

- "(i) has and will at all times have sufficient funds and other resources to fulfil and meet all its duties, commitments and liabilities entered into and/or incurred by reason of this Agreement as and when they fall due; and
- (ii) promptly fulfils and meets all such duties, commitments and liabilities".

In about August 2004, disputes arose between ABP and Ferryways which were initially resolved by an agreement dated 17th February 2006 in which ABP gave Ferryways further time to pay – the "Time to Pay Agreement" ("**TPA**").

Further disputes between ABP and Ferryways arose between March and June 2006 and in June 2007 Ferryways was bought by a competitor, in the same month ceased trading and was declared insolvent in February 2008. ABP sought to recover the monies owed to it by Ferryways and proceedings were issued against Ferryways and, pursuant to the Letter Agreement, MSC.

The case centred on the construction of the Letter Agreement and whether it amounted to an indemnity or guarantee. An indemnity is a primary liability (that is, a liability which exists independently of any other liability). Conversely, a guarantee is a secondary liability (that is, a liability which exists only in circumstances in which the primary obligor cannot be called upon or cannot pay) and if the underlying contract is varied or additional time is given to pay, then the liability of the surety is discharged, unless there is a provision preserving the surety's liability in these circumstances. No such provision had been included in the TPA.

ABP argued that the presence of the words "at all times" pointed to a primary liability on the part of MSC and that, on this basis, MSC's obligations were akin to an indemnity in favour of ABP. MSC relied on the words "as and when they fall due" and argued that these words suggested a secondary liability and that MSC's obligations were therefore more akin to a guarantee of Ferryways' obligations.

The Court agreed with MSC and held that the words used in the Letter Agreement pointed to a guarantee rather than an indemnity. It therefore found that the TPA effectively discharged MSC's obligations as guarantor to Ferryways.

Practical implications

The Court's decision is a useful reminder that any significant variation or extension of time in relation to an underlying contract will have the effect of discharging a guarantor, unless the guarantor expressly agrees to assume a primary obligation to the contrary, and clear written provisions are included in the contractual documents to that effect.
