**Neutral Citation Number: [2005] EWCA Civ 630**
Case No: 2004 1613 A3

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**BRISTOL DISTRICT REGISTRY**
**(His Honour Judge Havelock-Allan QC)**

Royal Courts of Justice
Strand, London, WC2A 2LL
24 May 2005

B e f o r e :

**LORD JUSTICE CHADWICK**
**LORD JUSTICE LONGMORE**
**and**
**LORD JUSTICE NEUBERGER**

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**Between:**

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| **TRIODOS BANK NV** | **Claimant/ Respondent** |
| **- and -** | |
| **ASHLEY CHARLES DOBBS** | **Defendant/ Appellant** |

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**The Defendant/Appellant appeared on his own behalf**
**NEIL LEVY Esq (instructed by TLT Solicitors, Bristol BS99 7JZ) for the Claimant/Respondent**

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Lord Justice Longmore:

1. The main question raised by this appeal is whether and to what extent a guarantee by which it is agreed:-

    (a) that the guarantor will pay money due from the principal debtor "under or pursuant" to a specific loan agreement; and

    (b) that the creditor can agree to any amendment or variation of the loan agreement without reference to the guarantor

    applies so as to require the guarantor to pay sums due under subsequent agreements made between the creditor and the principal debtor. It is not a question on which there is much authority.

2. Introduction

    The appeal is from a judgment of HHJ Havelock-Allan QC given as long ago as 26th March 2002 in which he gave summary judgment for the claimant Bank pursuant to a personal guarantee executed by Mr Dobbs on 26th April 1996 whereby Mr Dobbs agreed to pay all monies due and owing to the Bank "under or pursuant" to two loan agreements made on the same date with a company of which Mr Dobbs was director called Acorn Televillages Ltd. The purpose of the loan was partly to refinance borrowing made by the Company from Allied Irish Bank and partly to complete the first stage of a project to construct what is known as a "televillage" at Upper House Farm in the Powys village of Crickhowell. As its name implies, a televillage is a development linked to the internet and enabling residents of the village to work within a congenial environment rather than having to commute to a large town. The total amount of the loan (in two separate contracts) was £900,000 and the limit of Mr Dobbs' liability under the guarantee was £50,000. Other security was taken in the form of a first mortgage over the site, a floating charge over the Company's assets and an assignment of Mr Dobb's life insurance policy.

3. By November 1998 the first phase of the project had been completed and the amount of the outstanding indebtedness to the Bank was about £800,000. The Bank then agreed that they would finance phase two of the project; the Bank then made two further loan agreements on 4th November 1998 agreeing to lend a total of £1,980,000 to the Company. The existing indebtedness continued but it was now covered by these 1998 loan agreements which had raised the borrowing limit to the amount mentioned. Each of these agreements says on its face that it "replaces" the earlier agreements. The period of the loan agreements was described as being until 31st October 1999 and in each case the security was described in the following terms:-

    "1. Existing first legal mortgage dated 26 April 1996 over the freehold land and

buildings known as Upper House Farm, Standard Street, Crickhowell, Powys, NP8 1BP registered at HM Land Registry with title Absolute No WA729178.

2. Existing floating charge over all the assets of the Borrower both present and future dated 26 April 1996 and registered at Companies House, 13 May 1996.

3. Existing guarantee of Ashley Charles Dobbs in the sum of £50,000 dated 26 April 1996.

4. Existing assignment of General Accident Life insurance policy No: 2709471LB providing cover of £610,000 and the life of Ashley Charles Dobbs Assignment dated 27 November 1995."

4. On 10th September 1999, the 1998 loan agreements were themselves, to use the same word, 'replaced' by a further loan agreement between the Company and the Bank which has been referred to as "the 1999 facility". Under this facility the amount of the loan was raised from the £1.98 million permitted by the 1998 loan agreements to a maximum of £2.6 million. Clause 8 of the Facility provided that the Bank should continue to have the benefit of the mortgage over the site granted on 26th April 1996, the floating charge of the same date, the collateral mortgage of the life policy over the life of Mr Dobbs and the personal guarantee given by Mr Dobbs on 26th April 1996. In addition to this security, Mr Dobbs agreed to arrange for himself and his wife to execute a second mortgage over their own house in the Televillage (No. 23) in order to secure Mr Dobbs' personal liability under the guarantee. On 19th September 1999 Mr and Mrs Dobbs did just that. When in March of 2000 Mr Dobbs and his wife moved to Polperro in Cornwall he granted a first charge on their new home replacing the earlier charge.

5. Apparently taking the view that the development was not a financial success, the Bank on 7th August 2000 made a formal demand on the Company for the repayment of the Company borrowing. The Bank appointed administrative receivers over the Company's assets on 20th October. In due course the site was sold for £2,100,000 leaving a shortfall on the indebtedness of £80,622.79. The Bank decided to call on Mr Dobbs to pay under the guarantee he had signed on 26th April 1996. They made a demand on 25th June 2001 and started proceedings in the Bristol Mercantile Court on 31st July 2001. On 26th May 2002 the judge gave summary judgment in their favour declaring:-

    (1) that the guarantee extended to the borrowing under the facility agreement of 10th September 1999; and also

    (2) that Mr Dobbs was estopped from denying that the guarantee so extended.

   He did not at that stage give judgment for any monetary sum because Mr Dobbs asserted that the Bank and the administrative receivers had mismanaged the receivership and that the Company's assets had been sold at an undervalue. Mr Dobbs also asserted that the Bank was in breach of its contractual obligations by withdrawing or terminating the loan facility in 2000. Those allegations were, in due course, exhaustively considered by Lewison J who on 19th April 2004 delivered a 303 paragraph judgment dismissing all Mr Dobbs' allegations save for two breaches of contract which led to nominal damages only. Mr Dobbs application for permission to appeal was dismissed by Chadwick LJ on 17th December 2004. HHJ Havelock-Allen had, however, given Mr Dobbs permission to appeal against the declarations made by him but had stayed the future conduct of such appeal to await the outcome of the proceedings which later took place before Lewison J. That is the reason why this appeal was heard on 15th April 2005 more than 3 years after the judge's judgment.

6. The essence of Mr Dobbs' argument before the judge and before us has been that his guarantee of 26th April 1996 only applied to sums due "under or pursuant" to the loan agreements of 1996 and that once those agreements were replaced by the 1998 agreements and then by the 1999 Facility Agreement, there could be no further liability under the guarantee despite the fact that the guarantee was expressly referred to in the later agreements as being security for these loans.

7. The Documentation

In order to understand this argument I need to set out the terms of the guarantee in a little more detail. The preamble to the guarantee provided:-

> "WHEREAS
>
> (A) Triodosbank N.V. has agreed to lend the respective sums of £400,000 and a sum not exceeding £500,000 to Acorn Televillages Limited (Limited company No 2786103), ("the Company") on the terms and conditions set out in two loan agreements numbered 96/782 and 96/783 ("the Loan Agreement") (which expression means both loan agreements together or either loan agreement as the context can permit) both dated . . . April 1996.
>
> (B) The Guarantor, as required by the terms of the Loan Agreement, has now agreed to guarantee the liabilities of the Company under the Loan Agreement on the terms hereinafter appearing."

The guarantee itself was then contained in clause 2 of the guarantee document, the material parts of which were in these terms:-

> "2.1 The guarantor irrevocably and unconditionally guarantees to the Bank that it will on demand pay to the Bank and discharge all monies and liabilities whether of principal, interest or otherwise, which now are or may at any time hereafter (and whether before, on or at any time after such demand) be due, owing or incurred by the Company to the Bank under or pursuant to the Loan Agreement, provided that the liability of the Guarantor under this Guarantee shall not exceed £50,000 plus such interest, charges and expenses as may be incurred by the Bank in connection with the Loan Agreement as from the date of demand being made of the Guarantor and as may be incurred by the Bank in enforcing this Guarantee."

Clauses 2.3 and 2.4 then provided:-

> "2.3 The Guarantor's liability under clause 2.1 is not affected by an arrangement which the Bank may make with the company or with another person which (but for this clause 2.3) might operate to diminish or discharge the liability of or otherwise provide a defence to a surety.
>
> 2.4 The Bank may at any time as it thinks fit and without reference to the Guarantor:
>
> > 2.4.1 grant time for payment or grant any other indulgence or agree to any amendment, variation, waiver or release in respect of an obligation of the Company under the Loan Agreement;
> >
> > 2.4.4 compound with, accept compositions from and make other arrangements with the Company or a person or persons

liable on other securities or guarantees held or to be held by the Bank."

8. The two initial 1996 loan agreements (96/782 and 96/783) themselves contained two provisions envisaging that some amendments to the terms of the loan agreements might be made in the future. First, the provision for interest was for 8.5% variable which, however, was not to exceed Royal Bank of Scotland base rate from time to time in force plus a margin of 2.5%. The second sentence of this provision was:-

> "Triodosbank reserves the right to vary interest rates and will give a minimum of one month's notice of any increase."

The terms and conditions on the reverse provided (inter alia):-

> "9 The loan may be repaid in part at any time. Subsequent repayments will be rescheduled under a new loan agreement between the Bank and the Borrower."

These provisions make it clear that the loan agreement itself has terms which, if they are invoked by the Bank, will amount to amendments or variations of the loan agreement. Clause 2.4.1 of the guarantee, giving the Bank authority to agree amendments or variations with the borrower without reference to the Guarantor must at least encompass such amendments or variations. In my view it will encompass such amendments or variations even if a new agreement is formally executed which "replaces" the old agreement because the fact of a new agreement would then be a matter of form rather than substance. What is less clear is the extent to which clause 2.4.1 is intended to cover amendments or variations which are not expressly contemplated in the original agreement.

9. As a matter of principle there is no reason why the right of the Bank under clause 2.4.1 to agree amendments or variations to the loan agreement without reference to the guarantor should be confined to amendments or variations which are expressly contemplated by the agreement; the clause must mean that anything rightly termed a variation or an amendment is a matter which can be agreed without reference to the guarantor. The question is then whether what is said to be an amendment or variation is correctly so called. To my mind an agreement which truly "replaces" the original loan agreement would not rightly be called an amendment or variation to the original agreement, since it will be a new agreement. This will be particularly true in the context of a guarantee which obliges the guarantor to pay sums falling due "under or pursuant to" a particular loan agreement. Once that loan agreement has been replaced by a second and different agreement, sums due under that new and different agreement cannot be sums due "under or pursuant to" an earlier agreement. For this purpose it does not matter whether the old agreement is discharged in the sense of the loan being fully repaid and a new agreement then made (in the technical sense of there being a novation) or whether there is a replacement agreement which is, for the future, treated as governing the parties' relationships. The new governing agreement is not the agreement "under or pursuant to" which there falls due the money which the guarantor has guaranteed to pay.

10. The reason why it is necessary, in the present case, to be moderately precise about all this is because the two 1998 loan agreements mirror the two 1996 loan agreements. The reason why there were two loan agreements in 1996 is that the purpose of the smaller loan of £400,000 (Agreement No 96/782) was stated to be to:-

> "Refinance existing borrowing from the Allied Irish Bank"

while the purpose of the larger loan which was not to exceed £500,000 (Agreement No 96/783) was stated to be to:-

"Finance the construction of 17 properties at the site known as Upper House Farm, Standard Street, Crickhowell, Powys."

The first of the 1998 loan agreements under which the Bank lent £380,000 (Agreement No 98/1056) provided:

"Replaces Agreement No: 96/782

. . . . . .

PURPOSE OF LOAN Rescheduling of existing borrowing under Agreement No: 96/782 between the Bank and the Borrower."

The second of the 1998 loan agreements under which the Bank lent "up to" £1,600,000 (Agreement No 98/1057) provided:

"Replaces Agreement No: 96/783

. . . . . .

PURPOSE OF LOAN Rescheduling of existing borrowing under Agreement No: 96/783 and the renovation of farm buildings and conversion to workspace together with the construction of 21 energy efficient homes at the site known as Upper House Farm, Standard Street, Crickhowell, Powys, NP8 1BP."

The above recitation of certain of the terms of the 1998 agreements shows that Agreement 98/1056 is merely a rescheduling of existing indebtedness (something which the 1996 agreement which it replaced specifically envisaged might happen) whereas Agreement 98/1057 was not just a rescheduling but an agreement for a substantially higher sum for purposes different from and additional to the 1996 agreement which it replaced.

11. It seems to me, therefore, (technical though this may be) that the first of the 1998 agreements, even though it is said to "replace" its 1996 predecessor, is no more than an amendment to or variation of it, since the rescheduling was envisaged in it. The second 1998 agreement is, by contrast, considerably more than a mere amendment or variation of the corresponding 1996 agreement: not only does it "replace" the earlier agreement but it triples the sum lent and provides that it is for a considerably extended building contract. That is not a contract which, in my view, Mr Dobbs agreed to guarantee.

12. This conclusion is not, however, critical to the resolution of this appeal because there is yet a third (1999) agreement and the vital question for the court is whether the Company's liability under this further agreement is something which Mr Dobbs has guaranteed. This agreement is called a "Facility Agreement", is dated 10th September 1999 and describes the amount to be lent, under the head of Maximum Commitment, as:-

"£2,600,000 . . . or such higher amount as the Bank in its absolute discretion may determine."

This Facility Agreement was one of a series of agreements signed on the same day including (1) a Deed of Priorities made between the Bank, the Company and the building contractor whereby those parties agreed a ranking as between them of the proceeds of realisation of securities granted by the Company to the Bank and the contractor and (2) an "Agreement in relation to the Rescheduling of Debt and the Amendment of a Construction Contract". This latter agreement made a number of

amendments to the terms of the construction contract as well as recording that the existing loan agreements had been "replaced" by "the New Loan Agreement" viz the September 1999 facility. The facility provided in clause 2 that it was to be used in paying costs associated with the Building Project for which purpose a Project Account was to be maintained (A/c no 02848300) in the books of the Bank. From that account was to be paid, among other amounts, sums due to the building contractors under the terms of both the original building contract and of the Re-scheduling and Amending Agreement as it was called in the Facility Agreement. This meant that the Company's indebtedness to the Bank included sums falling due and paid to the building contractors from the Project Account under contracts to which Mr Dobbs' original guarantee could not, in my judgment, have been intended to apply.

13. The new Facility Agreement was, therefore, considerably more than an amendment or variation of either the original loan agreements of 1996 or, indeed, the later loan agreements of 1998. It must be a question whether clause 2.4.1 of the guarantee contemplates more than one amendment or variation as being permissible. Even if a replacement of the 1996 contracts by later similar loan agreements can be regarded as an amendment or variation within that clause, a further replacement might be said not to be within the clause. But, on any view of the matter, a replacement on terms so different from the original agreement in the way I have attempted to set out in the previous paragraph cannot be an "amendment or variation" of the initial contract.

14. Authority

    It is, of course, the law that a material variation in the contract between the creditor and the principal debtor will discharge the guarantor, unless the variation is one to which he assented or which is provided for in the contract of guarantee. In his book (1898) on the Law of Principal and Surety, Mr Sidney Rowlatt (as he then was) said this:-

    > ". . . it is apprehended that assent, whether previous or subsequent to a variation, only renders the surety liable for the contract as varied, where it remains a contract within the general purview of the original guarantee . . . . If a new contract is to be secured there must be a new guarantee."

    This passage was retained in the second edition of the book (1926) edited by the son of (the by then) Rowlatt J with his father's encouragement and was adopted by Lord Atkin in his speech in Trade Indemnity Co Ltd v Workington Harbour and Dock Board [1937] AC 1, 21 with whom the other members of their Lordships' House concurred. The actual decision in that case was that a loan of £45,000 made by a building owner to a building contractor did not constitute an agreement " . . . for any alteration in or to" the building contract which the company had guaranteed. In much the same way I do not think that a facility agreement, whereby it was agreed that the debtor's account with the creditor should be debited with sums due under the building contract to which the debtor was a party, can be said to be an amendment or variation to a contract of loan. Even if, however, it could be said that such an agreement was, in principle, such an amendment or variation, the question would still arise whether it was "within the general purview of the original guarantee". Lord Atkin's approval has been followed in the later cases of The Nefeli [1986] 1 Lloyds Rep 339, 345 per Bingham J and Melvin v Poseidon (The Kalma) pages 11-12 of transcript of 18th June 1999 per Cresswell J.

15. We were referred to British Motor Trust Co Ltd v Hyams (1934) 50 TLR 230 in which a Mr Lord acquired two motor coaches under two hire-purchase agreements from the claimants and persuaded his mother-in-law to guarantee his obligations by a contract indorsed on the agreements in the following terms:-

> "We . . . guarantee the due and punctual payment by the . . . hirer of all . . . moneys payable by him under the within written agreement . . . and we further agree that this guarantee shall not be avoided . . . by the owners and the hirer making any variation in the terms of the said agreement . . . provided that no variation shall make us liable for a greater maximum sum under this guarantee than that for which we are at present or may become liable under the present terms of the said agreement."

Mr Lord fell into arrears and the claimant, instead of resuming possession, made a new single agreement with him by which the two earlier agreements were consolidated and the vehicles were regarded as being hired together so that Mr Lord could not acquire property in any one vehicle unless he paid all instalments due on both vehicles. Branson J (to whom Rowlatt J's work does not seem to have been cited) described the clause permitting variation to be:-

> "so wide that it was almost impossible to put any limit to the power to vary."

and added:-

> "It might be that the position of the debtor was so altered that he would be less able to repay the guarantor, but even such a change was not beyond the very wide power of variation contained in the guarantee."

16. I would not wish to doubt the correctness of this decision on its facts but I would make two observations. First it is important to distinguish between a true variation of an existing obligation and the entering of what is in fact a different obligation even though it may purport to be no more than a variation. In that sense it is perfectly possible (and, indeed, right) to put a "limit to the power to vary". Secondly the proviso to the guarantee ensured that in any event Mr Lord's mother-in-law was never going to be liable for more than whatever she would have been liable for under the guarantee in its unamended form. This is an even tighter proviso than a monetary limit such as that provided for in Mr Dobbs' guarantee. The tightness of the proviso would, no doubt, be one justification for giving a wide construction to the variation provision and enabling the new arrangement to be regarded as a variation of the old one.

17. The first of the above observations derives some support from Samuels Finance Group Plc v Beechmanor Ltd and others (1993) P&CR 282 where Lloyd LJ said after setting out the first of the above citations of Branson J in Hyams:-

> "One can perhaps imagine changes falling short of a novation which would yet be so fundamental that they could not properly be described as a variation at all. I will not attempt to say where the line is to be drawn."

It is, indeed, not easy to draw a hard and fast line between permissible and impermissible variations but in the present case the obligations arising from the 1999 facility are so different from those arising under the original pair of loan agreements that I have no difficulty in saying that the line has been crossed. In the Samuels Finance Group case itself the variation was comparatively minor and could well have been said to be within the "purview" of the original contract.

18. Neither of the above authorities referred to the requirement that any variation (even if there is advance agreement to a variation of the underlying loan agreement) must be within the "purview" of the agreement, but the passage in Rowlatt remains in the 5th edition (1999) para. 4-72 and, in my view, this requirement is still law.

19. In the light of all these authorities, the question that has to be answered is whether the new 1999 Facility is an amendment or variation of the original loan agreement which is within the purview of

that original loan agreement. The fact that the intermediate 1998 agreements were "replacements" of the 1996 agreements is not conclusive of that matter since a replacement could be contemplated by a original agreement (as the 1998 rescheduling was) or a replacement might be so similar to the original agreement that it can truly be said to be a variation of it, as in the British Motor case. In this case, however, the 1999 facility was substantially different from the original two loan agreements and even if it could be said to be, on one view, a variation or amendment of those original 1996 agreements, it is certainly not a variation or amendment within the purview of the 1996 agreements.

20. The judge came to a contrary conclusion influenced by Mr Levy's submissions that the essence of the facility and, indeed, the essence of the 1998 agreements was a "rescheduling of the loan" (see 25C of the transcript and the judge's later adoption of the term at 43F). In my judgment it was considerably more than that and, for that reason, I regret I cannot agree with him. Mr Dobbs has effectively been held liable as if his guarantee were an "all monies" guarantee of all sums due from the Company (albeit with a limit), but that is not what he agreed.

21. That means it is necessary to consider the second way in which the Bank puts its case which is that, by agreeing that the guarantee should continue to stand as a security for the 1998 loans and, then, the 1999 facility, Mr Dobbs is estopped by convention from contending that the guarantee does not, on its true construction, extend to the 1999 facility or (to put the matter slightly differently) is estopped from asserting that the Company's indebtedness under the 1999 facility is not an indebtedness pursuant to the 1996 agreements, as varied.

22. Estoppel by Convention

This is a difficult area of the law and a claimant who relies on the doctrine will be fortunate to obtain summary judgment. The judge has dealt with this aspect of the case in meticulous detail but, on balance, I do not feel that the Bank's claim is capable of being dealt with in a summary way. I would not quarrel with the statement of the law on the topic agreed by the parties and accepted by the judge. He expressed the first requirement of the doctrine as being that

> "the parties have made a common but mistaken assumption as to the meaning of an agreement or something very similar to such a mistaken assumption"

save to observe that the words "very similar to such a mistaken assumption" show the uncertain ambit of the doctrine. The essential matter, however, is that there should be a common assumption. This necessarily requires a finding of fact that each party made that assumption. It is also necessary to be clear what the assumption is. It is insufficient to say, as Mr Levy does say, that both parties assumed, in a general sense, that the guarantee continued to apply. What he has to show is that both parties assumed that the 1996 guarantee applied to the 1999 facility.

23. As to this, even if one takes it as clear that the Bank did so assume, Mr Dobbs' evidence is to the contrary. He accepts in paragraph 13 of his witness statement of 4th March 2002 that he thought he remained liable under the guarantee but he goes on to say in paragraph 14:-

> "However I can say that I did not understand or believe that, in so signing the loan agreements on behalf of the company, I was thereby guaranteeing or even expressing any agreement or intention to guarantee the £2m 1998 loan or, subsequently, the £2.6m 1999 loan. The 1998 and 1999 facilities were very much larger than the 1996 facility of £900,000. I never agreed to nor did I understand or believe that I remained liable for anything other than £50,000 of £900,000."

24. Mr Dobbs is there saying in express terms that he did not himself believe (or assume) that his guarantee applied to the 1999 facility. For judgment to be given on the basis of an estoppel by

convention, the court would have to disbelieve this assertion and find that Mr Dobbs did, in fact, assume that the guarantee applied to the 1999 facility and thus that the Company's indebtedness under that facility was an indebtedness under or pursuant to the 1996 agreement. It may very well be that he did so assume but it is not appropriate to make such a finding in summary proceedings when he himself says the precise opposite.

25. The judge approached (43E-F) Mr Dobbs' evidence with caution and then made his own objective assessment, which led him to the conclusion that Mr Dobbs thought the guarantee was a continuing security for the Company's borrowing after it had been rescheduled in 1998 and 1999. Quite apart from the fact that the 1998 agreements and the 1999 facility were much more than a mere rescheduling of early borrowing, it was with respect not right to make an objective assessment of the evidence without a trial if Mr Dobbs' assertion as to his state of mind was not to be believed.

26. It may be useful to say that I agree with the judge that the estoppel is not being relied on by the Bank as a cause of action and that Mr Dobbs cannot rely on the Statute of Frauds. To that extent Mr Dobbs' defences rightly failed for the reasons given by the judge.

27. For the reasons I have given, however, I cannot agree with the judge's disposition of the matter in his judgment of 26th March 2002. I would set aside the declaration which he made and leave the Bank to proceed to trial on the question of estoppel by convention if they are so minded.

**Lord Justice Neuberger:**

28. I agree.

Lord Justice Chadwick :

29. The first question for the judge was whether, as a matter of construction, the obligations of Acorn Televillages Ltd ("the Company") under the loan agreement dated 10 September 1999 ("the 1999 facility") were obligations for which Mr Dobbs was liable under the guarantee which he had executed on 26 April 1996. The judge answered that question in the affirmative. I agree with Lord Justice Longmore that the judge was wrong to reach that conclusion.

30. The question turns on whether, as a matter of construction, the obligations of the Company under the 1999 facility were in respect of "monies and liabilities . . . which . . . may at any time hereafter . . . be due, owing or incurred by the Company to the Bank under or pursuant to the Loan Agreement" (clause 2.1 of the 1996 guarantee) in circumstances in which (i) the Loan Agreement (in that context) means one or other (or both) of the two loan agreements numbered 96/782 and 96/783, (ii) the guarantee itself provided (at clause 2.4.1) that the Bank might, at any time and without reference to the guarantor, "agree to any amendment, variation, waiver or release in respect of an obligation of the Company under the Loan Agreement" and (iii) each of the two 1996 loan agreements contained an express provision (at condition 9) that the loan might be repaid in part at any time and that (if so) "Subsequent repayments will be rescheduled under a new loan agreement between the Bank and the Borrower".

31. As Lord Justice Longmore has explained, the two 1996 loan agreements were "replaced" by new loan agreements made on 4 November 1998. Agreement 96/782 was replaced by an agreement numbered 98/1056; and agreement 96/783 was replaced by an agreement numbered 98/1057. The first of those new agreements (98/1056) was expressed to be made for the purpose of "rescheduling existing borrowing under agreement No 96/782 . . ."; and it was for an amount (£380,000) which represented the balance of the loan (£400,000) which had been the subject of agreement 96/782. The second of those new agreements (98/1057), on the other hand, was expressed to be made not only for the purpose of rescheduling existing borrowing under agreement 96/783 (£500,000) but

also for what, as Lord Justice Longmore has explained, was the second stage of the development project ("the renovation of farm buildings and conversion to workspace together with the construction of 21 energy efficient homes at the site known as Upper House Farm . . .") and was for an amount (£1,600,000) which was substantially greater than the existing borrowing under agreement 96/783.

32. I agree that the Company's obligations under the first of the new loan agreements made in November 1998 (98/1056) were obligations within the scope of the 1996 guarantee. That is because agreement 98/1056 – although "a new loan agreement" - can properly be regarded as an agreement which was made in order to reschedule "subsequent repayments" under agreement 96/782 following repayment in part of the loan made under that earlier agreement. The 1998 agreement falls squarely within condition 9 of the 1996 agreement. The 1998 agreement is plainly a variation or amendment "in respect of an obligation of the Company under the Loan Agreement" for the purposes of clause 2.4.1 of the 1996 guarantee; and, on a true construction of the 1996 guarantee, the obligations under agreement 98/1056 are properly to be regarded as obligations "under or pursuant to" agreement 96/782 for the purposes of clause 2.1.

33. I agree, also, that the Company's obligations under the second of the new loan agreements made in November 1998 (98/1057) were not obligations within the scope of the 1996 guarantee. Agreement 98/1057 goes well beyond a rescheduling of the outstanding indebtedness under agreement 96/983. It was made for a purpose (phase 2 of the development) which went beyond the purpose of the original loan; and it was for an amount which included substantial "new money" (£1,100,000) in excess of the original loan (£500,000). It is, to my mind, impossible to regard agreement 98/1057 as an agreement of the nature contemplated by condition 9 of the earlier loan agreement; and it is impossible to regard agreement 98/1057 as an agreement which does no more than amend or vary "an obligation of the Company under [agreement 96/783]" for the purposes of clause 2.4.1 of the 1996 guarantee.

34. It is important to keep in mind that the underlying obligation of the guarantor under the 1996 guarantee – clause 2.1 – is in respect of monies and liabilities due, owing or incurred by the Company "under or pursuant to" the 1996 loan agreements. It is important to keep in mind, also, that the guarantor is not to be taken to have agreed that his liability under the guarantee would be increased or made more onerous by a subsequent agreement made between the lender and the borrower (to which he is not party) unless there are clear words in the guarantee which show that he did agree to be bound to a more onerous obligation in the future imposed without further reference to him. In the present case, clause 2.4.1 of the 1996 guarantee, read with clause 2.1, exposed the guarantor to the risk that his liability in respect of obligations of the Company under the 1996 agreement might be made more onerous by an amendment or variation *of those obligations*. Clause 2.4.1 did not expose him to the risk of liability in respect of additional obligations of the Company which were not properly to be regarded as an amendment or variation of existing obligations.

35. Although it may be said that agreement 98/1057 does amend or vary an obligation of the Company under agreement 96/783 – in so far as the later agreement reschedules repayment of the debt under the earlier agreement - the 1998 agreement imposes additional obligations which cannot be seen as an amendment or variation of any obligation in the 1996 agreement. In particular it imposes obligations to repay new monies lent for a different purpose. It cannot be said that the obligations of the Company under agreement 98/1057 (taken together) are no more than an amendment or variation of the obligations in agreement 96/783. Liability as guarantor in respect of the obligations of the Company under agreement 98/1057 is substantially more onerous than liability as guarantor of the obligations under agreement 96/783. It is no answer to say that the guarantor's liability under the 1996 guarantee is limited to £50,000. The risk that the guarantor will be called upon to pay £50,000 – in circumstances where the loan is secured by fixed and floating charges over the

borrower's assets (including the development site) – is substantially greater if the loan is £1.6 million than if the loan is £500,000.

36. It follows that, upon a true analysis, the position immediately before the 1998 agreements were replaced by the 1999 facility was that Mr Dobbs had remained liable on his 1996 guarantee in respect of the Company's obligations under agreement 98/1056; but that he was not liable as guarantor in respect of the Company's obligations under agreement 98/1057. The question then, as Lord Justice Longmore has pointed out, is whether the Company's obligations under the 1999 facility can be treated as obligations "under or pursuant to" agreement 96/782 – accepting, for this purpose, that the obligations under agreement 98/1056 were themselves properly to be regarded as obligations under or pursuant to the earlier agreement.

37. The answer, in my view, is plainly "No". It is difficult to regard the 1999 facility as the rescheduling of debt due under agreements 96/782 or 98/1056. The facility agreement provides, in terms, for draw-down to be applied to repay the existing indebtedness. But, even if the 1999 facility could be said to vary or amend an existing obligation under the 1996 agreement in that respect, it is beyond argument that the 1999 facility imposes new and different obligations in respect of the "Maximum Commitment" (£2.6 million); obligations which cannot be said to be by way of variation or amendment of any obligation under or pursuant to the 1996 agreement. And there can be no doubt that the obligation of a guarantor in respect of the borrower's obligations under the 1999 facility agreement would be substantially more onerous that the obligation in respect of agreement 96/782.

38. That leaves for consideration the second question that was before the judge. Is Mr Dobbs estopped by convention from contending that, upon its true construction, the 1996 guarantee does not have the effect that the Company's indebtedness under the 1999 facility is within its scope? For the reasons set out by Lord Justice Longmore that was not a question which could be determined on an application for summary judgment. Mr Dobbs' assertion that he never thought or assumed that his liability as guarantor extended beyond a total indebtedness of £900,000 should not have been dismissed, summarily, as incredible. He was entitled to a trial on that issue.

39. I agree that the appeal should be allowed; and that this Court should make the order which Lord Justice Longmore has proposed.

ORDER:

1. Appeal allowed. Declarations made by His Honour Judge Havelock-Allan QC on 26 March 2002 and paragraph 1 of the order of Lewison J made on 19 May 2004 be set aside.

2. The respondent to pay the appellant's costs of the appeal and below, to be the subject of detailed assessment if not agreed.

3. The appellant's costs to be set-off against the costs which Lewison J ordered the appellant to pay the respondent in paragraph 5 of his order dated 19 May 2004.

4. There shall be a case management conference on the first open date after 14 days before a Master of the Chancery Division.

(Order does not form part of approved Judgment)