English High Court Update: (Dis)Comfort Letters, Guarantees and Indemnities

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PRACTICES Shipping, Ship Construction and Conversion, Europe, Middle East and Africa, Ship Sale and Purchase, Energy Finance, Offshore Oil and Gas

Two recent decisions in the High Court of England and Wales, *IDBI Bank Ltd v Axcel Sunshine Ltd* [2025] *EWHC 442* (*Comm*) and *Jones v City Electrical Factors Ltd* [*2025*] *EWHC 414 (Ch),* reaffirm the importance of careful drafting in guarantee documents, comfort letters and the pitfalls of getting it wrong.

Where the intention is to create a conditional payment obligation, the parties should use unequivocal promissory language, which establishes a clear and expressly binding obligation. In these circumstances, the guarantee should explicitly set out the guarantor's primary obligation to pay on demand and confirm that such obligation is independent from any default of the primary obligor.

Where the intention is to create a "see-to-it" obligation, the parties should use specific language to adequately reflect the specific obligations, which the guarantor is undertaking to ensure that the primary obligor will perform.

Where the intention is to create both a conditional payment obligation and a "see-to-it" obligation, the parties should include both of the above and make clear they are separate and independent obligations of the guarantor.

Where the parties to a comfort letter do not intend to create any liability, they should ensure none of the above are included and the comfort provided is expressly non-binding.

When Is a Comfort Letter Not Very Comfortable?

The High Court has recently held that labelling a document as a "comfort letter" does not necessarily prevent that document from taking effect as a guarantee and indemnity (*IDBI Bank Ltd v Axcel Sunshine Ltd (2025)*). Parent companies, owners and shareholders, in particular, should take note of this decision, as it serves as a stark reminder of the consequences of failing to properly document the non-binding nature of the comfort being offered.

In *IDBI Bank v Axcel Sunshine,* the court reconfirmed the decision in *Associated British Ports v Ferryways NV [2009] EWCA Civ 189*, which established that even if a document is clearly labelled as a "comfort letter" (documents which are typically expressed to be non-binding), it is the substance of the document and its construction as a whole which determines its correct categorisation and the liabilities (if any) which flow from it. In *IDBI Bank v Axcel Sunshine,* the "comfort letter" had inadvertently granted a full guarantee and indemnity to the lender in respect of the obligations of the borrower under a US$67 million loan agreement, and, as the borrower had failed to repay that loan, the provider of the "comfort letter" was liable to repay the loan and accrued interest totalling nearly US$144 million. The court went on to clarify that the inclusion of wording that "…*we hereby irrevocably and unconditionally agree, confirm and undertake*…" and further the

general construction of the “comfort letter” meant the document bore all the hallmarks of a guarantee and indemnity. The wording was found to be promissory in nature and went far beyond simply providing the non-binding comfort typically associated with a comfort letter. The label attached to the “comfort letter” was disregarded as irrelevant in determining what (if any) liabilities were created in it.

What Type of Guarantee Am I Giving?

The High Court has also recently reconfirmed that the wording of a guarantee can create both a “see-to-it” obligation and also a “conditional payment” obligation (*Jones v City Electrical Factors Ltd (2025)*). At first glance, the distinction may not appear to be of any importance, but the parties to a guarantee should take note, as the distinction is potentially significant when calling on the guarantee. Guarantors and those taking the benefit of a guarantee should carefully consider the nature of the obligations being guaranteed and should reflect that accordingly in the construction of the guarantee document. Depending on the nature of the primary obligations, one type or the other (or both) may be desirable.

It is well established that a “see-to-it” guarantee creates only liability in damages - meaning that the guarantor’s liability is contingent on the establishment of the primary obligor’s liability, and the guarantor’s obligation is to *see to it* that the primary obligor performs its obligations.

Similarly, it is well established that a conditional payment guarantee (typically in the form of an indemnity) creates a direct liability in debt in respect of which the beneficiary of a guarantee could file a bankruptcy petition under section 267 of the Insolvency Act 1986. In these cases, the guarantor’s liability depends only on the service of a payment demand.

In *Jones v City Electrical,* the guarantee contained the following language:

(i) “…we hereby unconditionally guarantee the due and punctual performance and discharge of all …obligations under or pursuant to …”

(ii) “…we hereby unconditionally guarantee … the due and punctual payment on demand of all sums now or subsequently payable … under or pursuant to …”

The court held that (i) above was a “see-to-it” guarantee and that (ii) above was a “conditional payment” guarantee.

The court noted that the inclusion of both (i) and (ii) above meant that the parties intended there to be a distinction in the guarantor’s obligations. The court added the underlying contract was for the supply of goods and services on credit, the obligation for payment on demand in part (ii) was clearly and directly owed by the guarantor to the supplier, without the need for the guarantor to see to it in respect of the primary obligor’s obligation.

Conclusion

Parties are often tempted to keep guarantees and comfort letters as short and as simple as possible, but there is a clear need to be very precise about the existence and nature of the obligations intended to be created. Those taking the benefit of a guarantee should make that document absolutely clear and unambiguous as regards the obligations being created, and those giving comfort letters should make that document absolutely clear and unambiguous as regards the non-binding nature of the comfort being provided. Although these cases are of primary concern to parties to a finance transaction, the interpretation and categorisation of guarantees can have wider

implications for owners, builders and manufacturers in large infrastructure projects and shipbuilding transactions where financial and performance guarantees are also common.

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