The bank, the property developer, the dentist and his solicitor

Partners may find themselves jointly and severally liable for monies advanced to any or all of them for purposes they knew nothing about, warns **Andrew Petersen**

AN UNUSUAL feature of the House of Lords case *AIB Group (UK) plc (formerly Allied Irish Bank plc and AIB Finance Ltd) v Martin* [2001] UKHL 63 reported at [2002] 1 WLR 94 is that the appellants, despite losing, attracted the sympathy of all five law lords (including the Lord Chancellor) and at least two judges of the court below.

Facts

In the 1980s, David Martin ('M'), a property developer in Newcastle-Upon-Tyne, acquired a large portfolio of residential properties on his own account and in separate partnerships with, among others, Alan Gold ('G') on the back of finance provided by AIB ('the Bank'). G, a dentist practising in London, took little interest in the business, and in practice G's brother, a solicitor in Newcastle, acted for G and advised him on the terms of any acquisitions. For each transaction a separate bank account was opened. Business was rosy for M and G during the 1980s, but in 1991 the Bank, faced with an overdraft of £717,000 in the name of M alone and being, in the words of Jacob J "particularly confused as to which particular individual was responsible for which particular different property" required an audit of its accounts and security with M.

As a result of the audit, two facility letters were issued to M and G in February 1993. The first consisting of a loan of £1.71m, to M and G jointly, the second consisting of £591,000, to M alone. G signed the first letter at the request of M at Victoria Station in London on the basis that M would give it to G's brother for approval (once again indicating the level of care G gave to his affairs). Apparently this was not done and the letter executed by both, together with the second executed by M alone, was returned direct to the Bank.

In July 1993, a mortgage was granted by M and G respectively providing security for the facility letters. G signed this mortgage after it had been reviewed by his brother. Clause 1 provided that if the expression "the mortgagor" included more than one person (which it clearly did) it was to be construed as referring to all and/or any one of those persons and that the obligations of such persons were joint and several. Standard stuff you may say. By cl 2, the mortgagor covenanted to repay all sums advanced to the mortgagor, and all other indebtedness and/or liabilities of the mortgagor to the bank, whether alone or jointly.

High Court decision

In due course there was a default on the payments due to the Bank under the facility letters and the Bank sought to enforce the mortgage against G and M jointly in the High Court (Jacob J). Before the judge there was no dispute as to the meaning of those provisions, with the judge commenting that the effect of the clause was plain, obvious and frightening in its effect resulting in each partner being liable not only for partnership debts but for the debts of the others on their own accounts. Reluctantly he gave judgment for the Bank.

Appeal dismissed

G appealed, contending that Jacob J had wrongly conceded that the meaning of the provision was not in dispute. It was emphasised in particular that G could only participate in the profits of the partnership venture including him and not in any of the other ventures, and that the facility letters did not show that G had accepted a separate indebtedness for the liabilities of M. The Court of Appeal, again with some reluctance, dismissed G's appeal, holding that (1) It was common ground that if the construction in the court below was wrong the Court of Appeal could adapt it notwithstanding that a concession had been made citing *Donaghey v P O'Brien* [1966] 1 WLR 1170; and (2) "David Martin and Alan Gold" had to be read as "David Martin and Alan Gold or any one of them" as provided for by cl 1. Once this was recognised M's obligation to pay was a several liability of G and vice versa. Sedley LJ was particularly reluctant and said if he could be persuaded that there was any intellectually respectable way of relieving G of his liability with which he has been burdened, he would have wanted to hear from Counsel for the Bank as to why he should not adopt it. Sir Christopher Slade said he had considerable sympathy with G because he suspected that in executing the mortgage he had no idea he was assuming liability for the sole debts of M.

House of Lords

After an initial refusal of leave G, with the permission of the Appeal Committee, appealed to the House of Lords. At the hearing G's Counsel contended that the mortgage should be given a "distributive" construction, with the consequence that G and M were under a joint and several liability in respect of monies advanced to them jointly, but only under a several liability in respect of monies advanced to them separately. Lord Millet found this argument very attractive and put forward a scholarly "way out"; but his brethren did not take it up. He then reluctantly agreed with their unanimous view. Dismissing the appeal, the law lords held that no process of construction could avoid the conclusion that G and M had covenanted to pay sums advanced by the Bank to M alone. Clause 1 was not three separate covenants, one by G and M jointly and one by each of them individually. It was a single joint covenant by both of them to pay "all sums of money ... advanced to the mortgagor". "The mortgagor" meant the both and/or each of them.

In addition to their lordships' sympathy for the appellant, the case is also noteworthy for the way the phrase *reddendo singular singulis* is bandied about as if Lord Woolf had never banished Latin from the courts.

And finally

The story does end with some success for G. Lord Hutton, with some satisfaction, pointed out that Jacob J, when deciding the *non est factum* point, found the real intention of the parties did take into account the joint liability. Lord Hutton noted that G's brother, upon whom G relied entirely, fully understood that the mortgage had the effect for which the Bank contended. G's brother even ensured that such a clause did not apply when he and his brother gave supporting security for a further project of M. This reasoning presumably helped G succeed in an action for negligence against his brother's firm, an action that at the time of judgment was still being pursued with the insurers. To date, it is not known if G still relies fully on his brother for advice, or if his brother relies on G for his dental treatment ■

Andrew Petersen is a barrister employed in the banking department of Dechert, London EC4