CLIFFORD
CHANCE

Client briefing April 2017

Is there still a future for rental guarantees (Part IV)?

Hoge Raad (Dutch Supreme Court) 17 February 2017 Hansteen vs. Mr J.L.G.M. Verwiel q.q.

The central theme of this client briefing is formed by section 39 of the Dutch Bankruptcy Act ("DBA"). This section permits the liquidator (*curator*) of a bankrupt tenant (*huurder*) to early terminate its rental agreement (*huurovereenkomst*) with the landlord (*verhuurder*), with due observation of a notice period of at maximum three months (unless the rent has been prepaid for a longer period). Rental payments falling due during this notice period are deemed to be estate claims (*boedelvorderingen*) and as such enjoy a high priority.

In April 2011 and December 2013 we published two client briefings in relation to the following three cases decided each by the Dutch Supreme Court (*Hoge Raad*) viz:

1. Aukema q.q. vs Uni-Invest B.V. (14 January 2011) in which it was held that, in case of an early termination of the rental agreement by the liquidator in the bankruptcy of the tenant on the basis of section 39 DBA, a claim by the landlord for contractual damages was not allowed as this would be contrary to the purpose of section 39 DBA; moreover it was explicitly confirmed that an early termination of the rental agreement by the liquidator is a termination for just cause with does not give rise to a claim for (further) damages.

2. Romania Beheer B.V. (15 November 2013) in which it was decided that although the landlord's claim for contractual damages was not allowed against the bankruptcy estate (*boedel*) of the bankrupt tenant, such a claim could be validly made against the guarantor of such claim whereby the Dutch Supreme Court made a distinction between the bankruptcy estate of the bankrupt tenant and the tenant *in personam*; it was also held in that case that any possible recourse claim (*regresvordering*) of the guarantor against the bankruptcy estate insofar as it would exceed the non-verifiable part of the landlord's claim against the tenant, could also not be exercised against the bankruptcy estate; and

3. Transeuropean-properties IV NL Autodrome B.V. vs. Mr J.C.M. Silvius and Mr P.J. van Steen q.q., 22 November 2013, in which it was held that the doctrine developed by the Dutch Supreme Court in the Aukema qq / Uni-Invest B.V. case in respect of rental agreements also applied to rental agreements forming part of financial sale- and- lease- back transactions.

Recently, in the case of Hansteen vs. Mr J.L.G.M. Verwiel q.q., the Dutch Supreme Court added another chapter to this somewhat somber saga. And it does not get more cheerful.

The facts of the case to the extent relevant for this client briefing, are as follows:

- on 1 October 2008 Bouwgros Holding B.V. sold a commercial property, which it had rented out to its subsidiary Bouwgros B.V. ("Bouwgros"), to Hansteen; the rental agreement was continued between Hansteen and Bouwgros;
- ABN AMRO Bank N.V. ("ABN AMRO") issued on the request of Bouwgros a bankguarantee dated 8 September 2008 (the "bank guarantee") to and in favour of Hansteen, such on request of Bouwgros; The

bank guarantee was issued for a maximum amount of EUR 881,832.80;

- on 3 June 2009 Bouwgros was declared bankrupt and Mr Verwiel was appointed as its liquidator;
- with his letter of 16 June 2009 the liquidator terminated the rental agreement with due observance of the statutory notice period of 3 months on the basis of section 39 DBA;
- eventually, the commercial property was returned by the liquidator to Hansteen on 8 October 2009; and
- in the meantime ABN AMRO paid to Hansteen an amount of EUR 881,832.80 pursuant to the bank guarantee and ABN AMRO obtained payment from Bouwgros of the corresponding amount under the counter-guarantee (*contragarantie*) issued by it in favour of ABN AMRO, by setting off the amount of the claim against a deposit in the account maintained by Bouwgros in its books.

The liquidator did not agree to the foregoing and went to court, demanding, *inter alia*:

(a) a declaration from the court (*verklaring voor recht*) that Hansteen was not entitled to draw under the bank guarantee in excess of a certain amount which was determined on the basis of the arrears in rental payments in accordance with section 39 DBA; and

(b) payment to the liquidator of the excess amount received by Hansteen from ABN AMRO through its payment under the bank guarantee.

In first instance the district court (*Rechtbank*) of Amsterdam rejected the demands from the liquidator referred to above. In appeal the court of appeal (*Gerechtshof*) found that Hansteen was partly unjustly enriched (*ongerechtvaardigd verrijkt*) to the detriment of the bankruptcy estate by the combination of rental agreement, bankguarantee and counter-guarantee resulting in Hansteen receiving the full amount of its contractual damages claim under the rental agreement (via the payment by ABN AMRO under the bank guarantee) while such payment came at the cost of the bankruptcy estate through the exercise by ABN AMRO of its right of set off, as explained above.

Both parties appealed in highest instance to the Dutch Supreme Court from the court of appeal's intermediate judgment. The Dutch Supreme Court found in favour of Hansteen. In doing so the Dutch Supreme Court repeated the considerations used in its judgment in the Aukema/ Uni-Invest case referred to above in respect of the scope and content of article 39 DBA. It also made the same distinction between the bankruptcy estate on the one hand and the bankrupt person on the other as it had made in the Romania Beheer case. On this basis the Dutch Supreme Court held that a claim for damages by Hansteen pursuant to the early termination of the rental agreement based on the relevant clauses of such rental agreement was not void vis-à-vis the bankrupt person itself (although it could not be filed for verification in the bankruptcy estate nor otherwise be brought to the detriment of such bankruptcy estate). Similarly the Dutch Supreme Court held that the scope and content of the bank guarantee were not changed by the bankruptcy of the tenant and the early termination of the rental agreement pursuant to article 39 DBA. However, still according to the Dutch Supreme Court, any right of recourse of the guarantor against the bankrupt tenant cannot be exercised against the bankruptcy estate. In this respect it does not matter in which way recourse (*verhaal*) is sought against the bankruptcy estate; the nature of the claim stands in the way of such recourse claim being brought to the detriment of the bankruptcy estate, such in view of what is considered above about the ratio on which article 39 DBA is based.

On the basis of the facts determined by the court of appeal, the Dutch Supreme Court concluded that Hansteen was not unjustly enriched by receiving the payment under the bankguarantee. In the first place, in its relationship with ABN AMRO it was entitled to make the claim under the bankguarantee and secondly, receipt by Hansteen of the payment from ABN AMRO was not made unjust because ABN AMRO took recourse against the bankruptcy estate while the liquidator had not contested this apparently.

Overall conclusions

First of all the doctrines developed in the cases discussed in the two client briefings specified above also apply to independent bank guarantees issued to and in favour of landlords of (commercial) property.

To the extent that such guarantors wish to take recourse against the bankruptcy estates of such tenants, in case the liquidator has terminated the rental agreement pursuant to article 39 DBA and such recourse relates to rental payments falling due after the date of bankruptcy and exceeding the applicable period specified in section 39 DBA this may be in violation of section 39 DBA. In this respect it does not matter in which way recourse is sought

against the bankruptcy estate as the nature of the claim prohibits that it is brought to the detriment of the bankruptcy estate. The foregoing even seems to apply in case the (bank) guarantor is secured by a pledged deposit on an account of the bankrupt tenant with such (bank) guarantor.

It also seems to be the case that section 39 DBA does not prohibit contractual damages being claimed and filed for verification in the bankruptcy of the tenant, to the extent that such damages arise as a consequence of, for instance, default by the tenant/liquidator in respect of the redelivery conditions or the obligation to keep the property insured.

Observations

It seems that the Dutch Supreme Court in its judgment in the case at hand has disregarded two basic principles of Netherlands law.

First of all it seems that the Dutch Supreme Court ignores the fact that a bank guarantee (such as the bank guarantee in the present case) creates an independent obligation from the bank vis-à-vis the beneficiary (Hansteen in this case) which is abstract from the underlying relationship between (in this case) the landlord and the tenant. The tenant issues a counter-guarantee in favour of the bank in which the tenant agrees to indemnify the bank for all amounts paid by the bank under the bank guarantee to the landlord. That is the nature of the bank's claim vis-à-vis the tenant (and the tenant's bankruptcy estate) and not the rental agreement (as the Dutch Supreme Court seems to assume).

Secondly, a bank will in the vast majority of cases when it issues an independent bank guarantee on the request and instruction of its client, obtain security in the form of a pledged deposit or a credit balance on a blocked (and pledged) bank account of such client in the bank's books. We believe that this is also the case in the matter at hand. In its judgment the Dutch Supreme Court considers that a guarantor having made a payment under its guarantee to the landlord, cannot exercise its right of recourse against the bankruptcy estate of the tenant and that it does not matter in which way recourse is sought against the bankruptcy estate. This seems to ignore that a creditor having the benefit of a right of pledge does not have to file his claim for verification with the liquidator of the bankruptcy estate and can (as a so called "separatist") exercise its rights against the tenant as if the latter was not declared bankrupt.

In our view it is evident that the Dutch Supreme Court is rather persistent in its wish to ensure that the bankruptcy estates of bankrupt tenants will not be confronted with ever increasing debts in respect of rental agreements which serve no longer any purpose. In doing so the Dutch Supreme Court even seems to be willing to go to highly unusual lengths and to disregard the wishes existing in real estate practice.

This being as it is, we see a number of ways going forward, which might salvage at least something of the rental guarantee business.

1. Parties could agree to limit the scope of the (bank) guarantees issued in respect of the tenants' obligations under rental agreements to those obligations which would not be hit by the provisions set out in article 39 DBA. This will help going forward, but will not solve any issues which might arise in respect of existing bank guarantees.
2. Parties could consider creating bankruptcy remote vehicles which instruct banks to issue bank guarantees in respect of the obligations of other group companies under rental agreements entered into with landlords outside the group. Such vehicles should issue counter-guarantees in respect of such bank guarantees secured by appropriate security (usually pledged deposits). Obviously this will entail costs and is probably only achievable for large corporates.
3. Finally, parties could agree to amend their existing rental agreements by inserting a provision in such agreements whereby it is agreed that the rental agreement will be automatically terminated in the event of a bankruptcy or moratorium of the tenant, thus staying out of the scope of section 39 DBA (in case of bankruptcy) and section 238 DBA (in case of moratorium). That is, unless the Dutch Supreme Court overturns its own decision in the BaBy XL case of 13 May 2005 (JOR 2005/222 m.nt. Van Andel). We refer to our client briefing of December 2013 for a further explanation of this case.

All in all it is sad to see to what lengths one has to go in order to repair the damage caused by judgments which do not do justice to the demands made by society and practice.

Contacts

Jelle Hofland
+31 20 711 9256
jelle.hofland@cliffordchance.com

Jaap Koster
+31 20 711 9282
jaap.koster@cliffordchance.com

Pieter van Welzen
+31 20 711 9154
pieter.vanwelzen@cliffordchance.com

Nanette Rutgers
+31 20 711 9162
nanette.rutgers@cliffordchance.com

Theo Kliebisch
+31 20 711 9138
theo.kliebisch@cliffordchance.com