

## How conclusive is your conclusive evidence clause?

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Conclusive evidence clauses are commonly found in well drafted commercial and banking documents and, for factors and discounters, their importance should not be overlooked. Generally, a certificate issued under a conclusive evidence clause is, in the absence of fraud or obvious error on the face of it, conclusive of both the liability and the amount of the debt owed by the borrower. However, because of the different ways in which conclusive evidence clauses may be drafted, the precise effect of the clause is dependent on its specific wording and formulation.

The practical benefit of a conclusive evidence clause is that it saves the party relying on it having to undertake an extensive, time consuming and potentially expensive investigation in order to determine the amount owed by the borrower.

### The approach of the Courts

In the case of *ABN Amro v Ambrose, McGinn & Others* the High Court considered the construction of a conclusive evidence clause in a deed of indemnity. In this case the defendants were directors of ABN's client and each of them had entered into a deed of indemnity in favour of ABN Amro which contained at clause 3 the following statement:

"For the purpose of determining my liability under this Indemnity I shall be bound by any acknowledgement or admission by the Company and by any judgment in your favour against the Company. For such purpose and for determining either the amount payable to you by the Company or the amount of any losses, costs, damages claims (whether prospective or actual and whether as claimant or defendant) interests and expenses ("Losses") I shall accept and be bound by a certificate signed by any of your directors. In any proceedings such certificate



shall be treated as conclusive evidence (except for manifest error) of the amounts so payable or of any Losses. In arriving at the amount payable to you by the Company you shall be entitled to take into account all liabilities (whether actual or contingent) and to make a reasonable estimate of any contingent liability.”

The company became insolvent and many of the debts were disputed. ABN commenced proceedings against the defendants under the deeds of indemnity and served certificates of indebtedness contending that these were conclusive based on clause 3. The defendants denied any liability to ABN arguing that the deed of indemnity was a performance bond not a contract of indemnity and, as such, their liability to ABN was a secondary obligation requiring ABN to exhaust every possible course of recovery before pursuing a claim against the defendants. If this analysis was correct then, in addition, they argued that they were released from any liability because of material variations made to the ABN invoice finance facility agreement.

## The decision

The High Court, however, decided that this defence had no real prospect of success at trial because clause 3 imposed primary, not secondary, liability on the defendants. The wording of the deeds made clear that it was an indemnity thereby suggesting the assumption of primary liability on the part of the defendants, and the reference in clause 3 to a reasonable estimate of contingent liability showed that liability was not dependent on any conclusive determination of liability against the company, another compelling indication that the defendants liability was primary rather than secondary.

The High Court also ruled that the defendants’ claim that the certificates contained a manifest error because ABN had not collected all outstanding debts failed on the basis that there was no such error as there was no positive obligation on ABN to collect those debts. Accordingly, as clause 3 precluded the defendants’ dispute as to the amount owed, the Court granted summary judgment in favour of ABN.

## The importance

For factors and discounters the importance of a conclusive evidence clause should not be underestimated. A well drawn clause will help to avoid long and costly arguments as to the liability of a guarantor or indemnifier, and as to the amount due. Whilst to a certain extent the ABN case turns on its own specific facts, it is reassuring to know that the courts are willing to preserve the purpose and effect of a conclusive evidence clause if correctly drafted. In practice we often come across documents which either do not contain a conclusive evidence clause or contain clauses which do not achieve their desired effect due to poor drafting.

As we are experts in drafting finance and security documentation for factors and discounters, and regularly rely on conclusive evidence clauses in recovering monies owed to our clients, we are very aware of the importance of these clauses.



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