Neutral Citation Number: [2024] EW Misc 16 (CC)

Case No: No 26 of 2024

IN THE COUNTY COURT AT BRISTOL
BUSINSS AND PROPERTY WORK

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 23 April 2024

Before :

HHJ PAUL MATTHEWS

- -

IN THE MATTER OF EVAN LAURETZ MAINDONALD
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

DOWNING LLP	**Petitioner**
- and -	
EVAN LAURETZ MAINDONALD	**Respondent**

- -
- -

James Davies (instructed by **Brecher LLP**) for the **Petitioner**
John Churchill (instructed by **Keystone Law**) for the **Respondent**

Hearing dates: 15 April 2024

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this revised version as handed down may be treated as authentic.

....

This judgment will be handed down by the Judge remotely by circulation to the parties or their representatives by email. The date and time for hand-down is deemed to be 11:00 am on 23 April 2024.

HHJ Paul Matthews :

Introduction

1. This is my judgment on the hearing of the bankruptcy petition presented by Downing LLP against Evan Lauretz Maindonald. It was presented at the County Court at Gloucester on 2 August 2023, but transferred to Bristol by order of DJ Napier on 7 February 2024. I heard it on 16 April 2024, preceded by an application by the respondent to adjourn the hearing or alternatively stay the bankruptcy proceedings until after 31 May 2024. I refused the respondent's application for reasons given orally at the time. The matter had been listed before me for two days, but in the event the whole hearing was completed on the first day. I am grateful to the parties and all the lawyers involved for enabling the matter to be dealt with so expeditiously. I also wish to express my gratitude to both counsel for the quality of the arguments presented on this matter.

2. The petitioner is the security agent for Downing Development Lending Ltd ("the lender"), and is authorised to enforce that company's security on its behalf. The respondent is a property developer, who formerly controlled Lime Grove Tuffley Ltd ("the borrower"), a property development company. The petition states that the respondent owes the petitioner the sum of £835,959.12, which became due on 8 March 2023.

3. Under a facility letter dated 31 July 2019, the lender made loan facilities available to the borrower, up to a limit of £5.3 million. The petitioner says that the borrower failed to make a required repayment of £400,000 to the lender by 29 October 2021, which (it says) was an event of default entitling the lender to make demand of the borrower for repayment of the whole of the outstanding loans. The lender made such demand upon the borrower on 22 February 2023 for £4,617,299.38. No repayment has been made. The borrower was put into administration by the petitioner on 10 March 2023. A loan statement from the petitioner dated 21 November 2023 shows the total indebtedness at that date as £6,272,615.25.

4. The respondent entered into a written guarantee dated 31 July 2019, guaranteeing payment to the lender on demand of the liabilities of borrower. These liabilities are relevantly expressed as follows:

> "2.1 Guarantee and Indemnity – General
>
> In consideration of the Lender providing time and credit facilities to the Principal and granting the Facility to the Principal, the Guarantor irrevocably and unconditionally:
>
> > (a) guarantees to the Security Trustee punctual payment and performance by the Principal of all monies and all obligations and liabilities now or hereafter due, owing or incurred by the Principal to the Security Trustee and/or the other Secured Parties (or any of them) or any respective assignee or successor whether express or implied, present, future or contingent, joint or several, incurred as principal or surety, originally owing to the Security

Trustee and/or the other Secured Parties (or any of them) or any respective assignee or successor or otherwise acquired by the Security Trustee and/or the other Secured Parties (or any of them) or any respective assignee or successor …

(b) undertakes with the Security Trustee that whenever the Principal does not pay any amount when due under or in connection with any Finance Document the Guarantor shall immediately on demand pay that amount as if it was the principal obligor …

[…]

2.3. Continuing Guarantee

This Guarantee is a continuing guarantee and will extend to the ultimate balance of the Guaranteed Obligations, regardless of any intermediate payment or discharge in whole or in part."

Procedure

5. Following the failure of the borrower to make repayment, demand was made under the guarantee on the respondent on 8 March 2023. The respondent's liability under the guarantee is limited to the sum of £760,000, plus interest from demand, costs and expenses. On 24 May 2023 a statutory demand dated 31 March 2023 in the sum of £771,493.56 was served on the respondent, being the sum claimed as at that date. The respondent did not comply with the statutory demand, and nor did he apply to set it aside. As at the date of the petition, the total amount claimed, including interest and costs, had increased to £835,959.12. The petitioner's allegations (i) that the respondent's centre of main interests is in the United Kingdom and (ii) that he is resident in England and Wales have not been challenged.

6. The respondent made a witness statement dated 26 October 2023 in opposition to the petition. This witness statement set out much of the background, and also detailed evidence underlying his legal submissions. The respondent's opposition to the petition in his statement is based on three main matters. The first is that in his submission the guarantee has been discharged by subsequent changes to the borrower's liability. The second is that there is a counterclaim which goes to set off or reduce his liability. The third matter is that he wishes to prepare a proposal for an IVA to be put to his unsecured creditors. The third matter was the basis of the application to adjourn or stay the bankruptcy proceedings. However, as that application failed, I need say no more about it in this judgment. But I will come back to the other matters.

7. On 23 November 2023, a member of the petitioner partnership, Parik Chandra, made a witness statement in response to that of the respondent. On the evidence before me, there is no substantial disagreement between the parties at least as to the main events which occurred. What the parties largely disagree on is the interpretation of some of the documents and their legal effect.

The facility letter and its three amendments

8. As I have said, the facility letter and the guarantee were entered into on 31 July of 2019. The respondent signed both documents, the former in his capacity of director of the borrower and the latter in his personal capacity as guarantor. The facility letter provided for a "Final Repayment Date" of loans made, defined as "the date falling 18 months from the date of this Agreement, as varied from time to time by an Extension Notice signed by the Borrower and the Lenders".

9. The terms of the facility letter provided in clause 5 for a mechanism for the drawdown of funds. This involved (i) a written request for an advance in a certain amount, (ii) the valuation of work done by an independent third party, the project monitor (in effect a quantity surveyor), and (iii) the release of funds limited to the amount of the valuation of work. It appears that from July 2019 through to October 2020 every request for drawdown was paid in full, presumably on the basis that the work that had been done was valued at the amount requested and then paid at that value. However, from about October 2020 the majority of requests for drawdown were not met in full.

10. The evidence is silent as to why this was so. The respondent's counsel told me, after taking specific instructions, that this was both because the work done was valued at less than the drawdown request and also because the lender failed to release funds even to the value attributed to the work done. However, as I say, there is no admissible evidence of the latter point, and indeed there are not even any particulars of it. It is a bare assertion in oral argument. At all events, according to a schedule exhibited to the respondent's witness statement, by August 2021, the borrower had requested drawdowns amounting to about £415,000 greater than the amounts actually released to it.

First amendment

11. The facility letter was amended for the first time by letter dated 18 December 2020. The amendment letter was signed by Mr Chandra on behalf of both the lender and the petitioner, and countersigned by the respondent on behalf of the borrower and on his own behalf as guarantor. The purpose of the amendment was to increase the total facility from £4.2 million to £4.5 million (in each case excluding interest and fees). The parties were legally represented.

Second amendment

12. The facility letter was amended for the second time by further letter dated 26 August 2021, because it had become clear that £4.5 million would not be sufficient to complete the development. Once again it was signed by Mr Chandra on behalf of both the lender and the petitioner, and countersigned by the respondent on behalf of the borrower and on his own behalf as guarantor. The respondent also signed two other letters dated 26 August 2021. The first was as sole director of the borrower giving certain confirmations in relation to the security of the lender. The second was to confirm that the lender might continue to rely on the guarantee in respect of the loan facility made available to the borrower under the facility letter. It appears that, again, solicitors were

involved in the preparation of each of these documents, and advising each of the parties.

13. The second amendment to the loan facility provided for a further increase in the limit to £5.865 million. However, there were other amendments made to the transaction as well. One was that the development was now to be divided into two phases, and funds were allocated separately for them. Another matter was that, by new clause 6.1.2 of the facility letter, the borrower undertook to "repay £400,000 on before 5 PM on 31 August 2021". A new clause 9.2 referred to this new obligation in providing that "the Borrower shall only be liable to pay 50% of the Exit Fee if, on or before 5 PM on 31 August 2021, the Lender receives at least £400,000 from the Borrower towards prepayment of the Loans in accordance with clause 6.1.2". A new definition of "Higher Interest Rate" referred to a rate of "20% per annum unless the Lender receives an amount in excess of £400,000 in cleared funds from the Borrower on or before 5 PM on 31 August 2021 … " when the rate would be 15%.

14. However, the borrower did not pay the sum of £400,000, or any sum, to the lender or its agent by 5 PM on 31 August 2021, or indeed at any time thereafter. On 29 September 2021, the petitioner wrote to the borrower (marked for the attention of the respondent) reciting the borrower's obligation to repay £400,000 by 31 August 2021. It noted that failure to do so would constitute an Event of Default under clause 15.1 of the facility, entitling the lender (amongst other things) to declare that *all* sums owed under the facility, interest and other sums became immediately due and payable. The letter stated the lender's agreement, without prejudice to its rights (which were reserved), to delay any enforcement action of the type which it could take, but only on certain conditions. These included a condition that "You repay £400,000 on or before 5 PM on 29 October 2021". In the event of failure to comply, the lender reserved the right to take immediate enforcement action against the borrower in accordance with the terms of the agreements between them.

15. On 7 February 2022, the petitioner wrote again to the borrower (once more marked for the attention of the respondent), reciting the borrower's obligation to repay £400,000 by 31 August 2021, the letter of 29 September 2021 and the condition to repay £400,000 by 29 October 2021, and noted that the borrower had again failed to comply. The petitioner expressly reserved the right to take immediate enforcement action against the borrower without further notice. The letters of 29 September 2021 and 7 February 2022 were exhibited to the witness statement of Mr Chandra, who comments on them in his statement. They are not referred to however in the witness statement of the respondent. Yet he does not challenge that they were written and sent. No response to either letter is mentioned in the evidence or exhibited to any of the statements. I infer that none was sent.

Third amendment

16. There was then a third amendment to the facility letter, completed by deed on 22 June 2022. No lawyers were involved in this amendment, and the documentation was produced by the lender "in-house". All the signatures to the deed of amendment were attached electronically. The respondent executed the

deed on behalf of the borrower as a director of the company. There was no separate signature by the respondent as guarantor, and neither was there any confirmatory side letter. The deed of amendment reduced the total value of the facility from £5.865 million to £5.271 million. It redefined the expression "Final Repayment Date" as "within 30 days of receiving the written demand from the Original Lender and the Agent to repay the Loans". Amongst other things, amendments were also made so as in effect to remove the division of the works into two phases (which had been achieved by the second amendment to the facility letter).

17. The deed of amendment went on specifically to deal with the problem of the borrower's obligation to repay £400,000. It relevantly provided as follows:

> "4. RESERVATION OF RIGHTS
>
> 4.1. Pursuant to Clause 6.1.2 of the Facility Letter, the Borrower was required to repay £400,000 to the Lender on or before 5 PM on 31 August 2021.
>
> 4.2. The Borrower has failed to comply with clause 6.1.2 of the Facility Letter and therefore, the Loan is in default. This constitutes an Event of Default under clause 15 of the Facility Letter entitling the Lender to:
>
> > 4.2.1. Cancel the Facility, at which time they shall immediately be cancelled; and/or
> >
> > 4.2.2. Declare that all or part of the Loans, together with accrued interest, and all other amounts accrued under the Finance Documents be immediately due and payable, at which time they shall become immediately due and payable; and/or
> >
> > 4.2.3. Declare that all or part of the Loans be payable on demand, at which time it shall immediately become payable on demand,
>
> and at any time thereafter the Security Trustee may, without prejudice to its rights under the Security Documents, enforce any or all of the Security Documents.
>
> 4.3. Notwithstanding the above, the Lender and the Security Trustee agree, save as set out below, to delay any enforcement action."

Bankruptcy law

18. Unlike the position in corporate insolvency, where there are a number of grounds for winding up a company, and that relating to inability to pay debts is expressed to relate to the company's debts *generally*, the grounds of a creditor's petition for the adjudication of an individual as bankrupt must be in respect of one or more *specific* debts owed by the debtor. Moreover, the debt or debts relied on must be a debt or debts which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay: see Insolvency Act 1986, s 267(1)(c). Inability to pay debts is shown either by a failure by the

debtor to comply with a so-called statutory demand, or the non-satisfaction of process issued in respect of a court judgment or order in favour of the petitioning creditor: see s 268.

19. In practice, the statutory demand is key. The debtor served with such a demand may apply to the court before the petition is heard for an order setting aside service of it upon him or her, on various grounds, including that "the debt is disputed on grounds which appear to the court to be substantial": see the Insolvency (England and Wales) Rules 2016, r 10.5(5)(b). If the application succeeds, the creditor must bring an ordinary claim for the debt. However, the court will usually allow the debtor to raise the "disputed debt" point at the hearing of the petition, as long as the debtor does not then seek to rely on any argument already presented, or which the debtor had the opportunity to present, at an earlier stage, *eg* on an application to set aside service of the demand: see *Harvey v Dunbar Assets plc* [2017] BPIR 450, CA.

20. The "disputed debt" test has been interpreted by the courts as meaning that, if there is a real prospect of successfully defending the claim against the debtor in an ordinary civil claim, whether by way of defence or equitable set-off, such that the debtor could resist an application for summary judgment under CPR part 24, the petition will be dismissed as an abuse of the process, and the petitioner will be left to his or her civil claim: see *eg Guinan III v Caldwell Associates* [2004] BPIR 531, [16]; *Markham v Karsten* [2007] BPIR 1109, [45]; *Hayes v Hayes* [2014] BPIR 1212, [7]; *Go Capital Ltd v Phull* [2020] BPIR 819, [24]; *Re Field* [2021] EWHC 2474 (Ch), [16]; *Marwaha v Entertainment One Ltd* [2023] EWHC 480 (Ch), [21].

21. Indeed, in the last of these cases, the deputy judge (Dame Sarah Worthington) applied to applications to set aside a statutory demand other elements of the practice in summary judgment cases. She said:

> "22. As with summary judgment applications, the court should not conduct a mini-trial of the issues; on the other hand, the judge is likely to have to decide on the credibility of the factual assertions, and is entitled to 'grasp the nettle' and determine short points of law or construction where 'the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument'; and a case does not need to go to trial simply because 'something may turn up' which would have a bearing on the question of construction … "

The construction of the second amendment

22. As to principles of construction of contracts, I was referred to the well-known passage in the judgment of Lord Neuberger in *Arnold v Britton* [2015] AC 1619, [15]:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to

mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* … And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. … "

Was there an Event of Default?

23. Counsel for the respondent submitted that, contrary to the petitioner's view of the matter, the borrower *had* complied with its obligation to repay £400,000 of the loans to the lender on or before 31 August 2021. He accepted of course that no actual cash had been paid. However, he referred to the fact that the request drawdowns had not been met in full, on the basis that work already done by the borrower had been undervalued, to the extent of some £415,000 as at the middle of August. That meant (he said) that the borrower had in effect contributed more than £400,000 worth of work to the project by the end of August, and that *that* satisfied the borrower's obligation. So there was no Event of Default at all.

24. I cannot accept this submission. The terms of the obligation placed on the borrower to *repay* £400,000 to the lender were perfectly clear. First of all, new clause 6.1.2 of the facility letter used the words "repay £400,000". The natural and ordinary meaning of "repay" is to pay back money that has earlier been paid to you. A contract of loan such as there was here is usually one where money is paid from lender to borrower, and then subsequently money is repaid from borrower to lender. Benefits in kind do not come into it at all, unless expressly mentioned. Even if the contract is one where a money obligation is incurred at the outset, such as leaving a purchase price outstanding by way of loan, the repayment obligation of the borrower is still one to pay a sum of money, and not one to do work or transfer an asset. That would be barter, not loan.

25. As I say, it is obviously possible for the parties to agree differently, but there is no sign that they did that here. On the contrary, other relevant provisions confirm the ordinary meaning of "repay". New clause 9.2 referred to the lender receiving "at least £400,000 from the Borrower towards prepayment of the Loans in accordance with clause 6.1.2". And the new definition of "Higher Interest Rate", in dealing with the same repayment event, referred to the lender's receiving "£400,000 in cleared funds from the Borrower". These terms are not consistent with work done. Instead they indicate money paid.

26. In my judgment, I am in a position to "grasp the nettle" and decide the question of construction now. The respondent has had the opportunity to place any further documents bearing on the matter before me. It is to be noted, for example, that there is no contemporary correspondence from the borrower or the respondent in response to the lender's assertion of an Event of Default, for example by saying that repayment had in fact been made by doing work to the value of £400,000 or more. Copies of any such correspondence would be in the control of the respondent, and would not be dependent on disclosure by the

lender. I bear in mind also that the respondent's construction would make no commercial sense to the lender. In my judgment, it is not even *faintly* arguable. It is simply unarguable.

27. Accordingly there *was* an Event of Default for the purposes of the facility letter, even though the lender was prepared to delay enforcement of its rights, as set out in the letters of September 2021 and February 2022.

Discharge of the guarantee?

28. Counsel for the respondent submitted that his liability under the guarantee was discharged by the deed of amendment of June 2022 (the third amendment). As is well known, any material variations made in the underlying contract to which the principal debtor is party will result in the discharge of the guarantor from liability under any guarantee given of the principal debtor's liability, unless the guarantor consents: see *Holme v Brunskill* (1878) 3 QBD 495, CA. Counsel submitted that the 2022 amendments materially increased the borrower's obligations compared with those under the original facility letter. Indeed, counsel went so far as to submit that the 2022 deed "in substance" made a new agreement, because it replaced existing clauses in their entirety.

The respondent's complaints

29. In his witness statement, at [48], the respondent identified what he called the "key amendments to the terms of Facility made by the Third Facility Amendment". In his next paragraph, at [49], he said that these "variations were substantial and capable of adversely affecting me". He described their alleged effect in the eight subparagraphs of that paragraph. The first subparagraph concerned the removal of the obligation to provide the phase 2 works facility. I deal with this point in more detail below. The next three of these eight subparagraphs in substance complained that the amount of funding available to the borrower under the facility had been reduced by £595,000. That reduction did not increase the burden on the borrower, much less on the guarantor . On the contrary, it prevented the burden from increasing.

30. The fifth subparagraph complained of the removal of the Land Loan Facility of £400,000. However, as confirmed in the 2021 amendment to the facility, the parties acknowledged that the Land Loan Facility had already been fully drawn down. So it was not removed. The sixth subparagraph complained that the Fees Facility of £125,506 could now be used to fund fees in connection with amendments to the facility, which was wider than before. However, the second amendment to the facility had already provided that the full fees would be added to the loans, so these were already part of the borrower's liability generally. This amendment therefore did not increase the borrower's burden.

31. The seventh subparagraph complained that the fixed repayment date had been changed to an on demand payment date. This is dealt with below. The eighth subparagraph complained of the removal of conditions under which the petitioner was obliged to allow the borrower to utilise the facility. In fact, the utilisation conditions at clause 4 of the facility provisions were not removed. They were retained in an expanded and amended form. They did the same three

main things that the original three subclauses of clause had done. Moreover, the utilisation provisions at clause 5 of the facility letter were not altered at all by the 2022 deed of amendment.

Counsel's submissions

32. In his written skeleton argument and in oral argument before me, counsel very sensibly did not rely on all these eight points. But he did rely on point 1 (the removal of the phase 2 facility), and point 7 (the change in basis upon which repayment could be demanded). In addition to these two matters, he also relied on the agreement in clause 4.2 of the deed, that an Event of Default had occurred, and that the loan was therefore agreed to be in default.

33. Dealing with the first of these three points, the phase 2 facility had been introduced by the 2021 amendments. I have no doubt that the introduction of this division into phases conferred certain advantages on the borrower. For example, the borrower could now complete part of the development (phase 1) and sell the relevant properties to raise money which could be used in the completion of the development (phase 2). However, the original facility as agreed in 2019 did not contain such provisions. The proposal put to the lender at the outset was for a single phase development.

34. I agree that the removal in 2022 of the advantage which had been granted to the borrower in 2021 made things potentially more onerous for the borrower as a result (compared to 2021), but I cannot agree that it was a fundamental change to the facility. If it were fundamental, it would have been in there from the beginning. Accordingly, I do not see that removing it could have made the agreement a *new and different* agreement.

35. The second matter is the change from a term loan with a final repayment date fixed at 18 months from the date of the agreement (unless varied by the agreement of the parties) to the date 30 days after a written demand is made by the lender. Counsel for the respondent says that this too is fundamental, and introduces far more uncertainty for the borrower than already existed. It therefore materially increased the rights of the creditor and the obligations and risk of the guarantor.

36. I cannot accept this argument. The original final repayment date under the facility was 18 months from 31 July 2019 (*ie* 31 January 2021), by which time the borrower had to repay all loans in full, together with all other sums outstanding. This had been amended by the second facility amendment to 31 July 2022. At the time of the execution of the deed of Amendment, therefore, there were only 40 days left. Even if the lender had made a demand immediately on the execution of the deed of amendment, the loans would have been repayable just 10 days earlier than previously. In the context of a facility lasting even 18 months, let alone three years, that is not fundamental. Indeed, changing from term dates to 30 days after demand meant that in practice there would be *more* time for the borrower to repay. This does not increase the burden on the borrower. It certainly does not make the agreement a new and different agreement.

37. Thirdly, in light of what I have held to be the true construction of the relevant documents, the express words in the deed of amendment that there had been an Event of Default simply agreed that what happened in fact was in any event true, namely that had been such an event. This cannot have materially worsened the position of the borrower. It certainly cannot have made a new and different agreement.

38. Even taking the three matters together would not in my judgment make a new agreement. It would still be a facility agreement between the same parties for the development of the same development in the same, and most of the mechanisms and applicable contractual provisions remained the same. It is not as if the end result was an agreement to demolish (instead of develop) buildings of a different kind in a different place with different people involved. It was not the case of a dock to be built here being replaced by a cathedral to be built elsewhere. It was not a new and different agreement, but an amended version of the old. In my judgment, the contractual facility arrangements after the third amendment were still well within the scope of the wide words of the guarantee given in the present case: *cf Downing LLP v Sanguine Hospitality Ltd* [2020] EWHC 3011 (Ch), [78].

The respondent's consent

39. My conclusion therefore means that it is strictly unnecessary for me to deal with the remaining issues. But in case I am wrong I will deal with them nevertheless. Logically, the next question is whether it makes any difference that the respondent did not enter into any side letter or confirmatory document, as he had done in relation to the first and second amendments of the facility. The fact is that the respondent knew all about the 2022 amendment deed, because he himself negotiated and signed it, as sole director of the borrower. I do not think it is realistic for the respondent to say that he agreed to it in his capacity as a director of the borrowing company, but did not agree to it in his capacity as guarantor of the borrower's liability. On the basis of the language used in the document, he was agreeing, and that was that.

40. The respondent knew very well that the lender required security from him, and had sought and obtained confirmation from him on the earlier occasions of amendment being made. It made no commercial sense for the facility to be amended again without the consent of the respondent as guarantor. In my judgment, in the circumstances the signature of the respondent on the deed of amendment conveyed also the consent of the respondent as guarantor. If the respondent did not intend this, then in my judgment the burden lay on him to use language in the agreement sufficient to make clear to the lender that, though *the company* was willing to enter into these amendments, *he himself* was not willing to do so as guarantor. He did not do so, and the lender and the petitioner undoubtedly relied upon his acquiescence in operating the facility as amended on this occasion.

Waiver of defences

41. But even if that were not so, the respondent, in the guarantee entered into by him expressly waived certain defences that might otherwise be open to him. Paragraph 2.4 of the guarantee relevantly provides as follows:

> "The obligations of the Guarantor under this Guarantee will not, be affected by any act, omission, matter or thing which, but for this clause 2.4 (*Waiver of Defences*), would reduce, release or prejudice any of its obligations under this Guarantee (without limitation and whether or not known to it or the Security Trustee for a period or periods) including:
>
> […]
>
> (e) any amendment, novation, supplement, extension (whether of maturity or otherwise) or restatement (in each case, however fundamental and of whatsoever nature) or replacement of a Finance Document or any other document or security … "

42. By virtue of paragraph 1.2(r) of the guarantee,

> "In this Guarantee (unless the context otherwise requires):
>
> […]
>
> (r) the term 'Finance Document' includes all restatements, amendments, modifications, variations and supplements including those providing for further advances. The terms of the other Finance Documents and of any side letters between any Secured Party and any Obligor are incorporated into this Guarantee … "

43. These clauses are intended to negative the effect of the rule in *Holme v Brunskill*, referred to earlier. It is clear that, to some extent at least, it is competent to the guarantor to do so if he or she so wishes: *Triodos Bank NV v Dobbs* [2005] EWCA Civ 630, [14]-[16]; *CIMC Raffles Offshore (Singapore) Ltd v Schahin Holding SA* [2013] EWCA Civ 644, [22], [28], [29]. To the extent that it is competent for the guarantor to do so, I am satisfied that the wording adopted in the present case was sufficient for the purpose. The opening words of clause 2.4 are very wide, and sub-paragraph (e) makes clear that that wide language extends to "amendment [*etc*] of a Finance Document *or any other document or security*" (emphasis supplied). So it is not, as counsel submitted, confined to the amendment [*etc*] of a Finance Document. On that basis, the guarantee would be effective in the circumstances of the present case. However, that is not the end of the story.

"The doctrine of the purview"

44. It is clear from a number of judicial decisions, binding on me, that there is a doctrine in the law of guarantees known as "the doctrine of the purview". These decisions include that of the House of Lords in *Trade Indemnity Co Ltd v Workington Harbour and Dock Board* [1937] AC 1, and those of the Court of Appeal in *Triodos Bank NV v Dobbs* [2005] EWCA Civ 630 and *CIMC Raffles Offshore (Singapore) Ltd v Schahin Holding SA* [2013] EWCA Civ 644.

However, apart from the actual *existence* of this doctrine, almost nothing else seems to be agreed about it.

45. In the *CIMC Raffles* case, Sir Bernard Rix (with whom Arden and McCombe LJJ agreed) posed the question in this way:

> "51. So what is the purview doctrine? Is it a doctrine of pure construction, albeit of particular application to contracts of guarantee? Or is it a doctrine of law, reflecting the equitable concerns of *Holme v. Brunskill*, however much it may be influenced by matters of interpretation? There is something for both theories in the cases cited above, and the matter has not perhaps been authoritatively resolved. Moreover, the above cases show the purview doctrine applied in two situations. In one situation, such as *The Nefeli*, the issue is not concerned with the discharge of a guarantee but is simply as to its scope. It either applies or does not apply to the new arrangement. In the other situation, however, the issue is not directly whether the guarantee covers the new arrangement, but whether an 'anti-discharge' provision operates to exclude the *Holme v. Brunskill* doctrine. That was the situation contemplated by *Rowlatt* and thus by Lord Atkin, and was the subject-matter of the actual decision in *Triodos*. In other words, it is even possible that there are two closely allied doctrines. One is a principle of pure construction, which may always arise in a guarantee, and that is the question of what the guarantee covers. The other is a principle as to the scope of an 'anti-discharge' provision, which seeks expressly to throw the cloak of present consent over future events so as to prevent those events subverting the guarantee. The latter principle, but not the former, is tied up with the doctrine of *Holme v. Brunskill*."

46. That is only the beginning of the problems associated with this idea. Another difficulty is to know precisely what the "purview" of the original contract is, not as a *fact* in any particular case, but as a *concept* generally. This is however entirely opaque. None of the authorities seems to explain it satisfactorily.

47. In the absence of authority, I would have started from the position that, in our system, the parties may contract for whatever they like, only subject to public policy limits. From the cases referred to above, however, it would appear that there *may* be a rule of *law* that the parties to a contract of guarantee may *not* contract in advance that absolutely any alteration, however fundamental, of the original contract giving rise to the liability being guaranteed may be effected without releasing the guarantor. If that is indeed the case, then I am puzzled. I do not immediately see what are the public policy limits that are being infringed. Of course, it may be unwise, or even foolhardy, for the guarantor to enter into such a guarantee. But that is freedom of contract for you.

48. An alternative view is that there is no problem at all with the *concept*, and it is at least theoretically possible to contract to guarantee whatever liability may be agreed in future. It is just that is very unlikely on the facts that anyone would agree to do so outside the "purview" of the original contract. That is what, on this view, the "purview" means: the outer limits of obvious intention. To go further requires a clear expression of your intention to do so. Then it would be

a matter of construction in each case as to whether the terms of the specific contract demonstrated an intention to guarantee a liability arising *outside* the purview. That appears to have been the view taken by Chadwick LJ in *Triodos Bank NV v Dobbs* [2005] EWCA Civ 630, [29]-[30].

49. If that were the case here, then (contrary to the actual decision in *Triodos*) I have no doubt that the wording employed here (quoted above at [4]) did so. It is hard to think of wider language that could be used than that used here. Effectively, this is an "all-monies" guarantee. And it may be contrasted with the highly restrictive guarantee wording to be found in the *Triodos* and *CIMC Raffles* cases, which provide the context for the discussion in those cases. And, as is well known, in questions of construction, context is everything.

50. Perhaps however this doctrine fastens upon the character of a "waiver of defences" clause in a guarantee as a kind of clause exempting from liability of the type which the Court of Appeal in the 1960s and is 1970s railed against, and said, almost as a matter of judicial legislation, ought not be possible. The problem is that, in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, the House of Lords unanimously rejected the Court of Appeal's approach, and overturned the so-called doctrine of "fundamental breach". Lord Wilberforce (with whom Lords Salmon, Keith and Scarman agreed) said, at 843:

> "At the stage of negotiation as to the consequences of a breach, there is everything to be said for allowing the parties to estimate their respective claims according to the contractual provisions they have themselves made, rather than for facing them with a legal complex so uncertain as the doctrine of fundamental breach must be. What, for example, would have been the position of the respondents' factory if instead of being destroyed it had been damaged, slightly or moderately or severely? At what point does the doctrine (with what logical justification I have not understood) decide, ex post facto, that the breach was (factually) fundamental before going on to ask whether legally it is to be regarded as fundamental? How is the date of 'termination' to be fixed? Is it the date of the incident causing the damage, or the date of the innocent party's election, or some other date? All these difficulties arise from the doctrine and are left unsolved by it.
>
> At the judicial stage there is still more to be said for leaving cases to be decided straightforwardly on what the parties have bargained for rather than upon analysis, which becomes progressively more refined, of decisions in other cases leading to inevitable appeals …"

51. And Lord Diplock said, at 848:

> "A basic principle of the common law of contract, to which there are no exceptions that are relevant in the instant case, is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative; but in practice a commercial contract never states all the primary obligations of the

parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering. But if the parties wish to reject or modify primary obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words."

52. Of course, there are rules for the construction of exemption clauses, generally requiring clear language to show that a party intends to give up rights or remedies to which he or she would otherwise be entitled: *Soteria Insurance Ltd v IBM UK Ltd* [2022] EWCA Civ 440, [34]-[37]. But there is no common law rule restricting exemption clauses as a matter of law. It is simply a matter of construction of the contract, though now subject, of course, to the impact of any relevant legislation, such as the Unfair Contract Terms Act 1977.

53. An alternative view that the doctrine of the purview is a rule of law which follows inexorably from the nature of the contract of guarantee itself, that you can only guarantee the liability that is put in front of you. On this view, the nature of a guarantee of another's liability does not include the ability to contract to guarantee whatever liability may be agreed between others in future. That too would be novel. There is no doubt that you can lawfully agree to guarantee a liability that may change at least in *some* respects. But, even if that be so, I am in no doubt that on the facts of this case the matter does not fall outside the "purview" of the original contract. This case does not infringe any such purview doctrine, and the guarantee is in my judgment valid for the liability expressed to be engaged.

54. In my judgment, it is not properly arguable that, even if the respondent had not actually consented to the third amendment of the facility letter in June 2022, the wide guarantee liability undertaken by the respondent in this case, coupled with the wide anti-avoidance provisions at clause 2.4, does not as a matter of construction cover the liability of the borrower following the third amendment. This argument has no real prospect of success.

The proposed counterclaim

55. I turn now to consider the counterclaim argument. First of all, the respondent says that the petitioner and the lender committed a number of breaches of the facility agreement, which the respondent calculates caused the borrower to lose a profit in the sum of £1,476,821. I observe at the outset that the borrower (now in administration) has never threatened, or intimated any intention to bring, legal proceedings in respect of any such alleged breaches. Nevertheless, in summary, these alleged breaches were:

1. The imposition by the project monitor, HBM, of additional conditions upon drawdowns.

2. The requirement by HBM that funds be spent on professional fees without the consent of the borrower.

3. HBM facilitated the embezzlement of money by approving false invoices provided by companies in which the contractor had an interest.

4. The imposition by the lender of further constraints upon drawdowns after the termination of the role of EA Construction as contractor for the works.

5. The requirement by the lender that further drawdowns under the facility agreement be made via the second charge lender, Proseed, with further information to be provided.

6. The lender's insistence that the development be completed in a single phase rather than allowing individual properties to be completed and sold.

56. Earlier, at [10], I referred to the bare assertions, without particulars, that the lender had refused to advance funds to the value sought by the borrower when the Project Manager valued the work done at less, and that it had refused to advance funds even to the value given by the Project manager. In circumstances where there are no particulars and no substantive evidence in support of these allegations, I cannot take them any further. They would not prevent summary judgment under CPR Part 24, and they do not prevent this petition from proceeding.

Merits

57. The first four of these complaints are entirely unparticularised, let alone supported by any evidence other than the respondent's bare assertion. Nor is there any explanation as to how the lender or the petitioner could be liable in law for any wrongdoing by HBM, an independent contractor. There is no basis for concluding that any of these complaints is properly arguable, and no basis for concluding that any of them has a real prospect of success.

58. The fifth complaint is no better particularised, but is in any event misconceived. By letter dated 11 February 2021, the respondent as director of the borrower gave Proseed "full authority to proceed with progressing the above development on our behalf", in relation to the funding of the development "full authority to correspond/negotiate with, and make approve payments to, the supply chain relevant to delivering the scheme", and, in relation to the marketing of the development "full authority to correspond/negotiate" with Help to Buy, Homes England and the relevant estate agents. Having given authority to Proseed to act, the respondent cannot complain that Proseed exercised that authority. Moreover, if Proseed did anything wrong (not particularised), then that is a matter between the borrower and its agent, Proseed.

59. The substance of the sixth complaint has already been dealt with. The 2021 amendment to the facility letter introduced a distinction between phase I and phase 2 of the development which had not previously been part of the project. Then the 2022 amendment to the facility letter in effect removed that distinction. The original facility letter, the 2021 amendment in the 2022 amendment were all agreed between the lender and the borrower. The lender had no obligation thereafter to allow the development to be completed and sold in phases, much less as individual properties. So failure so to allow was no breach of contract.

"No set-off"

60. Accordingly, there is nothing in any of these complaints that has a real prospect of success. Even if any of them *had* had such a real prospect, the facility letter contained a "no set-off" clause in Schedule 4, in the following terms:

> "3.3. All payments to be made by the Borrower under the Finance Documents shall be calculated and be made without (and free and clear of any deduction for) set off for counterclaim".

These words clearly exclude the borrower's right to set off any counterclaim against its liability to pay. The liability of the respondent under the guarantee mirrors that of the borrower. The respondent cannot rely on any right of the borrower to set off the borrower's counterclaim to the extent that the borrower had no such right itself.

61. It is of course established law that a "no set-off" clause does not operate to exclude a counterclaim which is relied upon to dispute a bankruptcy petition: see *McAllister v Lloyds* [1999] BPIR 548, [18]-[19]; *Stone v Vallance* [2008] BPIR 235, [5]-[6]. But here the *borrower* cannot rely on that to defeat the "no-set off" clause, because the bankruptcy petition is against the respondent, and not the borrower. And the *respondent* cannot rely on those cases either, to set off against *his own* guarantee liability, because any set off there may be belongs to the borrower, as the person with the counterclaim, and not to the respondent.

62. Accordingly, because of the no set-off clause, the liability of the borrower could not be reduced by any claim to set off any counterclaim that might be established. And it is the liability of *the borrower* that has been guaranteed by the respondent. I was referred to the decision of the Court of Appeal in *Octagon Assets Ltd v Remblance* [2010] Bus LR 119. But in that case it appeared that the principal's liability was equalled or exceeded by the value of the counterclaim, so that the guarantor was guaranteeing a potentially zero liability. The court held that it would be unjust to allow a petition to go forward against the guarantor when, if the petition had been against the principal, it could not have done. The counterclaim was not treated as a set off against *the guarantor's* personal liability.

Does it matter?

63. But even if, contrary to my view, the complaints made (i) had a real prospect of success, and (ii) could be taken into account to set off against the borrower's liability, there is a further difficulty in the way of the respondent. This is that he himself has valued the loss to the borrower at £1,476,821, though without condescending to particulars. Yet the liability of the borrower under the loans as at February 2023 was £4,617,299.38, and is now over £6 million. Deducting the loss as valued by the respondent even from the lower figure still leaves a liability of over £3 million, far exceeding the limit on the respondent's guarantee. So, even if such a counterclaim were made, and succeeded as alleged, it would not affect the respondent's liability under the guarantee. Counsel for the respondent referred to the observations of the Court of Appeal in *TSB Bank plc v Platts* [1998] 2 BCLC 1, 8d-g, but that was referring to a different point and does not assist here. In my judgment, the counterclaim argument fails.

Conclusion

64. Accordingly, the overall conclusion to which I come is that none of the prospective defences which the respondent seeks to put forward against his liability under the guarantee has any real prospect of success, and this petition must therefore succeed. I therefore made a bankruptcy order against the respondent on 19 April 2024, as from the time that this judgment was sent out in draft to the parties' lawyers by email in the usual way. The present is the final version of this judgment, handed down formally today.