Neutral Citation Number: [2023] EWCA Civ 533

Case No: CA-2022-000075
& CA-2022-000075-D

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)
His Honour Judge Cawson KC (sitting as a Judge of the High Court)
[2022] EWHC 2245 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2023

Before:

LORD JUSTICE NEWEY
LADY JUSTICE SIMLER
and
LORD JUSTICE ARNOLD

- -

Between:

CLOSE BROTHERS LIMITED (trading as Close Brothers Asset Finance)	**Claimant/ Respondent**
- and -	
(1) ROOSTER TRUCKING COMPANY LIMITED	**Defendant**
(2) DAVID WILLIAM TAYLOR	**Defendant/ Appellant**
(3) LUKE HUDSON TAYLOR	**Defendant**

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The Appellant appeared in person
Justin Kitson and Darren Finlay (instructed by **Addleshaw Goddard LLP**) for the **Respondent**

Hearing date: 4 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This is an appeal by the second defendant, Mr David Taylor ("Mr Taylor"), from a decision of His Honour Judge Cawson KC ("the Judge") dated 20 June 2022. The question raised by the appeal is whether the Judge was justified in declining to stay enforcement of a final charging order which the claimant finance company, Close Brothers Limited ("Close"), had obtained.

2. In 2015 and 2016, Close entered into four hire purchase agreements with T.T. Express (Oldham) Limited ("TTX"), a company of which Mr Taylor was the only director and controlling shareholder. Mr Taylor guaranteed TTX's obligations under the hire purchase agreements.

3. By 2017, TTX had financial problems and, on 15 September, it went into administration. By then, however, replacement hire purchase agreements had been concluded between Close and the first defendant, Rooster Trucking Company Limited ("Rooster"), of which the third defendant, Mr Taylor's son Luke, was at the time the sole director and shareholder. Rooster entered into two hire purchase agreements with Close on 29 June 2017 and, according to Close, Mr Taylor gave a guarantee on the same occasion in respect of Rooster's obligations to Close. On 13 July 2018, Rooster entered into a further hire purchase agreement with Close, which counter-signed on 16 July 2018. This time, on Close's case, Mr Luke Taylor gave a guarantee.

4. The goods and equipment which were the subject of the hire purchase agreements with Rooster comprised a static home, a motor home, two race trucks and a race truck transporter trailer.

5. The present proceedings were issued on 15 October 2019 in the Business and Property Courts in Manchester and given the number BL-2019-MAN-000096. By them, Close claimed as against Rooster both delivery up of the items which had been the subject of the hire purchase agreements and damages. Close also sought relief as against Mr Taylor and Mr Luke Taylor pursuant to the guarantees which they were alleged to have given.

6. On 25 November 2019, Close obtained a default judgment against Mr Taylor for £296,740.24 plus costs. On 13 December 2019, at a hearing at which none of the defendants appeared, District Judge Richmond ordered Rooster to deliver up the goods which Close claimed and also to pay £305,724.73 plus costs.

7. On 21 February 2020, Mr Taylor and Rooster applied to set aside the judgments against them "BECAUSE the Claimant substantially failed to disclose to the Court the full extent of payments made to the Claimant by the Defendant under the purchase agreements". In a witness statement of the same date, Mr Taylor said that the application was "to correct a gross error in amount of the Judgment Debt set out in the default judgment 25th November 2019 … due to failure by the Claimant to disclose full financial data to the Court".

8. A draft defence dated 27 March 2020 was subsequently provided, on behalf of all three defendants. This principally took issue with the quantum of Close's claim. With regard to the guarantees which were said to have been given by Mr Taylor and Mr Luke Taylor, it was pleaded that these "are not admitted as having been executed by

[Mr Taylor] and [Mr Luke Taylor] respectively, and are required to be proven" and that "[o]n, and only on, proof of each of [the guarantees] being executed by [Mr Taylor] and [Mr Luke Taylor] respectively, [Mr Taylor] and [Mr Luke Taylor] as guarantors are only liable to [Rooster's] liability". This was also said in relation to Mr Taylor's alleged guarantee:

> "[Mr Taylor] does not admit that he executed the [guarantee] exhibited, to guarantee the debts of [Rooster]. [Mr Taylor] has no recollection that he contracted with [Close] to be guarantor for [Rooster] under [the guarantee] for finance under [the hire purchase agreements]. [Close] is put to strict proof of the document claiming to be [the guarantee]."

9. The defence will have been served as a draft because judgment had already been entered. However, the document was clearly prepared with professional assistance and ran to 100 paragraphs and eight tables. Mr Taylor and Mr Luke Taylor both signed to confirm that they believed "the evidence given in this Defence" concerning them to be true.

10. On 18 June 2020, Mr David Derbyshire, a regional sales manager in Close's banking division, made a witness statement in response to the draft defence. He said that he had attended signing meetings with Mr Taylor and Mr Luke Taylor, had witnessed their execution of the guarantees and had signed each guarantee himself to confirm this. As regards Mr Taylor, Mr Derbyshire said:

> "7. On 29 June 2017 I attended Woodstock Distribution Centre in Oldham for Rooster to execute the finance agreements … and for David to execute his personal guarantee. Woodstock Distribution Centre was David's business premises at that time. I have been there many times before. The signing meeting took place in the boardroom. Both David and Luke attended the meeting. Luke executed the finance agreement on behalf of Rooster and David executed his personal guarantee.
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> 8. As David wasn't a director of Rooster he was signing what I call a non-connecting personal guarantee. … By signing [a 'confirmation letter'], David confirmed to Close that he was fully aware of the guarantee's implications. The letter was signed by David at the meeting on 29 June 2017 at the same time he signed his personal guarantee."

11. The "confirmation letter" to which Mr Derbyshire referred was, on the face of it, signed by Mr Taylor on 29 June 2017, with Mr Derbyshire also signing as witness. The letter read:

> "I understand that Close Brothers T/a Close Brothers Asset Finance have asked for the personal guarantee of myself and Close Brothers Limited T/a Close Brothers Asset Finance have

> also indicated that I should seek independent legal advice concerning the implications of such a guarantee.
>
> I am fully aware of the implications of this guarantee and I am happy to enter into this Agreement without taking independent legal advice."

12. Mr Taylor replied to Mr Derbyshire's evidence in a witness statement dated 23 June 2020. Mr Taylor accepted that Mr Derbyshire had come to Woodstock Distribution Centre on 29 June 2017, but, after expressing "hope" that Mr Derbyshire "didn't manipulate documents", challenged the authenticity of the "confirmation letter" and stated that Mr Taylor "did not sign a personal guarantee in favour of [Close] for assets financed by [Close] for Rooster". Mr Taylor observed, "My usual business practice is not to sign personal guarantees for any company of which I am not a director or major shareholder".

13. The application to set aside the judgments against Rooster and Mr Taylor was heard by District Judge Richmond on 15 July 2020. Rooster and Mr Taylor were represented at the hearing by a solicitor-advocate who had prepared written outline submissions. These noted that there is "a dispute as to whether [Mr Taylor] and [Mr Luke Taylor] knowingly signed the respective guaranty and indemnity forms", they "not [being] aware of having done so", but the focus of the submissions was on quantum. It was said that "[s]etting aside the default judgment will allow for a proper account to be taken of the moneys (if any) properly due to [Close] by [Rooster]" and that "[t]hat then determines the extent of the liability of the guarantor, [Mr Taylor], as well as [Mr Luke Taylor]". In a similar vein, the solicitor-advocate explained during the hearing:

> "Essentially Mr Taylor's position is: 'I'm happy to pay any money I owe, but for 8 months now, Close Brothers, I've been asking you for the account documents from which I can work out how much I owe. The reason I, Mr Taylor, don't have any account documents is because they were taken away by bailiffs who seized my computers'."

14. The application to set aside the judgments against Rooster and Mr Taylor was dismissed. In the course of his judgment, District Judge Richmond said:

> "The final point I have under the heading of 'bad points' (if I can put it that way) is the question of whether the guarantee was signed or not. Really I have nothing more than a bald assertion that Mr Taylor is not very sure whether he signed it. It is an unevidenced point. It is not fleshed out in the statements, it is hardly fleshed out in the skeleton arguments, and it is not something really that gets me very far in deciding whether there is a real prospect of successfully defending the claim in the face of the perfectly logical submission that Mr Finlay [who was appearing for Close] made, which was that when one looks at the background to this who on earth would have provided finance for this company given what had happened to its predecessor without seeking personal guarantees in return."

15. On 6 August 2020, Close obtained an interim charging order over Mr Taylor's home. District Judge Clarke ordered Mr Taylor's interest in the property to stand charged with the payment of £367,613.46 together with any further interest and the costs of the application.

16. Rooster and Mr Taylor applied for permission to appeal against District Judge Richmond's decision of 15 July 2020. On 23 September 2020, His Honour Judge Hodge KC granted a stay of execution, but he ordered Rooster and Mr Taylor to ensure that the assets which had been the subject of the hire purchase agreements remained fully insured, that no use was made of them and that they remained in safe keeping and were not disposed of. On 22 March 2021, Snowden J refused permission to appeal on paper, but the application was renewed at an oral hearing before Fancourt J on 13 October 2021. A few days earlier, on 10 October, Mr Taylor had made a witness statement in which he had said, among other things, that "for reasons best known to them [Close] have used some pretty despicable acts to create a liability, by manufacturing various documents, and forging signature, a liability for which they now seek to apportion to myself and my son"; that "[t]here were no personal guarantees signed by myself, Mr Derbyshire was told robustly that I would not sign any more [personal guarantees]"; and that "Mr Derbyshire has therefore falsely stated in his witness statement that myself or Luke, signed a personal guarantee at our office or our home".

17. During the hearing on 13 October 2021, Fancourt J asked Mr Taylor what had led him to believe that the guarantee was a forgery when the defence had proceeded on the basis that he could not remember whether he had signed it. Mr Taylor replied that he had "always said that from the beginning" but his solicitor-advocate had not wanted to write that down. Mr Taylor also said that in June 2017 he "would absolutely not sign any more [personal guarantees] because [he] was up to the hilt" and "wouldn't put anything on the line".

18. Fancourt J dismissed the applications for permission to appeal and lifted the stay which Judge Hodge KC had directed. Fancourt J said in his judgment:

> "24 I can accept that [Mr Taylor] would have preferred not to … offer further guarantees, but it is clear to me that if the claimant was not going to default TTX and Mr Taylor on the original agreements, he really had no choice. As DJ Richmond correctly found, it makes absolutely no sense at all that in the context of default by an existing lessee that had gone into insolvency, the liability would be transferred over to another company that may or may not have been worth anything in substance and the previous guarantee and rights that Close Brothers had against Mr Taylor under the existing guarantee would have been given up, together with an existing claim against him worth £291,000 that had already accrued.
>
> 25 I am afraid, therefore, that the belated attempt to argue that the guarantee was a forgery, which is inherently unlikely in the circumstances, does not have any real

> prospect of success at trial. Despite Mr Taylor's able presentation of the arguments about inconsistencies and oddities in some of the documentation, the substance of the matter appears very clear to me. There was a refinancing in relation to the assets leased to TTX, when it became insolvent and unable to continue to pay the hire, and the terms of the refinancing, which let Mr Taylor off the hook under his original guarantee, were agreement on the sums in the new hire purchase agreements to be further guaranteed by Mr Taylor.
>
> 26 In those circumstances, I am afraid that I am not persuaded that there is any real prospect of the new defences of Rooster and Mr Taylor succeeding at a trial and, therefore, I refuse permission to appeal against DJ Richmond's refusal to set aside the default judgment."

19. On 18 February 2022, the charging order over Mr Taylor's home was made final by Deputy District Judge Manley in the revised sum of £396,504.26 plus additional costs of £266. By an application notice dated 3 March, however, Mr Taylor applied for an order "varying the terms" of the final charging order "by imposing a stay of enforcement action by [Close] pending resolution [of] an outstanding application brought by [Mr Taylor] in claim no. BL-2019-000096 and a new claim against [Close] for forgery of personal guarantees". In a section of the application notice verified by a statement of truth, Mr Taylor said:

> "D2 [i.e. Mr Taylor] has always maintained that he did not sign the personal guarantee. The judgment in default against D2 has always been regrettable and was a result of D2 acting as a litigant in person at the time of the judgment and predominantly thereafter and lacking sufficient knowledge of necessary CPR and Court procedures …. D2 fervently maintains that he and D3 [i.e. Mr Luke Taylor] did not sign personal guarantees in respect of the liabilities of D1 [i.e. Rooster] …."

20. Mr Taylor relied in support of his application on three new witness statements. Two of the statements dealt with the meeting on 29 June 2017 at which, according to Close, Mr Taylor signed the personal guarantee on which the claim against him is founded. First, Mr Neil Fox, who was employed by TTX as assistant operations manager, explained in a statement dated 10 January 2022 that he had attended the meeting and said this about it:

> "16. Mr David Derbyshire requested that Mr David Taylor sign a personal guarantee.
>
> 17. Mr David Taylor was extremely robust in his response. Mr David Taylor refused point blank to sign any further personal guarantees on the grounds that Mr Taylor was 'on the hook' with the Bank (Yorkshire

> Bank) and was not prepared to extend his exposure further.
>
> 18. Mr Derbyshire accepted Mr David Taylor's response, they shook hands. Mr Derbyshire offered his sympathies with the dilemma facing the Taylor's transport company and depot. Mr Derbyshire left the premises."

Next, Mr Doru Vlad Costache, who was employed by TTX as general manager, said in a witness statement dated 22 January 2022 that, while he had not been in the board room where the meeting of 29 June 2017 had taken place, his office had been next door and, "[a]s [he] was going about [his] own business, [he] was listening to the conversations going on in the board room". Mr Costache went on:

> "29. I heard Mr. Derbyshire explaining to Mr. Luke Taylor how a novation worked. All seemed to be happy with that arrangement.
>
> 30. I then heard Mr. Derbyshire requesting Mr. David Taylor to sign a personal guarantee. Mr David Taylor told Mr. Derbyshire to '*f*ck off*'. I heard Mr. David Taylor explain that he would not expose himself further, as Mr. David Taylor stated that he already had significant '*pg's*' with Yorkshire Bank. And those may be called upon in the very near future. Due to the Yorkshire Bank '*pulling the plug*'."

21. The third fresh witness statement was made by Mrs Amy Bradsell-Alty on 10 January 2022 and addressed the personal guarantee which, on Close's case, Mr Luke Taylor signed at Mr Taylor's home on 13 July 2018. Mrs Bradsell-Alty said that she had been employed by TTX, was involved in Rooster and had been present when Mr Derbyshire visited Mr Taylor's home on 13 July 2018. She continued:

> "8. Mr Derbyshire had come to Oldham to have Mr Luke Taylor sign for the Tiger Trailer ….
>
> 9. Mr Derbyshire asked Mr Luke Taylor to sign a personal guarantee. At which point Mrs. Taylor stopped proceedings. Mrs. Taylor informed Mr Derbyshire that her son would not sign any guarantees.
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> 10. I can confirm that Mr Luke Taylor did sign the hire purchase agreement ….
>
> 11. I can also confirm that Mr Luke Taylor did not sign a personal guarantee.
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> 12. Mr Derbyshire accepted Mrs Taylor's comments. Mr Derbyshire and his assistant left the Taylors home."

22. By the time his application of 3 March 2022 came before the Judge, Mr Taylor was relying on further evidence that had been served in these or related proceedings. This included two reports dated 2 June 2022 from a handwriting expert. One of these related to signatures of Mr Taylor and the other to signatures of Mr Luke Taylor. In that relating to Mr Taylor, the expert concluded that there is a "high probability" that neither the "confirmation letter" nor the guarantee in his name dated 29 June 2017 was signed by Mr Taylor. The expert was, however, working from photocopies although she noted that, "[i]n the examination of documents, it is essential whenever possible for 'best evidence' to have the original documentation". She was, moreover, comparing the signatures on the "confirmation letter" and guarantee with samples provided by Mr Taylor which were limited to (a) a 2019 driving licence and (b) signatures and other things written for the purpose of the exercise in May 2022. As regards Mr Luke Taylor, the expert expressed the view that it was more probable than not that he did not sign the guarantees in his name or certain documentation concerning the relevant hire purchase agreements.

23. Mr Taylor relied, too, on an affidavit he swore on 10 June 2022 in which he said Mr Derbyshire had "falsely state[d] … that he witnessed me signing a [personal guarantee]". Mr Taylor stated that he did not sign either the "confirmation letter" or the guarantee in his name.

24. The application of 3 March 2022 came before the Judge on 20 June 2022. Following reference to the hearing which had taken place before Fancourt J in the previous October, Mr Taylor told the Judge:

> "So in '22, after that hearing, I had to go and embarrass myself by going to see two of my ex-employees, because I knew that they were all privy to what had gone on upstairs, and they were all privy to what was going on upstairs because … TTX went, in inverted commas, 'bust'. And, at that point, I had a face full of bankers, insolvency practitioners, Uncle Tom Cobley and all, and so that I didn't forget anything I had people witnessing everything I were doing."

25. In a judgment given that same day ("the Judgment"), the Judge concluded that the application of 3 March 2022 should be dismissed. I shall return to his reasons below. As the Judge noted, the "outstanding application brought by [Mr Taylor] in claim no. BL-2019-000096" to which there had been reference in the application notice had already been disposed of.

26. Undeterred, on 12 July 2022 Mr Taylor issued a claim for damages against Close in the Business and Property Courts in Liverpool. On 20 September, Mr Derbyshire made a witness statement in those proceedings (which had by then been transferred to Manchester and numbered BL-2022-MAN-000062) in which he responded to Mr Taylor's affidavit of 10 June 2022 and to the witness statements of Mr Fox, Mr Costache and Mrs Bradsell-Alty. Mr Derbyshire said this:

> "8. … I do remember that Vlad's [i.e. Mr Costache's] office was next to the boardroom at Woodstock. This is the only part of his statement that is correct …. Vlad would sometimes come in and say hello to me when I

visited David but he was never present at any meetings where David or Luke signed documents …. Dave didn't tell me to '*f*ck off*'. He signed his guarantee without raising any concerns or questions about it.

9. I don't remember Mr Fox or Mrs Bradsell-Alty in a business setting at all. I don't know who Mr Fox is and I don't know why an '*office administrator/wages clerk*' like Mrs Bradsell-Alty would be at a signing meeting. If Mrs Bradsell-Alty was Luke's girlfriend, I may have met her at a race meeting but I can't remember that.

10. David's wife was at home when we signed up HPA ATEB011845 [i.e. the hire purchase agreement which Mr Luke Taylor signed on behalf of Rooster on 13 July 2018] but she wasn't involved and didn't stop anything. She was floating around in the kitchen and in the background. My memory is that it was a very normal sign up, very ordinary. I remember the union jack memorabilia and the fine china being out and that it was still all friendly hugs and kisses as I left.

11. The statements admit that I requested guarantees from the Taylors at each signing meeting but allege I was told guarantees wouldn't be given. Had that happened, the deals would not have gone ahead.

12. I've worked for Close for more than 20 years and if a deal was approved with a guarantee it wouldn't just go through if the guarantee wasn't given. There's credit managers, there's a team in pay-outs, it goes through levels of checks to make sure that whatever Close is paying out on matches the proposal. What is returned by me has to marry up to the acceptances and to the figures that were accepted and then its authorised.

13. If there's something wrong when the deal gets handed in for processing and pay out, then it's checked and I am told to go back and do it correctly. I've done that before when an issue has been spotted. I had to re-arrange the meeting and go back. But if the Taylors refused to sign their guarantees, all the paperwork would have been taken away – the documents and everything – and the deal wouldn't have happened."

27. On 15 October 2022, Nugee LJ granted Mr Taylor permission to appeal against the Judge's decision of 20 June 2022, "limited to the issue whether the Court should have acceded to the application on the basis that the Appellant had better evidence of fraud than before". Having noted that, by the time of the hearing on 20 June 2022, Mr Taylor was alleging that the guarantee in his name had been forged and that he was

relying on “further, and potentially better, evidence of forgery than had been before Fancourt J”, Nugee LJ observed that “the essential point that [Mr Taylor] now has better evidence of forgery is included in [the grounds of appeal]”. Nugee LJ went on to say that “[t]here are also other issues raised, in particular a complex issue as to the title to the assets”, and that he “refuse[d] permission on these grounds which do not seem to me to raise an arguable issue with a real prospect of success”.

28. In the course of the hearing before us, Mr Taylor explained that, in the early days of this litigation, he did not recollect signing the guarantee but did not have a positive recollection of not doing so. He said that he had only remembered that he had not signed the guarantee when he had been reminded of that by the former employees who have now provided witness statements (presumably, Mr Fox and Mr Costache).

29. In the period since Close initiated these proceedings in 2019, Mr Taylor, Mr Luke Taylor and Rooster have made (or attempted to make) numerous other applications. Aside from applications for permission to appeal, there have been applications for the proceedings to be struck out (10 December 2020), for permission to bring a counterclaim (22 March 2021), for the judgments against Mr Taylor and Rooster to be set aside (13 February 2022, 7 March 2022, 12 June 2022, 25 July 2022, 12 September 2022 and 22 November 2022), for a stay of Mr Taylor’s application for permission to appeal against District Judge Richmond’s order of 15 July 2020 (15 June 2021), alleging contempt of Court on the part of Close, a Mr Martin Cross of Close, Mr Derbyshire and Mrs Sally Emerton of Addleshaw Goddard LLP (19 January 2021, 4 April 2022, 11 September 2022 and 12 June 2022), to stay enforcement (21 March 2022), to set aside a penal notice which had been endorsed on District Judge Richmond’s order of 13 December 2019 (31 May 2022 and 12 June 2022) and for the provision by Close of documents (4 March 2022). On 4 April 2022, the Judge made a limited civil restraint order against Mr Taylor and Rooster on the basis that they had made a number of applications which had been totally without merit. Thereafter, some applications were made by Mr Luke Taylor rather than his father.

30. For its part, Close has obtained an order for Rooster to be wound up. On 22 July 2022, Rooster applied for an injunction restraining Close from presenting a winding-up petition, but, the Judge having dismissed the application on 12 August, a petition was presented on 26 September and, on 13 December, District Judge Ranson made a winding-up order. On 3 January 2023, Mr Taylor purported to apply on Rooster’s behalf for the winding-up order to be set aside, but District Judge Ranson dismissed the application on paper as totally without merit on 25 January.

31. Close has also applied for claim number BL-2022-MAN-000062 to be struck out, presented a bankruptcy petition against Mr Taylor and applied for an extended civil restraint order to be made.

32. Close has not so far succeeded in recovering any of the goods and equipment which were the subject of the hire purchase agreements with Rooster other than the static home. That was recovered on 18 October 2021 and subsequently sold for £14,500.

33. Mr Taylor told us during the hearing that Close has obtained evidence from a handwriting expert whose conclusions contradict the views expressed by the expert on whose reports Mr Taylor relies.

The Judgment

34. The Judge noted in paragraph 37 of the Judgment that the additional material on which Mr Taylor relied "does provide further, and potentially better evidence than that previously adduced and before Fancourt J on 13 October 2021, that Mr Taylor and Luke did not sign the relevant guarantees". Having, however, observed that "this is not the application to set aside the judgment in default against Mr Taylor (i.e. the order dated 25 November 2019) on the basis of which the final charging order was made" (paragraph 42), the Judge said that, in his view, "it is only if there is are (at the very least) reasonable grounds for <u>now</u> applying to set aside the 25 November 2019 default judgment, that it could be right to stay execution of any charging order that is based upon it" (paragraph 43). Addressing himself to whether such an application could be made, the Judge commented that "when matters have been determined through a proper court process, and once all avenues of appeal have been exhausted, parties are not, save in very exceptional circumstances, permitted to simply come back to court with better evidence to have the matter re-litigated in the hope of achieving a different result" (paragraph 44) and explained that the "only possible exceptional circumstance … that might be available to challenge the order dated 25 November 2019 order is … that relating to obtaining orders by fraud" (paragraph 47). In that connection, the Judge cited, among other things, the decision of the Supreme Court in *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, [2020] AC 450. The Judge noted at paragraph 56 that Lord Kerr, with whom Lords Hodge, Lloyd-Jones and Kitchin agreed, had there accepted at paragraphs 56 and 57 that the principles governing applications to set aside judgments for fraud were as summarised by Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners lp* [2013] EWCA Civ 328, [2013] 1 CLC 596 in the following passage at paragraph 106:

> "The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

35. In paragraphs 48-53, the Judge "identif[ied] certain features of the evidence as it stands at the moment, and how it has come before the Court". He said:

> "48 … I observe that the draft Defence, settled with the benefit of legal advice, as considered by DJ Richmond on 15 July 2020, simply put the Claimant to strict proof regarding the execution of the guarantee. There was no allegation or assertion at that point that Mr Taylor's signature had been forged, and Mr Taylor did not go so far as to deny that the relevant guarantee had been signed by him. This was the basis on which DJ Richmond, on 15 June 2020, was asked to and did deal with the matter.
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> 49 The matter was then further ventilated on the applications for permission to appeal, in particular at the hearing before Fancourt J on 13 October 2021. Mr Taylor then went further, as I have said, by denying, in his witness statement dated 10 October 2021, having executed the guarantee, but the case was not advanced with the particularity that Mr Taylor now introduces with the evidence subsequently produced. I note, for example, the graphic evidence that Mr Taylor now seeks to give to the effect that he recalls having told Mr Derbyshire to "*f*** off*". If true, one might have expected him to have mentioned this detail in his witness statement dated 18 October 2019 when he said that he told Mr Derbyshire 'robustly' that he would not sign any more guarantees. More fundamentally, this is inconsistent with the position that had been adopted in front of DJ Richmond, where it was being suggested he could not recollect having signed the guarantee at all. As Fancourt J held, this new case as to forgery lacked any credibility. Surely, if true, Mr Taylor would have recalled his robust response to Mr Derbyshire and referred to it, particularly after Mr Derbyshire made his witness statement evidencing execution of the guarantees.
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> 50 So far as the expert evidence is concerned, what is said by Mr Taylor in relation to that is that the expert evidence was obtained only after he had read a judgment of Chief Insolvency and Companies Court Judge Briggs in the case of *Lynch v Cadwallader & Aldermore Bank Plc.* [2021] EWHC 328 (Ch), a decision dated 23 February 2021 (not 2022), in which he read of the requirement of a bank to prove execution of a guarantee and where, on the facts of that case, the judge did not find the case to have been proved where expert evidence had been advanced.

51 So far as the expert's evidence itself is concerned, I have already noted what it says, but I do note that in relation to Luke, it is the expert's evidence that it is not his signature not only on the guarantees that he signed, but also certain hire purchase documentation, whereas it is Luke's own evidence in his witness statements that he did actually sign the HP agreements, albeit that he now denies having signed the personal guarantees.

52 I also remind myself of the commercial realities of the position, as identified by Mr Finlay in the course of his submissions and as commented upon by Fancourt J in the course of his judgment refusing permission to appeal. If Mr Taylor had robustly informed Mr Derbyshire that no further guarantees would be given, it is difficult to see why the Claimant would have been prepared to proceed with the re-financing.

53 It is conceivable that Mr Taylor might have persuaded himself now that he did not, in fact sign his guarantee, having heard that it might be necessary to show that a judgment was obtained by fraud, or at least that the advancement of a positive case in relation to the non-execution of the guarantees is a requirement of his case. However, having regard to the evidence as a whole, I do not consider that the position has moved on significantly, so far as the credibility of the evidence before the Court as to forgery of Mr Taylor's signature on his guarantee is concerned, from that as considered by Fancourt J when he gave judgment refusing permission to appeal."

36. Arriving at his conclusions, the Judge said this:

"58 There are, in my judgment, a number of real difficulties in any case that Mr Taylor might seek to advance in seeking to persuade the Court that there is some real prospect of the 25 November 2019 judgment, the judgment of DJ Richmond declining to set aside that judgment, or the judgment of Fancourt J refusing permission to appeal being successfully challenged on the basis of having been obtained by fraud.

59 Firstly, the alleged fraud, i.e. the alleged forgery of the guarantees and the alleged false evidence of Mr Derbyshire regarding the execution of the guarantees, was not based upon, and nor was it revealed by evidence as to any fraud on the part of the Claimant in obtaining any judgment, and in particular any evidence discovered since when the 2019 Default Judgment was

obtained, or the merits thereof were reviewed by DJ Richmond on 15 June 2020 and then by Fancourt J on 13 October 2021. Rather, Mr Taylor changed his position. Having said prior to 10 October 2021 that he could not recollect signing his guarantee, he then said in his witness statement that he could recall informing the Claimant's David Derbyshire in robust terms that he would not make any further guarantee, and alleged that his signature on his guarantee was forged. That was the position before Fancourt J, when Fancourt J determined the matter against Mr Taylor. Mr Taylor has simply now come up with further evidence in support of his position to that then deployed, but that does not provide, as I see it, any basis for re-opening the matter on the grounds of any judgment having been obtained by fraud.

60 Secondly, as I have indicated by reference to the commentary in [*Halsbury's Laws of England*, volume 11 (2020 edition)] at paragraph 1213, apart from showing that the fraud was discovered since the judgment, a strong case of fraud must exist, and any new claim alleging fraud is liable to be stayed or dismissed unless the fraud alleged has a reasonable prospect of success. In light of the considerations that I have identified, I do not consider that a strong case, or one demonstrating a reasonable prospect of success has been demonstrated on the evidence before the Court.

61 The third consideration is a final discretionary consideration so far as the application to grant a stay today is concerned. Although the application is prefaced on the basis that there will be a new claim to challenge the judgment, there is no such new claim and therefore no properly particularised and pleaded case for the Court to consider. As a matter of discretion, I would not, in any event, have been prepared to grant a stay of enforcement of the charging order without seeing at least a draft pleading.

62 However, the first of the above considerations is the most fundamental and important. The final charging order is based on a regular judgment that has been fully reviewed by the Court, before DJ Richmond on 15 June 2020, and again before Fancourt J on 13 October 2021, when he fully reviewed the defences being advanced and rejected them as having no real prospect of success. The case of fraud being advanced by Mr Taylor is not, on proper analysis, to the effect

> that any judgment has been obtained by fraud. The case of fraud is not based not upon the discovery of evidence after the event that impugns any decision. Rather the alleged fraud was a matter very much in issue before the Court when it finally determined the matter, it is just that Mr Taylor has come up with what he says is better evidence after the event. That does not in my judgment provide a proper basis for impugning the process that has led to the making of the final charging order."

37. In the same vein, the Judge said when refusing Mr Taylor permission to appeal on 20 June 2022:

> "D2 [i.e. Mr Taylor] does now have better evidence that he did not execute the relevant guarantee in the form of witness statements from D3 [i.e. Mr Luke Taylor], and employees of D1 [i.e. Rooster], as well as an expert handwriting report. However, I do not consider that this provides a credible basis for setting aside the Judgment as obtained by fraud, or for staying enforcement of the charging order in that:
>
> a. The alleged fraud is not based upon or revealed by evidence discovered since the Judgment. Rather, D2 has changed his position, having said prior to 10 October 2021 that he could not recollect signing the guarantee, he now says that he can recall informing the Claimant's David Derbyshire to "f*** off" when asked to sign the relevant guarantee, and has come up with better evidence in support of a case that he did not sign the guarantee than he had at the hearing before Fancourt J;
>
> b. The court is only likely to set aside a judgment obtained by fraud where there is a strong case for doing so. There are inherent weaknesses in D2's case, not least given his change of position, and the commercial reality of the position that the Claimant is unlikely to have been prepared to refinance without the benefit of a guarantee from D2, as identified by Fancourt J in rejecting his execution point;
>
> c. As a matter of discretion, I would not have been prepared to grant a stay of enforcement of the final charging order in any event absent the issue of a claim to set aside the Judgment, or at least a statement of case properly setting out the basis of the relevant claim."

An application for permission to rely on further evidence

38. By an application notice dated 30 March 2023, Mr Taylor sought permission to rely on further evidence. This principally comprised documents relating to the arrangements under which the hire purchase agreements with TTX were replaced by hire purchase agreements with Rooster. Mr Taylor maintained, in particular, that invoices apparently issued by TTX to which Addleshaw Goddard had referred in correspondence differed from the "genuine invoices" and had been "forged". Fancourt J considered, and convincingly rejected, such allegations in paragraphs 12-16 of his judgment of 13 October 2021.

39. I dismissed Mr Taylor's application on paper on 1 May 2023, essentially on the basis that the additional evidence did not relate to the only ground of appeal for which Nugee LJ had given permission. Mr Taylor having, however, indicated that he wished my decision to be reconsidered, we permitted him to refer to it on a "de bene esse" basis at the hearing.

Discussion

40. As can be seen from paragraphs 36 and 37 above, the Judge gave three reasons for his decision. I find it convenient to take the third of them first. That was to the effect that, as a matter of discretion, it was not appropriate to grant a stay of enforcement of the final charging order when (a) no application to set aside the judgment which the charging order secured had been issued and (b) there was not even a statement of case properly setting out the basis of such a claim.

41. That, it seems to me, was of itself an amply sufficient foundation for the Judge's decision. As things stood, the default judgment of 25 November 2019 was in force. Mr Taylor had applied to have it set aside, but that application had been dismissed by District Judge Richmond, and Mr Taylor had been refused permission to appeal against that decision both on paper and at an oral hearing. From 13 October 2021, when Fancourt J dismissed the applications by Mr Taylor and Rooster for permission to appeal, there was no way in which the default judgment could be challenged within the existing proceedings. Yet by the time the application for enforcement of the charging order to be stayed came before the Judge on 20 June 2022, some eight months after Fancourt J had given judgment, Mr Taylor had still neither issued a new claim for the default judgment to be set aside for fraud nor even provided a draft statement of case for such a claim. I am in no doubt that, in those circumstances, the Judge was entitled to decline to grant any stay in the exercise of his discretion. That is of itself enough to dispose of this appeal.

42. However, I think it is also appropriate to address the second reason the Judge gave for dismissing the application for enforcement of the charging order to be stayed: that he did not consider that "a strong case [of fraud], or one demonstrating a reasonable prospect of success, has been demonstrated on the evidence before the Court".

43. It is now the case, of course, that Mr Taylor and Mr Luke Taylor both deny having signed the guarantees in their names. Mr Taylor has given evidence that he told Mr Derbyshire "robustly" that he would not sign, and he relies in support of that on the witness statements of Mr Fox and Mr Costache, who have said that Mr Taylor was "extremely robust" when Mr Derbyshire asked him to sign a guarantee (Mr Fox) and

that Mr Taylor told Mr Derbyshire to "f*ck off" (Mr Costache). Likewise, Mrs Bradsell-Alty has provided a witness statement confirming that Mr Luke Taylor "did not sign a personal guarantee". Mr Taylor places reliance, too, on the handwriting evidence he has obtained.

44. A variety of matters, however, undermine Mr Taylor's claims:

i) It cannot plausibly be suggested that Close was willing to substitute hire purchase agreements with Rooster for those it had with TTX without taking a new guarantee. Close already had the benefit of a guarantee from Mr Taylor in respect of TTX's liabilities. In circumstances where the Taylors wished to transfer the relevant goods and equipment to a new company, it is unlikely in the extreme that it was prepared to do so on the basis that it would have no redress against anyone but the successor company. In his judgment of 13 October 2021, Fancourt J, endorsing District Judge Richmond, said at paragraph 24 that "it makes absolutely no sense at all that in the context of default by an existing lessee that had gone into insolvency, the liability would be transferred over to another company that may or may not have been worth anything in substance and the previous guarantee and rights that Close Brothers had against Mr Taylor under the existing guarantee would have been given up, together with an existing claim against him worth £291,000 that had already accrued". I agree;

ii) That Close expected Mr Taylor and, later, Mr Luke Taylor to guarantee Rooster's obligations is confirmed by the fact that guarantees were evidently prepared and brought to the meetings of 29 June 2017 and 13 July 2018. The idea that Close would have been happy to go ahead after Mr Taylor or his son had refused to sign a guarantee is absurd;

iii) I suppose that does not exclude the possibility that Close was misled into believing that Mr Taylor and his son had signed the requisite guarantees and "confirmation letter" because Mr Derbyshire had forged their signatures. This theory would seem to involve Mr Derbyshire proffering the guarantees for signature by Mr Taylor (on 29 June 2017) and Mr Luke Taylor (on 13 July 2018), accepting their refusal to sign them, forging their signatures on the guarantees and "confirmation letter" and then reporting to those at Close responsible for the "levels of checks" of which Mr Derbyshire spoke in his 20 September 2022 witness statement that the documents had been duly signed. Why, one wonders, would Mr Derbyshire, a regional sales manager who had worked for Close for many years, engage in such outrageous misconduct, involving fraud as against both the Taylors and Close? No possible motive is evident. On top of that, Mrs Bradsell-Alty referred in her witness statement to Mr Derbyshire having left Mr Taylor's home on 13 July 2018 with "his assistant". That suggests that an "assistant" would also have had to be aware that Mr Luke Taylor had not signed the guarantee in his name;

iv) Mr Taylor did not originally deny having signed the guarantee. His application to set aside the default judgment against him was put forward on the basis that Close had "substantially failed to disclose … the full extent of payments made to [it]" and that there was a need "to correct a gross error in amount of the Judgment Debt". Moreover, Mr Taylor explained in the draft defence that he

had "no recollection" of contracting to be a guarantor, not that he remembered refusing to execute a guarantee. It is true that, several months later, after Mr Derbyshire had said in a witness statement that he had witnessed Mr Taylor and his son signing the guarantees, Mr Taylor asserted that he "did not sign a personal guarantee", but the focus of the submissions advanced on his behalf at the hearing before District Judge Richmond on 15 July 2020 was still on quantum, not liability. The District Judge was told at the hearing that Mr Taylor's position was essentially, "I'm happy to pay any money I owe, but … I've been asking you for the account documents from which I can work out how much I owe". It was not until more than a year later, in a witness statement dated 10 October 2021, that Mr Taylor first referred to having told Mr Derbyshire that he would not sign any more guarantees "robustly";

v) Mr Taylor asserted in the application notice of 3 March 2022, in a section verified by a statement of truth, that he had "always maintained" that he had not signed the guarantee in his name. That is plainly incorrect: he had not initially denied signing the guarantee;

vi) Mr Taylor told Fancourt J that in June 2017 that he "would absolutely not sign any more [personal guarantees] because [he] was up to the hilt" and "wouldn't put anything on the line". In a similar vein, Mr Fox and Mr Costache said in their witness statements that, at the meeting on 29 June 2017, Mr Taylor "refused point blank to sign any personal guarantees on the grounds that [he] was 'on the hook' with the Bank … and was not prepared to extend his exposure further" and that Mr Taylor told Mr Derbyshire to "f*ck off" on the basis that he "would not expose himself further" and "already had significant '*pg's*' with Yorkshire Bank". However, Mr Taylor was already "on the hook" to Close as result of the guarantee he had given for TTX and so was not being asked to increase his exposure. It is therefore hard to imagine that Mr Taylor would have declined to provide a guarantee for Rooster, let alone that he would have done so in such trenchant terms, for the reasons given or that he would have voiced such objections to Mr Derbyshire. Nor is it persuasive that Mr Taylor's "usual business practice" is said to be "not to sign personal guarantees for any company of which [he is] not a director or major shareholder". The situation was not a "usual" one. Mr Taylor had existing obligations to Close and the company in respect of which he was being asked to give a guarantee was his son's;

vii) The idea that Mr Derbyshire would have either "accepted Mr David Taylor's response" and shaken hands or "accepted Mrs Taylor's comments", as Mr Fox and Mrs Bradsell-Alty have said, is also implausible;

viii) By his own account, Mr Taylor remembered that he had not signed the guarantee in his name only when reminded of that by Mr Fox and Mr Costache. That implies that Mr Taylor's evidence to that effect is not the product of his own independent recollection. It implies, too, that Mr Taylor had spoken to Mr Fox and Mr Costache by 23 June 2020, when he first said in a witness statement that he had not signed a guarantee. Yet Mr Taylor did not refer to having refused to sign "robustly" until 10 October 2021 and, even at that stage, there was really no more than bare assertion. There was no evidence from Mr Fox or Mr Costache until January 2022;

ix) Mr Taylor told the Judge that in 2017 he had had "people witnessing everything that [he was] doing" and that he "knew that [two ex-employees] were all privy to what had gone on upstairs". Supposing that to be correct, Mr Taylor would have known from the outset that, if he could not recollect whether he signed the guarantee in his name, he should consult the ex-employees. Yet Mr Taylor at first went no further than to not admit that he had signed;

x) It strains credulity that Mr Taylor and his son should both now deny signing when they had previously said no more than they could not recollect doing so; and

xi) With regard to the handwriting evidence on which Mr Taylor relies, (a) the expert was working from photocopies and from signatures of Mr Taylor which had been supplied by him and, for the most part, generated for the purpose of the report, (b) as the Judge observed, "in relation to Luke, it is the expert's evidence that it is not his signature not only on the guarantees that he signed, but also certain hire purchase documentation, whereas it is Luke's own evidence in his witness statements that he did actually sign the HP agreements, albeit that he now denies having signed the personal guarantees" and (c) an expert instructed by Close has evidently arrived at contrary conclusions; and

xii) The additional documents on which Mr Taylor sought permission to rely in his application dated 30 March 2023 do not advance his case that his signature was forged on the guarantee in his name and the "confirmation letter".

45. In all the circumstances, I agree with the Judge that Mr Taylor has not demonstrated that he would have a reasonable prospect of success in a claim to set aside the default judgment against him (or any other order) for fraud. For that reason, too, I would uphold the Judge's dismissal of Mr Taylor's application for enforcement of the charging order to be stayed. In my view, the allegation that Mr Taylor's signature was forged on the guarantee in his name and the "confirmation letter" lacks conviction.

46. Turning finally to the first of the three reasons which the Judge gave for his decision, the conclusions I have reached thus far make it unnecessary for me to address this, and I think it better not to do so.

Conclusion

47. I would dismiss the appeal. I would also confirm the dismissal of Mr Taylor's application dated 30 March 2023 for permission to rely on further evidence.

Lady Justice Simler:

48. I agree.

Lord Justice Arnold:

49. I also agree.