Neutral Citation Number: [2024] EWCA Civ 1413

Case No: CA-2023-002479

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(KINGS BENCH DIVISION)
LIVERPOOL DISTRICT REGISTRY
His Honour Judge Cadwallader
KB-2023-LIV-000011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/11/2024

Before:

LORD JUSTICE LEWISON
LORD JUSTICE COULSON
and
LORD JUSTICE ZACAROLI

- -

Between:

Sze Ming Yeung	**Appellant**
- and -	
(1) Jeckz Investment Ltd (2) Kathy Cong (3) J&L (London) Holding Ltd	**Respondents**

- -
- -

Joshua Hitchens (instructed by **London Law Chambers**) for the **Appellant**
Sandip Patel KC (instructed by **Lex-Avoca Solicitors**) for the **Respondents**

Hearing Date: 6 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 14 November by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

LORD JUSTICE COULSON:

1. Introduction

1. This appeal arises out of an order for summary judgment made by His Honour Judge Cadwallader ("the judge") in favour of the respondents in the sum of £778,607. Although the appeal raises one issue of principle – the proper approach to allegations made in separate proceedings on an application for summary judgment under CPR Part 24 – the underlying dispute will be familiar to any civil lawyer in practice over the last century or more: has the appellant done enough to avoid summary judgment?

2. At the end of the appeal hearing, the court indicated that the appeal would be dismissed. These are my reasons for joining in with that decision.

2. The Factual Background

3. By an agreement made on 20 July 2017, the three respondents agreed to lend a total of £700,000 to a company called 888 OK Limited ("the company") for the purposes of property development. The property was located at 48-54 Renshaw Street in Liverpool ("the property"). The appellant was and is the principal director of the company.

4. As part of the loan arrangement, the appellant provided personal guarantees to each of the respondents in respect of the loans. The personal guarantees are also dated 20 July 2017. An additional £34,000 was loaned in November 2017.

5. On 14 February 2022, the respondents commenced these proceedings against the appellant seeking repayment of the loans pursuant to the terms of the personal guarantees. Paragraph 2.2 of the Particulars of Claim allege that, "on or about 20 July 2017" the appellant "provided a personal guarantee to each [claimant] in respect of the sum to be loaned by each [claimant]". The terms of those personal guarantees were set out in paragraph 10 of the Particulars of Claim.

6. In a defence and counterclaim dated 25 February 2022, the appellant admitted paragraphs 2.2 and 10 of the Particulars of Claim without qualification. The defence and counterclaim impliedly accepted that the personal guarantees were valid, but took the point that the redemption date for the loans was extended, and that ultimately, the redemption date became the date of the sale of the property. It was averred that, at the time that the defence and counterclaim was served, that sale had not occurred, so that liability under the personal guarantees had not yet crystallised. The only other issue on the face of the defence was an argument that the personal guarantees did not extend to the additional £34,000 which was advanced by the respondents in November 2017.

7. The property was sold on 15 June 2022. The undisputed evidence is that the appellant did not notify the respondents of that sale when or shortly after it occurred. Indeed, it appears that the respondents did not discover the fact of the sale until shortly before the summary judgment hearing in October 2023.

8. The first CMC took place on 15 June 2023 which, coincidently, was exactly one year after the property had been sold. At that hearing, the appellant told the respondents

that he had commenced Part 8 proceedings in the Chancery Division, seeking a declaration that the personal guarantees were invalid and unenforceable primarily because of undue influence. In those separate proceedings, there was a signed Particulars of Claim and a witness statement in which the appellant set out his case as to how and why the personal guarantees were invalid. I shall return to that material in greater detail below.

9. On 21 July 2023, the respondents sought summary judgment against the appellant in these proceedings. That application was heard by the judge on 5 October 2023 in the Civil Court Centre in Liverpool.

3. The Judgment Below

10. Having set out the background at paragraphs 1-6 of his judgment, the judge noted at paragraph 7 that the appellant did not seek to challenge the basis upon which the claim under the personal guarantees was pursued, or the date upon which liability under those personal guarantees crystallised. Instead, the appellant sought to challenge the claim on the basis set out in the separate Chancery proceedings. As the judge explained in paragraph 7, the arguments came down to the undue influence point asserted there.

11. At paragraph 8 of his judgment, the judge said that the separate proceedings gave rise "to something of a procedural tangle or difficulty". He thought it remarkable, given the existence of the current proceedings, that it was thought appropriate to start separate proceedings in a different division, in a different city. He noted that there was no attempt to explain how or why that had happened. At paragraph 9, the judge said that the separate proceedings were obviously intended to undermine the present claim. He went on:

> "…The question is what regard I should have to them in the present proceedings. It seems to me that apart from them, there is, for the reasons which I have already stated, no prospect of success in defending the claim because it is plain that the property has been sold and it is accepted that it has been sold and that liability has arisen under the personal guarantees has not been met and the primary debt has not been paid so as to give rise to that liability."

12. There were two reasons for the judge's decision to grant summary judgment, set out at [10] and [11]:

> "10 It seems to me that the difficulty which the defendant faces is that, firstly, in these proceedings the validity of the personal guarantees is admitted and not contested and, secondly, that there has been no application to amend the defence in these proceedings and no basis has been suggested upon which any such application, if it were made, could or should succeed. On that basis, it seems to me that it would be wrong for the court to allow these proceedings to be derailed by a defence which at some future point might be raised but has not been raised.
>
> 11 It is worth mentioning, as a secondary point, that the material in support of the other proceedings is thin to the point almost of invisibility, and the way in

> which they have been raised leads one to question, at any rate, whether they have been raised and pursued in good faith. But on any footing, it seems to me, that on the material properly before this court today, there is no real prospect of success in defending the claim and there is no other compelling reason for the question to be left over to trial. It follows from what I have already said that there is equally no basis for dismissing or striking out this application and no basis for staying it until some future date. Accordingly, I will give judgment summarily on the application, as asked."

In this way, the judge concluded, first, that he could properly ignore the allegations in the separate proceedings in the Chancery Division because the allegations there had not been raised in these proceedings [10]; and that, secondly, those allegations did not in any event give rise to a defence which had a reasonable prospect of success [11].

13. The appellant appealed. Although there are a number of different grounds, they are all couched in very general terms. The essential argument that they raise is that the judge was wrong to give no weight to the allegations in the separate proceedings concerning the alleged invalidity of the personal guarantees. There was no appeal in respect of the discrete issue concerning the additional £34,000. That was perhaps unsurprising, since the judge had expressly raised that point with counsel at the hearing, to be told that "there is nothing in the evidence or my instructions which permits me to take any substantive point along those lines".

4. The General Principles

14. The general principles relating to summary judgment are very well-known. CPR 24.3 provides that a court may grant summary judgment if it considers that the claim or defence has no real prospect of success, and there is no other compelling reason for the matter to proceed to trial. The court must consider whether the claim or defence has a 'realistic' – as opposed to a 'fanciful' – prospect of success: *Swain v Hillman* [2001] 1 All ER 91. A realistic defence must carry some degree of conviction, and so must therefore be more than merely arguable: *ED&F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].

15. As to the sorts of things that might lead to a conclusion that a claim/defence has no realistic prospect of success, perhaps the most practical recent summary can be found in the judgment of Asplin LJ in *Elite Property Holdings Ltd v Barclays Bank PLC* [2019] EWCA Civ 204 at [41-42]:

> "41…A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a *prima facie* case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No3)* [2003] 2 AC 1.
>
> 42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is

> coherent and contains the properly particularised elements of the cause of action relied upon."

16. In arriving at a conclusion under Part 24, the court must not conduct a mini-trial (*Swain v Hillman*) but, at the same time, it is not obliged to take at face value and without analysis everything that a party has said in his statements (*ED&F*). Short points of law can be disposed of by way of summary judgment (*ICI Chemical and Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725), but the court should hesitate about making a final decision if there are reasonable grounds for believing that a fuller investigation than is permissible at summary judgment stage might affect the outcome (*Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceuticals Co 100 Ltd* [2007] PSR 3). The court should take into account, not only the evidence that it has, but also the evidence that can reasonably be expected to be available at trial (*Royal Brompton Hospital NHS Trust v Hammond (No.5)*[2001] EWCA Civ 550). All that said, a defendant meeting a claim for summary judgment must put forward their best case (*Folgender Holdings Ltd v Letraz Properties Ltd* [2019] EWHC 2131 (Ch) at [28]. They are not entitled to wait, and hope that something may turn up later.

17. On the particular issue of points raised by way of defence which have not been pleaded, both parties referred to *Mishcon De Reya LLP v RJI (Middle East) Ltd* [2020] EWHC 1670 (QB). The judge had refused summary judgment on the basis of a point that had not been pleaded by the defendant. The claimant appealed. On appeal, Jeremy Johnson J said that there was no "firm and hard-edged rule" that a judge, when considering an application for summary judgment against the defendant, may only have regard to matters that are put in issue by the pleaded defence [55]. He went on to say at [57] that whilst the pleadings are relevant and important documents, a judge considering an application for summary judgment may need to take account of the possibility of an amendment when assessing whether the defence has a real prospect of success at trial.

5. The Appellant's Case as to Undue Influence

18. The material relied on by the appellant to allege undue influence in the separate proceedings consists of the Claim Form of 15 June 2023; the Particulars of Claim, signed with a statement of truth; and a witness statement of the appellant, also signed with a statement of truth. Both these later documents are dated 30 June 2023.

19. Mr Hitchens, although he was instructed late, explained the appellant's position with clarity and realism at the appeal hearing. He indicated that there were three complaints on the face of the Claim Form that he still pursued. The first was the undue influence allegation. The second was a complaint about the absence of an opportunity to take independent legal advice. The third was a claim that the personal guarantees had been backdated.

20. The Particulars of Claim say this about the personal guarantees:

> "3. On 28th September 2023 a Mr Michael Dong ("Dong")" for and on behalf of the D, attended C's offices. He had been involved throughout since the investment by the Claimants. Dong asked the C to sign an agreement. He, using C's computer, subscribed to a template provider called Simply

> Docs and downloaded a Personal Guarantee. He made changes, using C's computer, caused it to be printed and asked C to sign. C was not afforded an opportunity to obtain an independent legal advice. Dong would insist, more like a bully, that documents were not significant and were merely required to complete their requirements.
>
> 4. D, under pressure, signed the PG on 28 September 2017.To D's surprise, the PG has been backdated by the C with a date that is prior to when it was actually signed under undue pressure.
>
> 5. The backdated PG has been put to a date prior to the shareholder's agreement and falsely reflect that the PG was signed before the shareholders agreement."

21. The relevant parts of the witness statement say:

> "5. On 28th September 2017, Mr Michael Dong ("Dong") who was one of the members of the Defendants and has been involved throughout, paid a visit to my office and stated that he would require an additional agreement to be signed. Without explaining further, he asked to use our computer with internet access, which was provided. He asked for my bank card details to subscribe to Simply Docs Company who provide document templates and then downloaded a document namely Personal Guarantee. He made the amendments to the agreement to generate three copies and asked me to sign.
>
> 6. I was not sure as to the implications of the document, but he pressurised me to sign as it was not significant and assure me that it had no adverse consequences. Without having a chance to obtain a chance to obtain any legal advice on the documents, I signed on 28 September 2017.
>
> 7. I later discovered that, without my acceptance of the changes, he changed the date to be backdated. The document now records that I signed the document in the past whereas I did not."

6. The Relevance of the Separate Proceedings

22. In my view, in the passages at [9] and [10] of his judgment which I have set out at paragraph 12 above, the judge attached too much significance to the fact that the allegations concerning the undue influence of Mr Dong were raised in separate proceedings, rather than in these proceedings. The fact that there were two sets of proceedings is primarily a procedural matter, rather than a substantive issue. Moreover, the appellant is a litigant in person. He may simply not have realised that good practice and compliance with the CPR required him to raise any collateral attack on the validity of the personal guarantees in these proceedings, and not elsewhere.

23. Accordingly, although there is one potentially important point flowing from the fact that the allegations as to undue influence have been made in separate proceedings (which I address at paragraphs 34-36 below), I would not support the judge's first reason for granting summary judgment. In my view, what matters is *not* the fact that the attack on the validity of the personal guarantees has been raised in separate proceedings, but whether that attack gives rise to a realistic prospect that the appellant may be able successfully to defend the claim in these proceedings. To that extent, I agree with what Jeremy Johnson J said in *Mishcon De Reya* about a judge being entitled, where appropriate, to look beyond the confines of the pleadings in the proceedings and to consider the possibility of new points being raised by way of amendment.

7. Is There A Realistic Prospect Of Success?

24. At [11], the judge described the merits or otherwise of the undue influence case as "a secondary point", but as I have explained, I consider it to be the only point of relevance to this Part 24 application: does the defence of undue influence have a realistic prospect of success? For the reasons set out below, I conclude that it does not, and that the judge was right to describe the potential defence as "thin to the point of invisibility".

25. I consider that much of the content of the Particulars of Claim in the separate proceedings, and the supporting witness statement, are unexceptionable. Using a computer to generate a template for a personal guarantee is commonplace. If, as the appellant alleges, Mr Dong said that the personal guarantees were required to complete the respondents' requirements, he was quite right: any investor lending money to a development company runs the risk that, after the development is completed, the company will be put into liquidation and there will be no repayment. That is why personal guarantees are required in such circumstances. They are simply a fact of life for a developer: without them, they would generally not be able to obtain the funding that they need. Mr Hitchens called them "completely normal"; I agree.

26. In *Royal Bank of Scotland PLC v Etridge (No.2)* [2001] UK HL 44, the House of Lords were dealing with the rather different position of what Lord Scott called "surety wives". But they said that, generally, claims of undue influence should be raised early and had to be supported by clear evidence. In the present case, neither of those requirements has been fulfilled. The long and unexplained delay on the part of the appellant in taking the undue influence point is self-evident (see paragraphs 6 - 9 above). Moreover, the evidence put forward by the appellant, even taken at its highest, falls a long way short of supporting an arguable case of undue influence.

27. The first complaint is the assertion in the Particulars of Claim that Mr Dong "would insist, more like a bully, the documents were not significant and were merely required to complete their requirements." But no particulars are provided of how this alleged bullying manifested itself. The appellant's witness statement does not support the allegation of bullying by Mr Dong: bullying is not even mentioned. That says that Mr Dong "pressurised me to sign as it was not significant and assure me that it had no adverse consequences". But there is no elaboration on what Mr Dong did or said to "pressurise" the appellant into signing the personal guarantees. Many successful businessmen are forceful, but their conduct or demeanour would fall a long way short of undue influence.

28. I should add that, whilst Mr Hitchens accepted that the undue influence case advanced by the appellant was based solely on coercion/duress, at one stage in his submissions he sought to raise a different point: that the nature of the relationship between the parties was such that a relationship of influence could be inferred. There were, I think, grave difficulties with that. It was not a point that was pleaded in the separate proceedings. There is no evidence to support it. Moreover, Mr Hitchens realistically accepted that the relationship between the respondents and the appellant could not be described as a relationship of trust and confidence: rather, it was an ordinary commercial relationship. Accordingly, I consider that this unpleaded attempt to broaden the scope of the undue influence allegations was not realistically arguable.

29. The appellant's second complaint is that he was not afforded an opportunity to obtain independent legal advice. However, no matter what the text of personal guarantees may warn to the contrary, businessmen sign these sorts of documents every day without taking legal advice. There is no evidence that the appellant customarily took such advice, and no evidence that the appellant asked Mr Dong for the opportunity to take such advice. In those circumstances, there can be nothing in this second complaint.

30. The third complaint concerns the allegation of backdating. When the judge sought clarity on this aspect of the appellant's case, counsel then appearing indicated that it was not a point on which he could make any submissions. Although Mr Hitchens endeavoured to resurrect the argument on appeal, it quickly became apparent that this was a very muddled part of the appellant's case. It was not clear whether the appellant was suggesting that the personal guarantees had been backdated to July on 28 September 2017 and he had not spotted it, or had been backdated subsequently. Paragraph 4 of the Particulars of Claim is equivocal. Paragraph 7 of the witness statement (set out at paragraph 21 above) strongly suggests that the backdating had been done later, after 28 September. That would amount to an allegation of forgery, because the date of '20th July 2017' is typed on a number of the individual pages of the personal guarantees, each one of which is signed by the appellant. There is nothing to support such a serious allegation: it is not explained how a date shown on a page that the appellant signed could have subsequently been altered.

31. Mr Hitchens said that his instructions were that the appellant had signed the documents as we have them in the bundle, and did not realise that they were dated '20 July 2017'. But there is no evidence of that: it is not what the appellant says in either the Particulars of Claim or his witness statement. Since the date is on the front page and the first page of text, three times over, and the appellant signed those pages, that suggestion is implausible. Moreover, even if it were right, there is nothing to say that this was anything other than an ordinary situation in which an agreement is deliberately backdated to accord with other related agreements. It certainly does not indicate any undue influence.

32. There are other anomalies which, in my view, demonstrate that the defence of undue influence is without substance and wholly implausible:

    a) There is no mention of Mr Dong in the personal guarantees. Instead, the personal guarantees are signed (on every page) by the appellant, and by Peter Norton on behalf of the respondents. There is no reference to Mr Norton in any of the material produced by the appellant.

b) There is no explanation as to why the appellant waited for almost 6 years after signing the personal guarantees (on his case, in September 2017) before claiming that he had been bullied into signing them.

c) The appellant went to some lengths to plead a defence and counterclaim in these proceedings which made plain that the sums were not due because the property had not yet been sold. Yet when, a few months later, the property was sold, the appellant did not tell the respondents, and remained silent about it for over a year.

d) The appellant failed to tell the court about the sale at the CMC in June 2023, even though – as he well knew – the sale meant that his only pleaded defence in these proceedings was now obsolete.

33. In addition, there is not a single document or other piece of contemporaneous evidence to support the matters raised in the separate proceedings. The place where one might have expected to see such an assertion, at the very latest, was in the defence and counterclaim of February 2022, but not only is it not there, that defence instead assumes that the personal guarantees were valid and admits the date of 20 July 2017.

34. This links back to what I consider to be the relevant point about the existence of the two sets of proceedings. It is not disputed that the defence and counterclaim in these proceedings would need to be amended if the appellant was going to be allowed to run a defence of undue influence. In those circumstances, the judge should perhaps have considered in greater detail whether any such application would have succeeded.

35. In my view, any such application to amend would have failed because, amongst other things, it would have required the appellant to seek to resile from the admission that the personal guarantees had been signed on 20 July 2017, and from the implied admission that the personal guarantees were valid: see CPR 14.1A(3)(b) and 14PD 7. The authorities repeatedly emphasise the difficulty of resiling from an admission: see, for example, the decisions of William Davis J (as he then was) in *Cavell v Transport for London* [2015] EWHC 2283 (QB) and *The Royal Automobile Club v Wright* [2018] EWHC 913 (QB). Moreover, the absence of any explanation of why the appellant waited so long before raising the point for the first time would also have been fatal to any such application to amend.

36. So whilst I am sure that the appellant did not have these particular points in mind when he commenced the proceedings in the Chancery Division rather than seeking to amend, it gives rise to yet another hurdle which, in my view, he cannot surmount. The appellant has put forward no basis on which a judge could have concluded that, almost two years after signing the defence and counterclaim which assumed the validity of the personal guarantees, the appellant should be permitted to amend his defence in order to deny their validity.

37. Mr Hitchens hinted that there might be some evidence in the future which would support the defence of undue influence. In my view, there is no reasonable prospect of that. Even leaving aside my view that the time for raising that defence was – at the latest - February 2022, not June or October 2023, no other possible material has been identified. The appellant does not say that there was anyone at the relevant meeting other than him and Mr Dong, so there will not be any other live witness. Alternatively, it must be possible that Mr Norton was there (because he witnessed the

signature) but the appellant does not suggest that Mr Norton would or could give relevant evidence.

38. It was and is up to the appellant alone to set out a plausible case of undue influence at that meeting. He has had that opportunity in the Chancery proceedings and for the reasons that I have given, he did not take it. I was also unimpressed with the suggestion that there might be other documents by way of disclosure which could help. In this regard, Mr Hitchens sought to rely on a VAT invoice concerned with the obtaining of the template on 28 September, but that VAT invoice was not before the judge; was not seen by counsel on the application before the judge; was not before this court; and had not been seen by Mr Hitchens. No explanation for any of that was given. It was, with respect, hardly a smoking gun.

39. Finally, as to the argument that the personal guarantee did not cover the additional £34,000, I consider that that argument is not open to Mr Hitchens on this appeal. It was deliberately not advanced before the judge and therefore it was not addressed in his judgment. Neither was it included in the notice of appeal for which the appellant has been given permission.

40. In all those circumstances, I am confident that there is and will be no material or plausible evidence to support a realistically arguable defence of undue influence, and that everything available to this court points firmly in the other direction. For these reasons, I consider that the judge's secondary reason for granting summary judgment, although rather tersely expressed, was correct.

8. Conclusion

41. For these reasons, I conclude that the judge's first reason for granting summary judgment was wrong, but that his second reason was right, and that therefore he was right to grant the respondents summary judgment on the personal guarantees. The defence of undue influence has no realistic prospect of success.

LORD JUSTICE ZACAROLI

42. I agree.

LORD JUSTICE LEWISON

43. I also agree.