Neutral Citation Number: [2021] EWHC 328 (Ch)

Case No: BR-2013-005623

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
IN THE MATTER OF RODERICK JOHN LYNCH
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
London
EC4A 1NL

Date: 23/02/2021

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

- -

Between :

(1) RODERICK JOHN LYNCH	**Applicant**
- and -	
(1) ALEX CADWALLADER (in his capacity as Trustee in Bankruptcy of the Applicant)	**Respondents**
(2) ALDERMORE BANK PLC	

- -
- -

EDWARD KNIGHT (instructed by **DWFM BECKMAN**) for the **Applicant**
SIMON MILLS AND SAHANA JAYAKUMAR (instructed by **FRANCIS WILKS & JONES**) for the **Second Respondent**

Hearing dates: 1, 2, 3,4, 5, 8, 9 February 2021

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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 version as handed down may be treated as authentic.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

This judgment comprises the following parts and sections:

Introduction

1. This is an appeal against the admission of a proof of debt submitted to the first respondent, Mr Cadwallader in his capacity as trustee in bankruptcy (the "Trustee") of Mr Lynch ("Mr Lynch"). The appeal made by Mr Lynch concerns a personal guarantee dated 12 September 2011 (the "Guarantee") said to be entered into by Mr Lynch and made in favour of the second respondent, Aldermore Bank Plc (the "Bank"). The Bank states that it asked Mr Lynch to provide the Guarantee as part of a security package required for a finance facility given to Ruskin Private Hire Limited ("Ruskin"). Ruskin was wholly owned and controlled by Mr Lynch. He is also the owner of a dormant company known as Robust Training Limited ("Robust").

2. Ruskin became insolvent in 2013/2014. More particularly, the Bank served a statutory demand on Mr Lynch demanding £1,237,556.13 on 13 March 2014. Mr Lynch applied to set aside the demand on the basis that the Guarantee was unenforceable and questioning the quantum.

3. Subsequently the Bank discovered that a prior petition had been presented against Mr Lynch by Her Majesty's Revenue & Customs ("HMRC"). That petition was in respect of a sum of £85,000 odd presented on 17 October 2013. It was based on a statutory demand

dated 9 May 2013. The demand was made in respect of outstanding income tax and national insurance contributions extending back to the year 2005/2006. The Bank obtained an order for change of carriage of the petition on 24 May 2014. On 28 August 2013 HMRC presented a winding-up petition against Ruskin. It entered creditors' voluntary liquidation on 12 February 2015. The following month, on 12 March 2015, Registrar Barber (as she then was) adjudicated Mr Lynch bankrupt having found that the HRMC debt was undisputed and remained unpaid. The intervention of the HMRC debt and change of carriage meant that the court did not determine the application to set aside the Bank's statutory demand.

4. The Trustee is neutral as to the outcome of the challenge to the proof of debt. He has written to the court to explain that the estate is insolvent and there will be no return to unsecured creditors regardless of the outcome. At an earlier hearing, before a different judge, Mr Lynch was found to have standing to make this application.

The proof of debt

5. In 2015, the Trustee came to consider the proofs of debt. He turned first to Mr Lynch who acknowledged a number of debts as "genuine". The process continued and by late 2015 and early 2016 it became apparent that the proof of debt submitted by the Bank was disputed. Solicitors acting for Mr Lynch (DWFM) wrote "to put you on notice" that the Bank's "standing as a creditor" is disputed, inviting the Trustee to reject the proof of debt. More detail was provided in a later response:

    5.1. Mr Lynch himself categorically denies signing the Guarantee, and has given evidence to this effect in a number of witness statements bearing statements of truth.

    5.2. Miss Hughes, Ruskin's financial controller, and the person alleged to have witnessed Mr Lynch's signature on the Guarantee, has given evidence under a statement of truth that she neither saw, signed nor witnessed the purported guarantee.

    5.3. Mr Trevor Dartford, the independent broker who introduced Ruskin to Aldermore, assisted Ruskin in negotiating the facility with the Bank and who was copied into most, if not all, emails between the Bank and Ruskin, has given evidence under a statement of truth that there was never any discussion with the Bank about Mr Lynch

having to sign an unlimited Guarantee and of his firm belief that the Bank never presented a draft guarantee (whether limited or unlimited) to Mr Lynch for signature.

5.4. Both Miss Hughes and Mr Dartford also give evidence that had such a guarantee been presented to Mr Lynch to sign, they would have cautioned him against doing so.

6. At the relevant time, September 2011 Miss Hughes occupied the position of financial controller at Ruskin. At some point in time prior to that, Mr Lynch was her partner. They have one son. Miss Hughes gave evidence at trial. I shall deal with her evidence later in this judgment. Mr Dartford was a broker at a company known as Kalinsure and responsible for introducing Mr Lynch to the Bank. He did not provide evidence at trial. There was argument as to why he had not given evidence: Mr Lynch arguing that Mr Dartford had been "knobbled": payment due to him from the Bank had been stopped. The Bank arguing that as Ruskin had gone into default Mr Dartford was not entitled to commission. This is a dispute I need not determine. Mr Dartford's evidence has little weight but that does not mean it has no value.

7. The Trustee obtained advice from counsel and admitted the Bank's proof of debt in full. In summarising the Trustee's four page letter I do not intend either to criticise or reduce the value of the serious consideration given to the DWFM letter. It needs to be read in full. In summary, his reasoning may be divided into three. First, the claim that the signature on the Guarantee is not the signature of Mr Lynch necessarily meant that a person at the Bank had forged his signature: an allegation of fraud is serious. Secondly, in her judgment dated 12 March 2014, Judge Barber had "recorded that Arnold J (at the change of carriage hearing dated 2 May 2014) must have been satisfied that Aldermore was a creditor in order to make the change of carriage order, and that the issue is therefore res judicata." Lastly, the burden of proof lay with Mr Lynch, on the balance of probabilities, to prove that the Guarantee was not executed in accordance with its terms: "the mere fact that Mr Lynch and Miss Hughes deny having signed the Guarantee does not establish in and of itself that he did not in fact do so." The Trustee highlighted some evidential factors to support his view that the proof should be admitted, namely: the Bank's credit committee proposal form referred to Mr Lynch as having provided a guarantee; there is no document to evidence Mr Lynch's resistance to providing a guarantee; the documents support the Bank's requirement of a personal guarantee as a pre-requisite to obtaining a finance facility; and no expert evidence had been advanced to

disprove the authenticity of the signature on the Guarantee. The Trustee thought that Mr Lynch's position was inherently implausible as he did not state, in his first witness statement in support of the application to set aside the statutory demand, that he had not signed the Guarantee.

8. As is apparent from the foregoing, although this application concerns an appeal against a proof of debt submitted by the Bank, its substance concerns the validity of the Guarantee.

The Guarantee

9. The Guarantee is expressed to be executed as a deed and bears a signature which purports to be that of Mr Lynch. It is witnessed or purports to be witnessed by Ms Marion Hughes carrying a signature and an address.

10. A joint expert report has been obtained from Dr Robert Radley. All parties agree that the opinion of Dr Radley is not determinative of whether Mr Lynch signed the Guarantee, but the court may lend evidential weight, even significant evidential weight to his findings due to his great experience and qualifications. He has been an independent forensic handwriting and document examination expert for over 40 years. He holds the Diploma in Document Examination awarded by the Chartered Society of Forensic Sciences, and is a Registered Forensic Practitioner, regulated by the Council for the Registration of Forensic Practitioners.

11. Using a technique known as "speculative reflection" he was able to determine that the signatures had been applied to the document after the print: the pages were not blank when signed. He established through another technique that the signatures were not applied while resting on top of the Guarantee, and likewise he found no evidence that tracing had been used to pen the signatures. He concludes:

    11.1. there is strong evidence to support the proposition that the signature was not written by Mr Lynch. It is a simulation (freehand copy) or possibly a tracing of his general signature style;

    11.2. there is strong evidence to support the view that Miss Hughes's signature was written by her. His examination was restricted due to the limited number of comparison signatures he had seen;

11.3. there is no evidence to assist in identifying when the signatures were added to the Guarantee; and

11.4. the evidence as to when the Guarantee was created is inconclusive.

12. A detailed examination of the documentation and a consideration of the live evidence is required to determine, with the help of Dr Radley's opinion whether the signatures on the Guarantee are those of Mr Lynch and Miss Hughes.

The background

13. The business of Ruskin was transferred by Mr Lynch to the company on or soon after incorporation in 2004. Until then Mr Lynch was a sole trader providing transport services to children and vulnerable adults with special needs. In particular, inspired by the experience of having spent some time in a wheel chair himself, he provided transport with wheel chair access. He has been described as an entrepreneur. He was runner-up in the Black Businessman of the Year awards in 2005; by 2010, he was a semi-finalist in the Ernst & Young Entrepreneur of the Year Awards. He was a non-executive director on the Board of Association of Education and Learning Providers. He sat on the licensing board for Transport for London ("TFL"). Having been involved in the original summit held at the Winter Gardens in 2006 regarding disability transport for the 2012 Olympic Games, thereafter he worked with TFL and the London Olympic Games Organising Committee in planning the disability transport services required for the Olympic Games. He appeared on television current affairs programmes to speak on topical transport and disability issues. He spoke at prisons and colleges. He was on the board of the London Private Hire Car Association. In evidence Miss Hughes explained that he did not always regulate his language to suit the situation. She was asked if he was difficult and responded that she did not find him so. She said he has to be understood as a man with a passion for a cause.

14. The business of Ruskin was seasonal in that the greater part of its trade occurred during the school term time. It had several contracts with local authorities. Due to its seasonality, it required invoice financing. At first, this was arranged through the Royal Bank of Scotland ("RBS"). RBS traded using several subsidiaries including "Intelligent Finance" ("RBSIF") and RBS Invoice Finance Limited.

15. In or around 2008, the account of Ruskin was monitored by the RBS Global Recovery Group ("GRG"). The overt purpose of GRG was to assist small businesses recover from a short-term financial difficulty. In 2018 a public report by Promontory, commissioned by a UK regulator, revealed how GRG had failed small businesses. Indeed by late 2010 the relationship between RBSIF and Ruskin had soured and Mr Lynch decided to find another invoice finance company. In his third witness statement dated 11 January 2021 Mr Lynch explains:

> "…in 2008, recognising that Ruskin's training centre, Robust Training, had been funded by working capital in the form of invoice financing from RBS, I approached the Ruskin Relation Manager at Nat West, Mr Paul Champion, for an Enterprise Finance Guarantee loan ("EFG"), which was a government backed initiative. This would have enabled the Ruskin's balance sheet to be restructured and long term assets matched with long term funding. Although the loan was approved in principle, it was never fully sanctioned or advanced to Ruskin and the required personal guarantee for £925,000 was never given. At some time during 2008/2009, as I have mentioned in earlier witness statements, Tony Wright became involved with Ruskin via his position with Baker Tilly, a company that GRG insisted that Ruskin engage as independent advisors. In about 2010, after further requests to GRG to restructure the balance sheet were met with responses that the credit team had no appetite, Ruskin engaged Garrod Goodrich and Trevor Dartford to raise funding to replace the invoice discounting facility with RBSIF (in respect of which I had given a limited personal guarantee of £100,000)… Mr Goodrich and Mr Dartford introduced Mr Bramwell to Ruskin in early March 2011 and I had a number of conversations with Mr Bramwell about how the company could expand and we shared our views. Following this, Mr Bramwell signed a non-disclosure agreement in June 2011."

16. Mr Bramwell was and remains a director and shareholder of Inspiration Finance Plc ("Inspiration"). He explains that he had worked with Mr Goodrich on a few finance projects in the past. Mr Dartford I have mentioned. He wore several different hats acting as a business partner of Mr Bramwell and a sales director for Inspiration.

17. Mr Bramwell states in his written evidence:

> "I first met Mr Lynch in or around March 2011 to discuss potential financing options for Ruskin, which was already experiencing significant cashflow Issues, We looked at the possibility of me investing capital in Ruskin to bridge a funding shortfall of £400,000.00 and discussions continued over several months, during which I had numerous meetings with Mr Lynch and Ruskin's Financial Controller, Marion Hughes."

18. This was not the whole story. Mr Bramwell, as Mr Lynch says, was also excited about the prospect of being involved in Ruskin. He considered Ruskin a "noble business" operating in "an interesting and worthwhile area" but had some challenges. He accepted in cross-examination that he considered it a prospect. Mr Dartford had been engaged as a broker by Ruskin to find alternative finance. Mr Bramwell offered to act as its non-executive chairman to "resolve the faltering relationship between Ruskin and its incumbent financiers" and "find new investment and funding". In late June 2011 Inspiration made a loan to Mr Lynch for the purpose of injecting capital into Ruskin: £100,000 was paid at the end of June and another £100,000 in early July.

19. The Bank carried out a due diligence process known as a business survey on 29 June 2011. The report, dated 5 July 2011, was for internal purposes only and was carried out by Farid Nonoo. The report goes into considerable financial detail but the recommendation is short:

> "The requirement is for £1m line at 80% IP and relaxed concentration. The income stream appears undiluted but subject to contractual conditions and concentrated on two customers-both London Boroughs. Trading on would be necessary in a collect out. On the plus side, company appears financially

> profitable though cashflow appears tight- the incoming loan should resolve immediate issues. Collections and credit controls are weak for a CID facility and some concerns at the storage and supply of information. There are unanswered questions on invoice validation, sales statistics and VAT liability. On balance, not recommended."

20. Mr Clark (Regional Managing Director) of the Bank visited the premises of Ruskin on Friday 29 July 2011. The written evidence of Mr Lynch, in respect of this meeting, is important:

> "We discussed the possibility of Aldermore providing invoice discounting facilities to Ruskin and I gave Mr Clarke an overview of Ruskin's business and plans for the future. During this meeting Mr Clark mentioned that there was a possibility that Aldemore would ask me to sign a limited personal guarantee, which would be for no more than £150,000, but he did not say that it would definitely be required. Following the meeting Mr Clarke sent me an email on 2 August 2011."

21. The e-mail mentioned by Mr Lynch in his evidence did provide headline terms and the following:

> "I have not indicated any pricing at this stage with respect to a service fee (as a percentage of turnover) or discounting fee (cost funding) in case Simon has already costed this and will need to discuss this with him but we appreciate we need to be competitive in line with your existing funding arrangements."

22. He finished by stating that he needed to discuss the headline terms with his credit team to "ensure we have no major obstacles based on my own recommendations…". In cross-examination Mr Lynch explained that Mr Clark had said to him at the meeting: "we are aware of what you have at the moment" and the offer would be "pari passu to what you have… we know we have to remain and be competitive." Accepting that financiers such

as the Bank would require security, Mr Lynch was pressed in cross examination about the conversation with Mr Clark. The response was unhesitating:

> "Yes I am categoric in what I am saying. The only discussion that we spoke about at the end was the guarantee. He conveyed to me in verbal terms that…we spoke about being competitive and a guarantee being-if there was going to be a guarantee it would be pari passu to RBSIF. I never heard of the word before, that is the first time I heard of that word. I think was a common word between broker and him because Trevor Dartford mentioned the same word, pari passu."

23. His evidence was that he was willing to provide a limited guarantee but he would not have provided, under any circumstance, an unlimited personal guarantee. His oral evidence was that he would not have accepted an offer of finance from the Bank if it required and insisted on an unlimited guarantee. He thought that the industry standard was to ask for a personal guarantee to be limited to between 10%-15% of the loan facility. This would equate to the limited guarantee he had provided to RBSIF. Although Mr Mills for the Bank made clear that he had a different experience of the industry standard, he was in no position to give evidence himself. Accordingly no evidence was called to contradict Mr Lynch's assertion.

24. An internal document, not sent to Mr Lynch, proposes an unlimited guarantee and indemnity. Mr Lynch was required to give details of his assets and liabilities. Mr Clark did not give evidence at trial.

25. A recommendation discussion took place between Mr Dartford, Mr Clark and Simon Adcock (Regional Sales Director) of the Bank. That led to a request for a reference from RBSIF in mid-August 2011. A reference was provided by RBSIF on 16 August 2011 and soon after the Bank made an offer letter which was issued on 2 September 2011. The position of the Bank is that all the necessary documentation in respect of the finance offer was produced on this date: in other words, the Bank had printed a standard form personal guarantee ready for Mr Lynch's signature on this date. The evidence of how this printed guarantee was produced to Mr Lynch is confused. The evidence that it was printed is that an e-mail of the same date from Mr Broomhead (compliance manager) of the Bank to

Caroline Jameson asks her to "raise docs for single signatory". Mr Broomhead had said that the personal guarantee was subsequently sent by post to Mr Lynch. He changed his mind stating that the Bank does not send personal guarantees by post and that:

> "Their standard practice is for a member of the sales team (who is dealing with the transaction in question) to attend on the borrower company and proposed guarantor to go through the contents of the documents in person and then leave the documents with the borrower company/proposed guarantor to enable them to consider any of the documents and further and/or take independent legal advice if necessary."

26. He has no first-hand knowledge of what happened but understands that Simon Adcock took the Guarantee to the offices of Ruskin on 12 September and Ms Court collected them on 15 September 2011. The basis of his understanding is unclear. The evidence of Mrs Morgan (nee Court) in her statement summary is that "the guarantees would be sent by post to the home address. Copies may have been emailed to the client for information." In his written evidence Mr Adcock recalled that the offer letter was signed on 2 September 2011, that he printed the Guarantee and recalled taking it to Mr Lynch on 12 September 2011, along with other documentation. Unsurprisingly he was tested on his memory by Mr Knight. He acknowledged that he was wrong about the offer letter. It was not signed on 2 September 2011. He acknowledged that he did not print the documents and accepted that he could not say that he took the Guarantee to Ruskin. He went as far as acknowledging that the Bank may have made a mistake in not sending the Guarantee. I remind myself that Ms Court's evidence is an unsworn witness summary and she did not attend court.

27. The overall picture therefore is that the Bank did not know if the Guarantee was posted, e-mailed or personally taken to Mr Lynch. It could provide no evidence of it being e-mailed. Mr Adcock could not recall taking it and there is no evidence it was posted. This is to be weighed against the evidence of Mr Lynch, who said that he never saw or signed the Guarantee.

28. In any event Mr Lynch arranged to meet with Mr Bramwell on 5 September 2011. Mr Bramwell could not remember, unsurprisingly, the conversation although in his witness

statement he purported to remember certain phrases. He accepts that he cannot recall discussing the detail of the offer letter at the meeting. He was not aware that Mr Lynch had reverted to Inspiration or the Bank asking for some changes. Nevertheless he recalled that a meeting with associates of Mr Bramwell (Mr Goodrich and Mr Bultitude) would take place on 8 September at the offices of Ruskin. Neither Mr Goodrich nor Mr Bultitude have provided witness evidence at trial.

29. Mr Bramwell gave evidence that upon receiving the revised offer from the Bank, Mr Lynch raised a few queries relating to how the finance would assist Ruskin. He did not raise any issue about entering into a guarantee. His written evidence about the meeting on 8 September 2011 is that they conducted a line-by-line review of the revised offer. He says that three substantive issues arose namely, the requirement for Robust to provide a guarantee; the nature of the loan made by Inspiration to Mr Lynch and the Guarantee:

> "With regards his personal guarantee, Mr Lynch noted that the guarantee was unlimited, unlike the RBSIF guarantee. Trevor Dartford explained that we were not in a position to negotiate this point as Aldermore would not move on it. Trevor had extensive experience of dealing with Aldermore. I pointed out that, as Ruskin had so much debtor cover for the facility, it was unlikely that the guarantee would be called on. Little more was said about the personal guarantee, as it was clearly not negotiable, and Ruskin had very little room for manoeuvre as Aldermore was the only company prepared to offer facilities to Ruskin within an acceptable timeframe. Mr Lynch subsequently made some manuscript amendments to the Offer Letter to reflect his areas of concern and then signed it, with David Bultitude attesting his signature."

30. There is no doubt that the offer letter included a number of "preliminary conditions" which included "you will deliver to us dated and signed by Roderick John Lynch a guarantee and indemnity in our standard format."

31. As a matter of note, Mr Bramwell's evidence is that he had informed the Bank prior to 2 September 2011, that he should not be required to or "would not" provide a deed of

subordination: it had been requested on the mistaken assumption that Inspiration had lent money directly to Ruskin. It was nevertheless contained in the offer letter. His evidence is that he had informed the Bank that it should be taken out as a requirement, as it was based on a false premise. He repeated the request at the meeting on 8 September 2011. The Bank did not seem to get the message. On 14 September 2011, Ms Court provided a list of outstanding conditions which included the provision of an asset and liability statement for Mr Lynch, a signed deed of subordination from Mr Bramwell and "signed by Roderick John Lynch a guarantee and indemnity in our standard format, Tracey [Ms Court] to pick up tomorrow." In oral evidence Mr Bramwell commented: "Mr. Dartford was clearly in error." It was not the only time the Bank was in error.

32. Mr Bramwell's evidence was tested. First his recollection of events were not as straightforward as might appear. He made a mistake in reading "standard format" as the same as "unlimited". As set out above there was no mention of an unlimited guarantee. The wording in the offer letter and on the Bank's internal documents was "standard format". Secondly he assumed that the Bank would be seeking an unlimited guarantee. His assumption was based on a) his experience and b) the wording "standard format". As regards his experience, he had no experience of dealings with the Bank and cannot be said to have an industry-wide experience: he gave no such evidence. Thirdly his assumption was based on the absence of a document stating that it would be limited "in the absence of the offer letter limiting the guarantee, it would have to be assumed that Mr. Lynch was expected to sign an unlimited guarantee." It seems to me that the more onerous a personal guarantee the more likely it is that a respectable functioning bank would set out, in clear and easy-to-understand terms, the guarantor's liability. This is particularly so, if a guarantee is unlimited. Mr Bramwell thought the opposite, and referring to the terms of a personal guarantee he said:

> "But as far as I was concerned, any requirement for a guarantee which does not state in the body of the text a specific limit is, I would suggest by definition, an unlimited guarantee. "

33. Mr Bramwell did not, at any time, see "the body of the text". He did not see the Guarantee. There is evidence that the Bank did label their guarantees. At least one e-mail included an attachment named "Corporate Guarantee Unlimited.docx". No e-mail has been produced by the Bank that attached a personal guarantee. I infer from this evidence

that the Bank (a) had more than one type of guarantee; (b) by using the noun "corporate" in the title to the attachment, there is likely to be a "personal" guarantee and (c) the use of the adjective "unlimited" makes it equally likely that the Bank had a standard format guarantee that was "limited".

34. On 12 September 2011 Mr Adcock attended the offices of Ruskin. There is no doubt that he took a suite of documents with him. It has been argued that he took the Guarantee and a cover letter addressed to Mr Lynch recommending he take independent legal advice, asking him to sign the Guarantee and return it "to the above address". The letter is not signed and carries no header with the address. There may be many explanations for the lack of a signature or header on the letter. It cannot be disregarded that a strong possibility is that it was never sent or taken to Ruskin's offices on 12 September. It is curious that the Bank's case rests on Ms Court collecting the Guarantee on 15 September and that Mr Lynch at no time queried the requirement to enter a personal guarantee. The collection of the Guarantee is contrary to the directions provided in the letter. If Mr Lynch did not see or receive a guarantee or the letter, he could not have questioned its terms. The Bank's case is inconsistent in this regard.

35. On Wednesday 14 September 2011, Mr Adcock e-mailed Miss Hughes to say that subject to the pre-conditions being met "we shall transfer you from RBS on Friday". There followed a flurry of activity. He subsequently e-mailed Mr Broomhead "can you let Trevor [Mr Dartford] and I know asap of any outstanding pre-con's (sic) please." Miss Hughes responded to Mr Adcock "can you let me know what I need to give Tracey [Court] and Howard tomorrow." Ms Court responded direct to Miss Hughes with a list which included (i) the Guarantee (ii) the asset and liability statement of Mr Lynch (iii) the deed of subordination to be provided by Mr Bramwell and (iv) other matters mostly pertaining to Ruskin's liabilities. It is clear from the oral evidence of Miss Hughes and the terms of the e-mail exchange that Miss Hughes did not speak with Ms Court prior to her sending the list of outstanding matters at 13:14 on 14 September 2011. By referencing the requirement for Mr Bramwell to provide a deed of subordination so close to completion it may be inferred that the list could have been copied from an earlier document, was not checked against information already provided or that the Bank had an internal breakdown of communication. Miss Hughes thought that many of the outstanding matters had already been supplied and asked for some clarification from Mr Dartford. Mr Dartford e-

mailed Ms Court "so here are the answers" which related to certain licences or accreditations. In the middle of the afternoon, Ms Court e-mailed Mr Lynch directly, asking for identification documents. He responded promptly "no problem". She did not mention the Guarantee. As a result of the document mentioning items that had either already been supplied or were no longer required, its content cannot be relied upon as wholly accurate.

36. On Thursday 15 September 2011, Ms Court and Mr Atkinson attended the offices of Ruskin to "conduct a debt verification" exercise and collect the outstanding documentation. The Bank has not provided any evidence from Mr Atkinson who was the senior client manager and responsible for "taking on" Ruskin as a client. It appears that the statement of personal assets and liabilities signed on 15 September 2011 was faxed on Friday 16 September 2011 and not collected on the Thursday. Mr Atkinson wrote to Mr Clark, Mr Broomhead and Mr Adcock at 11:19 by e-mail on 16 September 2011:

> "Following Tracy and myself doing a pre-take on meeting with Ruskin Private Hire yesterday within our understanding of Ruskin, an investor called Mr Nigel Bramwell had already invested £100,000 loan and was looking at increasing this to £400,000…contrary to our understanding, Mr Bramwell has not invested the £100,000 and is not looking to invest any money directly…please can you advise if this point can be removed from the contract?"

37. The e-mail demonstrates that only at the twelfth hour had the Bank acted on the information Mr Bramwell provided weeks before. As the Bank wanted priority over any other lending, Mr Lynch provided a deed of subordination and not Mr Bramwell, since it was Mr Lynch who had injected capital into Ruskin.

38. Completion and the start of the facility began on 19 September 2011. An internal Bank note "Deal Outline" undated but likely to have been produced after 16 September 2011 (it refers to visiting the Ruskin premises on that date), forms part of the hearing bundle. Its provenance is unknown. It includes the following:

> "Security 1st ranked debenture

> Unlimited personal guarantee Roderick John Lynch- low worth!
>
> Corp guarantee Robust Training Ltd- dormant
>
> £200k loan postponement from"

39. No one from the Bank was able to speak to the document. Mr Lynch and Miss Hughes did not know of its existence.

40. The Bank produced a "Take-On Checklist" where the proposed client manager is named as Mr Atkinson. Ms Court signed the "sanction", dated it 14 September 2011 and signed that she had checked the documents. Under a heading "Documentation- preparation, distribution & completion" it states that the Guarantee was "sent out" on 12 September 2011. The letter "y" signifying "yes" in boxes for "signed by individual", "properly witnessed" and "dated". The document records that the Guarantee was sent directly to Mr Lynch by recorded delivery on 19 September 2011. Mr Broomhead was said to provide "D" Level sign off. His name has been entered in manuscript but he has not signed the document. Similarly his name is entered in manuscript under the heading "C3 settings checked by" but he did not sign the document. In a later file note produced and signed by Mr Broomhead on 30 January 2012 he says:

> "During a review of our documentation it was found that our Take On Checklist had not been signed. I have been asked to sign this. However I was not involved in the first prepayment for this client and therefore feel unable to sign off the Take On Checklist."

41. In his oral evidence Mr Broomhead readily accepted that he had no knowledge of what if any documents were taken to the Ruskin premises on 12 September 2011 or what if any documents were collected on 15 September 2011. He gives no evidence to support the statement in the note that it was "sent out" on 12 September, "signed by individual" or "properly witnessed" and "dated".

42. By an e-mail dated 10 February 2012, Mr Atkinson wrote to Mr Clark:

> "I must confess that a file note was not completed until now due to seeking further different viewpoints within Aldermore."

43. A further e-mail exchange included the following: "Doing all I can to cover my back as I believe Andy is!"

44. Although Mr Atkinson and Ms Court were not called to give evidence, the Bank rely on the "Take-on Document", never seen by Mr Lynch until these proceedings, and not signed off at the time, to support its case that the Guarantee was provided to Mr Lynch by the hand of Mr Adcock on 12 September and returned signed, witnessed and dated. The Guarantee and this evidence spells what may be described as the height of its case.

45. Mr Mills took the court to a number of the Bank's internal documents arguing that they provided sufficient evidence for the court to make inferences of fact to support its case; they were of minimal evidential value. These documents were not put to any witness because the authors of those documents had not been called. In consequence, the evidence about the documents, their meaning, the date and circumstances in which they came to be created could not be tested. As an example Mr Mills took me to what he called a "preliminary checklist" which was not put to any witness. It included ticks by numbered paragraphs. Three paragraphs had a circle around the number and a tick. Mr Mills submitted that it was permissible to infer that the author (who was not disclosed) had first circled the matters that required doing before the Bank could be satisfied that the conditions for lending had been satisfied. After they were satisfied, a tick was applied. One such matter concerned the Guarantee.

46. An inference can only be properly drawn from a fact or facts that has or have been established. Once a fact has been established an inference may be drawn to support a further finding of fact which follows logically from the established fact.

47. It has not been proved that the purpose of the circles was to indicate that an item on the sheet was outstanding. They may have been circled for other reasons. It is known that the Bank was not satisfied about the relevant licences, certificates and accreditations until 14 September 2011, yet the "Take-On" document included prior dates (12 September 2011). There is no explanation as to why there would be a shadow document for tracking

documents: casting further doubt on the evidential weight of the "Take-On Checklist". Mr Mills submitted that the handwriting was that of Ms Court. Her unsigned witness summary explains her working practice and contradicts the submission made by Mr Mills. In the summary, she says that she "relied heavily" on the Take-On Checklist. She does not mention a shadow document. The method she used for outstanding matters to be dealt with, was to mark them with an asterisk and then cross the asterisk out once satisfied. In the absence of cross-examination where the documentary record could be examined, the court is left with accepting that Mr Mills' interpretation of facts is possible, but that is not the same as drawing a proper inference of fact. I decline his invitation to do so.

48. In August 2013, HMRC presented a winding-up petition against Ruskin and it ceased to trade in February 2014.

The witnesses

49. The events germane to the determination of this case took place nearly a decade ago. When assessing the reliability of the six witnesses seen and heard, I have in mind the researches and findings of the cognitive psychologist and expert on human memory Dr Elizabeth Loftus, and the criminal psychologist and researcher at University College London, Dr Julia Shaw. Human memory is not stable. It has a strong propensity to change over time, to provide false accounts and be susceptible to suggestion. In short, memory is malleable. A confident witness may be mistaken. Contemporary documents may provide a valuable guide to the truth: *Armagas Ltd v Mundogas S.A.* [1985] 1 Lloyd's Rep.1, at page 57 col. 1; *Goodman v Faber Prest Steel* [2013] EWCA Civ 153. In *Gestmin SGPS S.A. v Credit Suisse (UK) Limited, Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm) Leggatt J (as he was) explained that the litigation process itself may lead to a witness's memory of events being based on documents and later interpretation rather than the original experience; all remembering of distant events involves reconstructive processes:

> "[18] Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to

interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

[19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces."[20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the

> matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."

50. Leggatt J set out the best approach to evidence [22]:

> "[T]he best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth"

51. Mr Lynch was the first to give evidence. He did not always provide a straight answer to a straight question. He was keen to put his side of the story forward and is likely to have felt frustrated by the examination process. This manifested itself late in the afternoon of the second day of cross-examination when Mr Lynch gave a high tempo, loud and impassioned answer to whether he was in the habit of answering proceedings by claiming fraud, which tended to stray. He accepted without hesitation that he discussed the provision of a personal guarantee on 29 July 2011. He ardently denied being told that the Bank would insist on an unlimited guarantee to such an extent that it would walk away if he did not provide one. He refuted absolutely the notion that Mr Bramwell had discussed

an unlimited guarantee with him on 8 September 2011 and rejected the suggestion that he saw and signed the Guarantee.

52. There were few documents produced by Mr Lynch that could be tested or examined. The Guarantee was one document as on the face of it, it bore his signature. At times he could not remember events. That is likely given the passage of time. He was asked about a meeting where he was invited to provide an undertaking not to trade through Robust. The Bank was concerned that there was an opportunity for Mr Lynch to divert contracts. He candidly accepted that there was such a conversation but he could not recall its detail. He remembered the fact that some of the documentation brought to Ruskin on 12 September 2011 had a curious white line running down the right hand side: his recall was based on a comment that Miss Hughes had made at the time. He could not remember any discussion with Mr Adcock on 12 September 2011 about the Robust board minutes. His memory was that those documents were brought to the office on 15 September 2011. That may have been an inaccurate reconstruction: reconstruction does not equate to dishonesty. It goes without saying that Mr Lynch is motivated to succeed in his appeal on the proof of debt. That does not take matters much further and I see no reason to discount his evidence as a result.

53. It is said against Mr Lynch that the truth can be gleaned from his first response to the Bank's statutory demand. Anything he said after does not represent the truth. In the bankruptcy proceedings Mr Lynch provided three witness statements. In his first witness statement dated 24 April 2014 he stated:

> "I should say at the outset that I dispute that I am liable for this sum and I also dispute that Aldermore has a valid and enforceable guarantee"

54. He goes on to say that before demand being made on Valentines Day 2014, he had never seen the Guarantee and:

> "It is inconceivable that I would have signed a guarantee which meant that I would be liable for the full extent of the invoice discounting facility. From my recollection of matters, I did sign

> some form of agreement with Aldermore but this limited my liability to no more than £150,000."

55. His evidence in those proceedings is clearly consistent with his evidence 7 years later save that he misremembered signing the agreement he thought he did sign: the Bank did not submit a proof of debt on the basis of a limited liability agreement. It is said that the court should have regard to an e-mail exchange between Mr Reddy which took place soon after the demand was made and at a time when Mr Lynch was acting in person. In my judgment there is nothing in that e-mail exchange that undermines the evidence he gave at trial. Mr Mills sought to undermine the evidence of Mr Lynch by introducing what may loosely be described as similar fact evidence, asking the court to infer that he gave dishonest testimony based upon previous denials that he had received certain documents sent in relation to other proceedings. In my judgment it would be dangerous to make a finding of dishonesty based on such evidence and in any event, the evidence must be considered as a whole.

56. In my judgment, overall, Mr Lynch gave honest testimony.

57. The next witness was Miss Hughes. She is described as a former financial controller and an accountant with 28 years of industry experience in the public and private sector. Her testimony is said by Mr Mills to be undermined by her interest. She was not cross-examined on her interest in the outcome of the case and during the course of cross-examination she made clear that she was offended at being called Miss or Mrs Lynch. I reject any notion that because she was involved in the business, and prior to that had been a partner of Mr Lynch, that she has an interest in the outcome of the case. She gave impressive and honest testimony. Her evidence was clear, thoughtful and measured. At times she corrected counsel on matters of detail and reminded him of the question he had asked. She struck me as a clearly intelligent and capable woman with integrity. She was asked if "it is fair to say that [Mr Lynch] is a fairly strong minded individual?" The purpose of the question was not readily apparent but Miss Hughes answered in an instant:

> "Depends what your definition of "strong minded" is. He believes in rights, he believes in causes, he does not suffer fools gladly. He is passionate about community, about giving back. He has come from a background, an underprivileged

> background and he suffered lots of things -- he has done exceptionally well for himself and he does not suffer fools gladly. His language may not always be Queen's English but you know, we all have different upbringings and we all talk differently."

58. She was quite properly examined about the signatures on the face of the Guarantee:

> "Q. You strike me as a careful person. Would you agree with me that you would not, if this is in fact your signature, or rather -- I will put it a different way. Would you agree with me that you would not sign any document as a witness unless there was already a signature on the document?"
>
> A. That is right.
>
> Q. Thank you. Moving on to the period afterwards ----
>
> A. Am I allowed to say something about this?
>
> Q. Yes.
>
> A. On the day of the 12th when we were sat in the room, it was a big oval table with Adcock opposite me, Mr. Dartford next to him, Mr. Lynch next to me and then me. The documents were passed around and Mr. Lynch signed them and then I signed them. Mr. Lynch signed every document in a black pen and this has not been signed in a black pen, it is a blue pen.
>
> Q. That is, if I may say, that is quite interesting evidence. It is not possible…
>
> A…. Mr Lynch used to shout and scream, like you said, in the training centre asking for black pens to sign documents with and he would not sign anything in blue so, yes I do remember that…on the scanned PDF version Mr Lynch has signed in a blue pen though. He signed every other document in a black

> pen and the documents were passed around the table. What you are putting to me is that at this point he took a different coloured pen and wrote in blue, and yet he would never sign a document in blue pen, you always have to find a black pen for him.

59. Her recall of the oval table meeting appeared clear. She would have seen the oval table on many occasions and it is likely that this was the first time she had sat at it with Mr Adcock. As regards the black pen, when compared with the signatures on the Ruskin and Robust documentation, where those documents are signed in black ink there is a notable difference. Her memory was not discredited on either of these issues.

60. In my judgment neither of these matters relied on short term memory, where memories may be lost in less than a minute. The events Miss Hughes recalled in the examination above were semantic. For example each time a black pen was asked (or shouted) for the memory would be reinforced. It is true, as Mr Mills says, that this evidence is not mentioned in her witness statement. One may expect such evidence to have been included if it was recalled at an earlier stage. It may have been the case that she was reminded about the colour pen when she was asked the question by Mr Mills or that it was the first time she had seen a colour pdf of the Guarantee. In its purest form, the evidence was untainted by reason of it having been subjected to the processes described by Leggatt J. In my judgment, in the circumstances where the evidence was not undermined in cross-examination, the raising of the colour pen for the first time, and the oval table meeting does not reduce its weight.

61. Miss Hughes accepted that the writing and signature on the Guarantee was similar to her writing and signature, but her evidence was “I did not sign it”. She was pressed by Mr Mills: “I am not asking to say that you did sign this now. My question is simply does it appear to be your signature?” She candidly responded that it does appear to be similar. Mr Mills tried a different tack, but Miss Hughes was firm in her response “my evidence is that I did not sign this document and that I do not know how it got there, and I do not know who put it there. That is my evidence.” She then gave examples of how the manuscript of her name and address under the signature is different from her writing style.

62. In my judgment, her evidence was not undermined. I treat her evidence as having been given with honesty and providing a reliable account of events.

63. Mr Broomhead was asked about the Take-On Checklist. Mr Mills asked him a few questions as examination in chief: "Can you explain why you have not signed this document?" Mr Broomhead could not explain. Cross-examination did not start until the next day. Mr Broomhead is likely to have given the Take-On Checklist some thought overnight. In cross-examination his evidence was confused. His first position was that he did not know why his name was on the Take-On Checklist. It would have been pre-completed by Ms Court. He was away and could not have dealt with the sign-off. Others knew he was away. Later he thought that it was him who had authorised the payment: he had not been away. His position reverted to that given in the examination in chief namely, he could not explain why he did not sign-off. I reject the submission that Mr Broomhead was falsifying his evidence but it is apparent that the Bank had not conducted the "take-on" in a systematic and thorough manner: mistakes had been made.

64. Mr Broomhead gave interesting testimony accepting that he had no personal knowledge of what happened at the meeting of 15 September 2011. He was not present and did not see the Guarantee. He had no knowledge of what Ms Court had taken with her to that meeting; and no knowledge of what documents she returned with. His written evidence stated that the Bank always required an unlimited personal guarantee from directors of companies that received finance. His position softened under cross-examination. He said that each case would be "looked at on a case by case basis". And that it would not be inconsistent with Bank policy for Mr Clark to have had the conversation, relayed by Mr Lynch, that it would ask for a limited personal guarantee. The evidence of Mr Broomhead is not inconsistent with that of Mr Lynch on this issue.

65. Overall, the weight I lend to Mr Broomhead's evidence is attenuated to reflect its inconsistencies and unreliability.

66. Mr Adcock gave strident evidence but accepted that he could not remember all the events of September 2011. He could not recall if the offer letter had been sent on 2 September 2011, if it had been signed, returned or whether it had to be signed. His written evidence was that the offer letter had been signed. His oral testimony was that he would have remembered this in 2014 when he was first asked to recall it (3 years after the event).

However his memory, even in 2014 was unreliable in this respect. There was no document which was signed on 2 September 2011. He gave evidence that the Guarantee would have been produced to Mr Lynch on 12 September 2011, but later accepted that he could not remember: "I cannot recall exactly the full suite of documents that I took out with me on that day." He self-restricted his evidence to what the Bank should have done or his usual practice. I shall lend such weight as is appropriate given his oral evidence.

67. The last to enter the virtual witness box was Mr Bramwell. He struck me as a confident character with an ebullient disposition. His evidence, as I have mentioned was tainted by his own knowledge bias at to what a "standard" guarantee comprises, accepting, that the wording in the offer letter referred to "format" not content. He was unable to recollect his appointment as non-executive chairman. He accepted that he could not recall accurately the conversation on 8 September 2011 and had no part to play in the events of 12 and 15 September 2011. He never saw the Guarantee. His evidence had little bearing on the issues that have to be decided.

Execution of the Guarantee

68. There can be no doubt, and none is expressed by Mr Lynch, that the Bank anticipated that he would provide a personal guarantee in respect of the facilities extended to Ruskin. The factual matrix includes however, a discussion about the provision of a personal guarantee between Mr Lynch and the Bank's regional managing director Mr Clark, at the meeting on 29 July 2011. It is not said that Mr Clark did not have the authority to discuss and agree whether a personal guarantee was required and if so whether it should be in limited or unlimited form. I find that the evidence supports the view that the Bank did not have a rigid policy against limited guarantees. It knew that Mr Lynch had provided a limited guarantee to RBSIF. I accept the evidence of Mr Lynch that the Bank wanted to be competitive. I find on the balance of probabilities that Mr Clark, who also sat on the Bank's credit committee, represented to Mr Lynch that the Bank would accept a personal guarantee in the same or similar form to that which he had provided to RBISF. I find that Mr Lynch found the offer agreeable.

69. The documentary evidence shows that Mr Atkinson was cautious and thought the Bank at risk. The facility was to be the largest advanced by the Bank at that time. He was

outnumbered by other members of the Bank that were excited and keen to clinch the deal, believing Ruskin to be a good prospect.

70. The documentary evidence supports a finding that RBSIF was attracted by the proposition that the Bank would take over the financing. It was keen to have the business of Ruskin off its ledger. The reasons why were not fully explored, but it is evident that Ruskin was under capitalised and the limited facility provided by RBSIF was a constraining force at a time when Ruskin was increasing its turnover and winning new contracts.

71. There is no evidence that Mr Lynch had informed the Bank that he was desperate for it to take over the RBSIF facility. One internal note demonstrates that the Bank was concerned that Ruskin may obtain a better outcome if it received an offer from HSBC. It did not want that to happen. This is consistent with the excitement, amongst personnel at the Bank, at the prospect of securing its largest client, and the knowledge that there was a potential competitor for the business. In these circumstances I accept Mr Lynch's evidence that he was expecting to provide a personal guarantee but the liability would be limited in the same or a similar way to that which he accepted and bargained for with RBSIF.

72. This finding is consistent with the documentary evidence: no document sent or purported to be sent to Mr Lynch mentioned an unlimited personal guarantee. The Bank's case is that documentation stated that a personal guarantee should be executed in standard format, and that an internal document set out that Mr Lynch was to provide an unlimited guarantee. This is insufficient evidence to displace the evidence given by Mr Lynch. First, there is no evidence to support a leap from a standard format guarantee to an unlimited guarantee. The evidence is that when the Bank wanted an unlimited guarantee it would call it by its name. One such occasion was the e-mail sent to Ruskin expressly referring to an unlimited corporate guarantee. Secondly, the naming of an unlimited guarantee in an internal document is consistent with the finding that if the Bank called upon Mr Lynch to provide such a guarantee it would have said so in the offer letters or in other correspondence including e-mails. The finding is not shaken by reason of an asset and liability document being called for, as contended by Mr Mills. Such information is likely to have been required whether the personal guarantee was limited or unlimited.

73. In my judgment it was for the Bank to make clear in writing the terms of the personal guarantee it expected Mr Lynch to execute. It failed to do so. The oral evidence provided by the Bank does not support its case that it insisted on an unlimited guarantee.

74. As to the execution of the Guarantee the Bank has failed to counter the case of Mr Lynch that the Guarantee was not taken to the offices of Ruskin on 12 September 2011. An e-mail dated 12 September attaches the Robust Guarantee and Robust board minutes for execution. As this was considered to be a sufficient method of conveyance for the Robust guarantee it is unlikely that it would not be sufficient for the Guarantee. This is particularly so since it was the Bank's practice to ensure that a prospective guarantor had time to take legal advice and consider the seriousness of entering such a guarantee. No proper explanation was proffered at trial by any witness. Although e-mailing the Guarantee did not necessarily exclude personal carriage, in the absence of evidence from Mr Adcock that he did deliver the Guarantee personally, it is more likely than not that a similar method would have been used to convey the Guarantee: no such e-mail exists. Mr Adcock did not review the documents he took to the offices and could not recall which documents were taken. The evidence is confused about whether it was sent by post. It can be said with some degree of confidence that there is no evidence of posting and no party to the proceedings has found an e-mail with the Guarantee attached. The evidence supports a finding that the documents taken to the Ruskin office on 12 September were corporate only.

75. The positive case put by the Bank is that Ms Court collected the signed Guarantee on 15 September 2011. In some ways it is an extraordinary position to take as there is no evidence that she did so. There is no doubt she did collect some documents: those taken by Mr Adcock on 12 September 2011. In these circumstances the court is asked to make a series of inferences to make good the Bank's position based on the Bank's normal practice[1], e-mails[2] and internal documents[3].

[1] The evidence of Mr Adcock
[2] from an e-mail providing information about outstanding documents. It was argued that Miss Hughes and Ms Court discussed missing documents prior to the e-mail including the Guarantee. There was no evidence to support the call. The inference would have to step into another sphere to include a finding that upon discovering that the Guarantee had not been attached or provided it was then transported to Mr Lynch for him to sign and

76. A major flaw to making such inferences is other evidence before the court, Mr Broomhead's lack of knowledge as to the signing of the Guarantee, and his failure to check the Take-On Checklist before payment was made.

77. The failure to provide evidence from Ms Court or Mr Atkinson, both present at the meeting on 15 September 2011, is striking. That is not to say that an adverse inference should be drawn from their absence. Ms Court, for example, was not prepared to provide sworn evidence. It is beyond argument that the court does not have the benefit of this evidence and Mr Lynch is prevented from testing these potential witnesses of fact by reference to the key events in which they were involved, and the documents Ms Court in particular produced or was involved in producing. This, in my judgment, reduces the weight the court can properly put on the untested documents.

78. On the other hand the court has evidence from Mr Lynch and Miss Hughes which the Bank was able to test and did test at length.

79. As to the proper way to treat the evidence of Dr Radley, Lord Justice Clarke explained[4]:

> "42. All depends upon the circumstances of the particular case. For example, the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong. More often, however, the expert's opinion will be only part of the evidence in the case. For example, the assumptions upon which the expert gave his opinion may prove to be incorrect by the time the judge has heard all the evidence of fact. In that event the opinion of the expert may no longer be

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that he was willing to sign an unlimited guarantee having been told that the bank required only a limited personal guarantee.

[3] In particular the Take-On Checklist

[4] *Coopers Payen v Southampton Container Terminal Ltd* [2003] EWCA Civ 1223 at [42]-[43]:

> relevant, although it is to be hoped that all relevant assumptions of fact will be put to the expert because the court will or may otherwise be left without expert evidence on what may be a significant question in the case. However, at the end of the trial the duty of the court is to apply the burden of proof and to find the facts having regard to all the evidence in the case, which will or may include both evidence of fact and evidence of opinion which may interrelate."
>
> 43. In the instant case the judge did not disregard the evidence of the joint expert. On the contrary in some respects she accepted it. A judge should vary rarely disregard such evidence. He or she must evaluate it and reach appropriate conclusions with regard to it. Appropriate reasons for any conclusions reached should of course be given.

80. The first thing to note is that the expert in this case provides an opinion about a factual situation. The court has the benefit of direct and credible witness evidence in favour of an opposing conclusion in respect of Miss Hughes but credible and consistent evidence in respect of Dr Radley's conclusion in respect of Mr Lynch. There is no rule of law or practice in such a situation requiring the judge to favour the evidence of the expert or the witness of fact.

81. I have found that Mr Lynch gave honest testimony; Miss Hughes was impressive, honest and capable. It is from those findings that I reach my conclusions.

82. I have been cited numerous authorities by both parties on the proof of debt. The burden of proof lies with the Bank. In *McCarthy v Tann* [2015] EWHC 2049 (Ch), [2015] BPIR 1224, I found that applications such as these are not appeals proper: it was not for the court to review a decision of the office-holder to decide if the decision was correct, rather the court had to determine, on the evidence before it, whether the claims should be admitted. The burden of proof falls on the creditor to make out their debt on the balance of probabilities.

83. The Bank has failed to prove that the Guarantee was conveyed to Mr Lynch on 12 September 2011 or later, failed to prove on the balance of probabilities that it was signed by Mr Lynch and failed to prove that it was collected or sent back to the Bank. In my judgment the evidence points, as Mr Knight argued, to a busy but chaotic few days at the Bank, between 12 September and 15 September 2011, where there were mixed feelings about the prospect of "taking-on" Ruskin, reservations and excitement, many people involved but no one individual having proper oversight. Mr Lynch did not agree to the provision of the Guarantee because he never saw its terms nor indeed did he have an opportunity to take legal advice. The Bank does not contend that there was more than one discussion between an officer of the Bank and Mr Lynch in respect of the provision of a personal guarantee. The Bank has provided no witness evidence to contradict the version of events as advanced by Mr Lynch. I accept his account.

84. The situation regarding the Guarantee may readily be contrasted with the facility to be advanced to Ruskin. There is no doubt that Mr Lynch, in his capacity as director of Ruskin, received the suite of documents, accepted the terms of the facility, signed the necessary papers and these were returned to the Bank by Mr Adcock.

85. As the Guarantee was never produced to Mr Lynch the issue of who signed it in his stead is live. In closing, the Bank raised an argument that Mr Lynch gave actual authority to Miss Hughes to sign it on his behalf, binding him to the contract. The Bank accepted, however, that Mr Lynch was never asked if he provided actual authority and Miss Hughes was not asked if she signed it with his authority. Mr Knight thought the point abandoned. Mr Mills rightly in my view, recognised the weakness of the argument. For the sake of completeness there is a lack of evidence to support the contention. I find on the balance of probabilities that Miss Hughes did not sign the Guarantee on the instruction of or with the actual authority of Mr Lynch or at all. She could not have signed it if the Guarantee had not been produced to her: there is no suggestion that the Guarantee had been sent separately to Miss Hughes. These conclusions logically lead to two further findings. First the signature was signed by a person at the Bank and secondly Miss Hughes did not witness the signature.

86. I recognise that the second finding is contrary to the opinion of Dr Radley. The opinion of Dr Radley is weaker in respect of Miss Hughes than it is in respect of Mr Lynch due to the reduced amount of comparable evidence available. Further Dr Radley warned:

> "I am not able to establish the full writing range of variation for Miss Hughes. I am therefore unable to ascertain whether this difference is merely within her range of writing variation but not evidenced in the limited known documents presented."

87. Dr Radley did not have the benefit of her explanation of the handwriting differences: it is similar but there were differences that stood out such as the last four letters of Marion. If the expert had more comparable evidence and a greater range there is a prospect that he would have reached a different conclusion.

Alternative arguments advanced by the Bank

(i) Res Judicata

88. A considerable amount of time was taken in closing, arguing that Mr Lynch cannot contend that the Guarantee was not executed by him. The reason for this is that he accepted that the Bank constituted a creditor in earlier proceedings. It could only be a creditor by reason of the Guarantee. If the argument was so strong, it would be surprising that the Bank should wait until trial and closing to deploy it. It was not pleaded in the defence which is sufficient, in my judgment, to reject the claim. Nevertheless I shall deal with it on its merits.

89. The jurisdiction to strike out proceedings as an abuse of process is an exceptional jurisdiction enabling a court to protect its procedures from misuse. One class of abuse involves re-litigation of issues already decided. The Bank relies on *Arnold v NatWest Bank Plc* [1991] 2 A.C. 93, at 104D – 106F for the proposition that a cause of action estoppel has arisen. The argument is misconceived. Lord Keith explained [104]:

> "Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment."

90. The cause of action in this case is grounded on statutory appeal process whereby the respondent is the decision maker: the Trustee. It may be that the Bank intervened, but the cause of action is not against the Bank. The matter relied upon to support the contention that cause of action estoppel arises was entirely different. It related to an application for change of carriage on a petition presented by HMRC. It has not been explained how resisting the change of carriage application is "identical" to a statutory cause of action. Indeed there was no cause of action simpliciter when seeking to resist a change of carriage.
91. If the Bank is relying on issue estoppel, Lord Keith explains [106]:

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

92. It is difficult to see how the issue formed an ingredient in a cause of action that has been litigated. The case has not been put by clear reference to the cause of action involved. The combination of different causes of action and different parties is fatal. In *PricewaterhouseCoopers v BTI 2014 LLC* [2021] EWCA Civ 9, Lord Justice Flaux concisely summarised the law [82 and 83]:

> "Where the parties to the second proceedings are not the same as those to the first proceedings (as in the present case), no question arises of the application of the doctrines of issue

> estoppel or res judicata, so that the parties are not bound in the second proceedings by the findings in the first…
>
> The mere fact that the second proceedings involve the re-litigation of issues decided in the first proceedings or a challenge to findings made by the judge in the first proceedings (and thus a collateral attack on the judgment in the first proceedings) does not without more amount to an abuse of process, as is made clear by the citation from the speech of Lord Hobhouse in the Arthur Hall case in [94] of the judgment of Simon LJ in Michael Wilson & Partners quoted at [63] above."

93. In any event the claim fails on the merits. An objective reading of the judgment given by Arnold J at the change of carriage hearing does not bear out the contention that there was a decision made as contended for. At paragraph 5 of his judgment he explained:

> "On 12 September 2011 Ruskin entered into an invoice finance agreement with Aldermore. It is alleged by Aldermore, but denied by Mr Lynch, that on the same date Mr Lynch entered into an unlimited personal guarantee of sums due from Ruskin under the invoice finance agreement upon demand by Aldermore. There is in evidence before me a copy of the personal guarantee, which, on its face, appears to be signed by Mr Lynch, and that signature appears to be witnessed by Ms Marion Hughes. Not only has Mr Lynch given evidence denying that he signed that document and suggesting reasons why he would not have done so but in addition he has served a witness statement from Marion Hughes in which she denies signing the document and denies witnessing Mr Lynch's signature. That is a dispute which I cannot possibly resolve at present, and nothing I say in this judgement should be interpreted as expressing a view one way or the other."

94. Whether correct or not, deliberate or not, Arnold J ordered a change of carriage on the basis that the Bank claimed to be a creditor of Mr Lynch, not that it was in fact a creditor.

95. In my judgment there is no merit in arguing that at the hearing of the bankruptcy petition, where there was a discussion between counsel and the court about the basis upon which Arnold J permitted the change of carriage, that any matter raised or discussed was capable of altering the very firm statement given by Arnold J that he was not deciding the issue which is before this court. Whatever the outcome of that discussion the decision had been made by Arnold J and not appealed. The plea of *res judicata* fails.

(ii) Written memorandum or note and estoppel

96. Section 4 of the Statute of Frauds 1677 states that a guarantee must be in writing and signed by a person with the requisite authority in order to be enforceable. I have found that the Guarantee was not signed by a person with the requisite authority in order to make it enforceable. The Bank argues that the offer letters are sufficient to provide a memorandum. There is much support for the proposition that a guarantee need not be contained in one standard form document. The facts in *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] EWCA Civ 265, provide one example. In that case the Court of Appeal considered the application of section 4 of the Statute of Frauds in the situation where the guarantee was contained in a sequence of emails between the parties finding that an agent who signed on behalf of a principal in an e-mail where the terms had been set out was sufficient to constitute an enforceable guarantee. Mr Mills argues that *Moat Financial Services* v *Wilkinson* [2005] EWCA Civ 1253 is "strikingly similar" to the present case. In *Moat Financial Services*, the defendants entered into negotiations with the claimant finance company to obtain a loan for the benefit of a company. An agreement was subsequently agreed and a facility provided to the company. The agreement was made in writing signed by the defendant and on behalf of the company. The agreement required security including a personal guarantee to be provided by the defendant, a legal charge over a property, and a charge over the first defendant's shareholding in the company. A further sum was advanced a few years after the first sum, after which a letter was sent by the claimant to the defendant referring to the additional advancement and requiring an alteration to the facility agreement to reflect the whole sum advanced. There was no mention that the personal guarantee should be

amended to reflect the increased exposure. After the company became insolvent the claimant sought to obtain relief against the defendant. The defendant resisted the quantum of the claim, on the basis that the personal guarantee had not been amended. The case was decided on a construction of the original letter prior to the first advance. Giving the lead judgment Neuberger LJ (as he was) explained:

> "First of all, it seems to me that, on a fair reading of the 1999 letter, agreement by Mr and Mrs Wilkinson that they will execute a new guarantee in respect of the company's liability for up to £250,000 rather than £100,000 and therefore no reference to the 1997 guarantee is necessary. In my view, as I have said, the effect of their signing the 1999 letter was that the terms of the facility letter were varied so that it referred to £250,000 rather than £100,000. The variation therefore was carried through, as I have mentioned, so as to impose an obligation on Mr and Mrs Wilkinson to provide: "the following security in a form and substance satisfactory to us [that is Moat]", Namely a personal guarantee, a legal charge over property, and a charge over the shares. That to my mind, was a perfectly clear obligation."

97. Attractively though this argument was put by Mr Mills, the facts of this case are quite different. This case is not about a variation of a facility. The Guarantee was not entered into by Mr Lynch. There is no letter of agreement that can be construed to read that if the Guarantee was not produced, signed or otherwise entered into, Mr Lynch would be bound by its terms notwithstanding he had not seen the terms. To make good the differences Mr Mills argues that "it is likely that Mr Dartford informed the Bank that Mr Lynch had agreed to give a guarantee and indemnity as required… even if he did not use those words…". The Bank has not provided sufficient or any first hand evidence to this effect.

(iii) Estoppel

98. The third alternative argument fails as there is no factual basis upon which an estoppel can operate. On the Bank's own argument, it could only succeed if the court found that

Mr Lynch caused the Guarantee to be delivered to the Bank knowing that it bore a signature similar to his own.

Conclusion

99. On this application the Bank bears the burden of proof to demonstrate on the balance of probabilities that it is a creditor of Mr Lynch. It seeks to do so by relying on the Guarantee. In my judgment it cannot do so. The first-hand evidence of Mr Lynch and Miss Hughes is to be preferred over those called to give evidence for the Bank. The key personnel at the Bank who are said to have dealt with the formalities and documentation for the financial facility advanced to Ruskin, did not give evidence. Mr Adcock, who did give evidence, was not able to recall if he saw the Guarantee and not able to say that he personally took it to the offices of Ruskin. There is no evidence that it was posted or e-mailed (the Bank's usual practice) to Mr Lynch. I have found that the Guarantee was never produced to Mr Lynch. He had never seen the Guarantee before the Bank made demand. It follows that he had never seen or read its terms. He understood from a conversation with the regional managing director that if a personal guarantee was required it would be in the same or similar form to the personal guarantee he had provided to a previous lender: RBSIF. That was the only conversation he had with a member of the Bank about the provision of a personal guarantee. As Mr Lynch had not seen the Guarantee he did not execute it. As the Guarantee was not produced to Ruskin or Mr Lynch it is more likely than not that Miss Hughes did not see the Guarantee prior to the facility being advanced. It follows that Miss Hughes did not witness the signature of Mr Lynch. This conclusion is consistent with the first witness statement of Mr Dartford (see paragraph 5.3 above). There is no evidence to support the contention that Mr Lynch provided actual authority to Miss Hughes to sign the Guarantee on his behalf. The alternative arguments of res judicata, agreement by offer and estoppel fail in law and on the facts.

100. I allow the appeal against the Trustee's decision to accept the proof of debt.

101. I invite the parties to agree an order.