[2023] EWHC 1822 (Comm)

CC-2022-MAN-000082

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (KBD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 17 July 2023

Before:

His Honour Judge Pearce

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Between:

ADVANCE GLOBAL CAPITAL LIMITED

Claimant

- and –

JEREMY HOWARD COOMBES

Defendant

- -
- -

Ms LISA FENG (instructed by **BERMANS LLP**) for the **Claimant**

Mr JAY JAGASIA (instructed by **MISHCON DE REYA LLP**) for the **Defendant**

Hearing date: 23 March 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 16:00 on Monday 17th July 2023.

INTRODUCTION

1. This is my judgment on the Claimant's application for:

    1.1. Summary judgment on the issues raised in paragraphs 21 to 28 of the Particulars of Claim, on the ground that the defence in relation to that part of the Particulars of Claim has no real prospects of success; and/or

    1.2. The striking out of those paragraphs of the Defence which deny the claim set out in paragraphs 21 to 28 of the Particulars of Claim on the ground that the Defence discloses no reasonable grounds for defending this part of the claim; and/or

    1.3. An order for an interim payment.

2. The application notice was issued on 15 February 2023. It is supported by a witness statement from Mr Jonathan Berkson, solicitor, of the same date. In response, the Defendant filed a witness statement dated 15 March 2023.

3. The application was heard on 23 March 2023 when I reserved judgement.

BACKGROUND

4. The Defendant was a director and shareholder of Castle Business Finance Limited ("the Company"). The Company offered invoice discounting and other related facilities.

5. The Claimant provided funding for the Company by a revolving credit facility entered into with the Company on 12 September 2016 ("the Facility Agreement"). The initial facility limit was stated to be $3 million. By deed dated 21 July 2017, the Defendant provided a personal guarantee and indemnity ("the Personal Guarantee" – at points within communications referred to below, it is abbreviated to "PG") in respect of the Company's liabilities under the Facility Agreement. Pursuant to the terms of an amendment letter dated 26 July 2017 signed by the Claimant and the Company, the Claimant agreed to increase the existing facility limit under the Facility Agreement to $6 million. By amendment letter dated 30 November 2017, there was a further variation to the Facility Agreement, by which the Facility Interest Rate (defined below) was increased.

6. By a letter dated 22 June 2020 the Claimant demanded immediate payment of the sum of £2,695,215.21 pursuant to Clause 11.15 of the Facility Agreement. On the

same day, Alastair Rex Massey and Paul David Allen were appointed joint administrators of the Company.

7. On and following that date, the Claimant made a series of demands as against the Defendant for sums allegedly due under the Personal Guarantee:

   (a) A demand dated 22 June 2020 for £269,521.52 ("the First Demand");

   (b) A demand dated 11 February 2022 for £269,521.52 plus interest that had allegedly accrued since the first Demand, a total of £306,426.51 ("the Second Demand");

   (c) A demand dated 9 November 2022 for £177,257.40 plus interest ("the Third Demand").

8. Between service of the Second and Third Demands, the Claimant, on 17 March 2022, served a statutory demand on the Defendant for the sum of £309,189.18. That statutory demand was set aside at a hearing before District Judge Wales sitting in the County Court at Bristol on 8 November 2022.

9. On 22 November 2022, the Claimant issued the Claim Form in this action, seeking monies allegedly due under the Personal Guarantee pursuant to the Third Demand. Paragraphs 21 to 28 of the Particulars of Claim, upon which the claims for summary judgment and/or strike out and/or an interim payment are based, relate to a claim on the Third Demand.

THE FACILITY AGREEMENT

10. The Facility Agreement sets out the terms upon which the Claimant provided credit to the Company. It refers to the concept of a "*utilisation*" of the facility and, within Schedule 3 headed "*Definitions and Interpretation*" states that a "*Utilisation*" means "*a utilisation by the Company of the Facility, including any Early Advance, or, as the case may be, the principal amount outstanding of that utilisation plus any unpaid compounded interest accrued on it*."

11. At clause 3, the Facility Agreement deals with the payment of interest as follows:

   "3 Interest and default interest

3.1 The Company must pay interest on each Utilisation in the currency in which that Utilisation was made at the relevant Facility Interest Rate. Interest is payable in arrears on the Interest Payment Date.

3.2 If the Company fails to pay when due any amount due from it under any Finance Document, interest will accrue on that amount (or so much as from time to time remains unpaid) from its due date to the date of actual payment at the Default Interest Rate in the currency of that overdue amount. Default Interest (if unpaid) arising on overdue amount will be compounded with the overdue amount on the last Interest Payment Date but will remain immediately due and payable."

12. Schedule 1 of the Facility Agreement states the Facility Interest Rate to be 7.5% and the Default Interest Rate to be 4% above the Facility Interest Rate. The Facility Interest Rate was increased to 8.5% by virtue of the amendment letter of 30 November 2017.

THE PERSONAL GUARANTEE

13. The introductory sections of the Personal Guarantee identify the parties as the Claimant and the Defendant. The Defendant, as guarantor, is referred to in the first person within the document. The "Client" is defined as Castle Business Finance Limited and the "Limit" as the "*Lessor* (sic – clearly this means "lesser") *of 10% of outstanding Utilisations or US$600,000."*

14. The term "*Utilisations*" is not defined within the Personal Guarantee. However the Claimant points to the terms of the Facility Agreement itself which include the definition referred to above.

15. Clause 1.1 of the Personal Guarantee deals with the Defendant's obligations as follows:

"1.1 On the basis that the maximum amount that may be recovered by you from me under clauses 1.1 to 1.1.4 inclusive is the Limit referred to above (unless clause 2.1 is applicable) together with all costs and expenses of enforcement on an indemnity basis in accordance with clause 1.2 below and interest in accordance with clause 7 below now I hereby:

1.1.1 guarantee the due performance of all the obligations to you of the Client under the Agreement or any other agreement with you or any other form of obligation to you; and

1.1.2 undertake to pay you on demand any debit balance on the Current Account between you and the Company; and

1.1.3 undertake immediately upon demand to pay to you all amounts now payable or which may at any time hereafter become payable to you by the Client, whether they arise under the Agreement or otherwise so that my obligations to you under this provision may be enforced against me at any time, without any prior demand on the Client; and

1.1.4 indemnify you and hold you harmless against all Losses you may suffer or incur by reason of any failure of the Client to comply with any term or condition of the Agreement or of any other agreement with you or any other form of obligation or security given to you.

1.2 On the basis of a complete indemnity I undertake to pay you all costs and expenses (including legal costs) incurred in enforcing or attempting to enforce either the terms hereof against me or the terms of any other guarantee and indemnity given by any other party in respect of any obligations of the Client to you."

16. Clause 3 provides:

"*The guarantees and indemnities given herein shall be continuing obligations which shall apply to the ultimate amount payable by the [Company]"*

17. Clause 7 states:

"*I shall be liable to pay you interest on all sums demanded by you hereunder from me. Such interest shall accrue from day to day and be calculated at the same rate as the Facility Interest Rate referred to in the [Facility Agreement]. It shall run from the date of your demand to the date when payment is received by you…, both before and after any judgment. Interest will be compounded on the last day of each month.*"

18. Clause 10 provides:

"*For the purpose of determining my liability under this guarantee and indemnity (which shall be additional to and not in substitution for any other security taken or to be taken by you in respect of the Client's obligations to you) I shall be bound by any acknowledgement or admission by the Client and by any judgment in your favour against the Client. For such purpose and for determining either the amount payable to you by the Client or the amount of any Losses I shall accept and be bound by a certificate signed by any of your directors. In any proceedings such certificate shall be treated as conclusive evidence (except for manifest error) of the amounts so payable or of any Losses. In arriving at the amount payable to you by the Client or of any Losses you shall be entitled to take into account all liabilities (whether actual or contingent) and to make a reasonable estimate of any liability where its amount cannot immediately be ascertained*."

19. Clause 17 provides:

"*This guarantee and indemnity is governed by English law. I accept the non-exclusive jurisdiction of the English Courts. If any provision hereof shall be invalid or unenforceable no other provisions hereof shall be affected. All such other provisions shall remain in full force and effect. This document contains all*

terms agreed as to my liability to you as a guarantor and indemnifier of the Client's obligations to you. All prior negotiations, warranties, offers and representations shall be of no effect unless set out in this document."

20. By clause 18.2, it is provided:

"In this deed except where the context otherwise requires:…(2) any words or phrases which are defined in the [Finance Agreement] shall have the same meaning assigned to them herein…";

THE CLAIMANT'S CASE

21. The Claimant contends that:

21.1. The Defendant is liable under the personal guarantee to indemnify the Claimant in respect of 10% of outstanding sums due from the Company to the Claimant;

21.2. The Third Demand was a valid demand for the amounts then outstanding;

21.3. The Third Demand was accompanied by a certificate which was conclusive of the amount payable by the Company, that is £1,772,574.04.

21.4. Accordingly the Defendant has no defence to a claim on the guarantee for 10% of that sum, £177,257.40.

THE DEFENDANT'S CASE

22. The Defendant raises a series of grounds upon which it says that the Claimant's application, in all three aspects, should fail:

22.1. The application is a collateral attack on the decision of Judge Wales on 8 November 2022 when he found the debt to be disputed on substantial grounds and/or that his decision gives rise to a res judicata or an issue estoppel and/or the proceedings are an abuse of process (Issue 1);

22.2. The parties entered into a collateral contract that obliged the Claimant to endeavour to recover monies due from the Company before taking action on the Personal Guarantee (Issue 2);

22.3. The Claimant is estopped, either by representation or by convention, from instigating these proceedings at this time (Issue 3);

22.4. The Third Demand is not valid because the true meaning of the term "Utilisations" is unclear and/or the Claimant has failed adequately to prove the sum due under the Personal Guarantee (Issue 4).

23. Whilst the burden of showing that any of the orders sought on this application should be made lies on the Claimant, it is convenient to examine the application by looking at each of the issues raised. I deal with the collateral attack issue first

because, if the Defendant's point is well made, it is arguable that the court should not or need not go on to deal with the other issues at all.

THE LAW

24. Mr Jagasia for the Defendant refers to the principles in relation to Summary Judgment applications at paragraph 24.2.3 of the commentary in the White Book. He summarises the six principles formulated by Lewison J in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 and approved by the Court of Appeal in A C Ward & Sons Ltd v Catlin (Five) Ltd [2009] EWCA Civ 1098 as follows:

    24.1. The court must consider whether the respondent has a "realistic" as opposed to a "fanciful" prospect of success.

    24.2. A "realistic" defence is one that carries some degree of conviction. This means a defence that is more than merely arguable;

    24.3. In reaching its conclusion the court must not conduct a "mini-trial;"

    24.4. This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents;

    24.5. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial; and

    24.6. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

25. To these principles, one might usefully add a seventh: that, whilst the overall burden is on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is not other reason for trial, if the applicant adduces credible evidence in support of the application, the respondent is under an evidential burden to show some real prospect of success or other reason for having a trial (see Sainsbury's Supermarkets Ltd v Condek Holding Ltd [2014] EWHC 2016 (TCC)).

26. As to the alternative argument for strike out on the basis that the defence discloses no reasonable grounds for defending the claim under CPR3.4(2)(a), I note paragraph 1.4 of PD3A which gives as examples of a defence that might fall foul of this rule, two examples:

    26.1. Where the defence consists of a bare denial or otherwise sets out no coherent statement of facts, or

    26.2. Where the facts set out in the defence, while coherent, would not amount in law to a defence to the claim even if true.

27. As these examples make clear, the focus in a strike out application tends to be on the statement of case itself. There are important procedural differences between this jurisdiction and that under CPR 24. In Kasongo v CRBE Ltd [2023] EWCA 2557, Choudhury J pointed to the need for procedural rigour in distinguishing between striking out and summary judgment application. The issue arose in that case with particular reference to the regulations relating to qualified one way costs shifting in the context of personal injury claims, but as a matter of principle, the same principled approach must arise in other cases, not least because there is an important distinction between strike out and summary judgment applications for the purpose of considering certifying a claim as being totally without merit.

28. In fact, I can see no grounds upon which the Claimant's application for strike out would succeed if the application for summary judgment did not. For that reason, I focus in this judgment on the application under CPR Part 24.

29. As to the claim for an interim payment, that is very much a backstop position for the Claimant. Since the procedural gateway here is that contained in CPR25.7(1)(c), namely that the court "i*s satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant…,"* it is apparent that the success of the application supposes that the Claimant fails in its primary case that it is entitled to summary judgment. For that reason, I defer consideration of that application until after dealing with the application for summary judgment.

ISSUE 1 - COLLATERAL ATTACK etc

Submissions

30. At the hearing of the application to set aside the statutory demand, Judge Wales was concerned with issues relating to the First and Second Demands. The application to set aside was brought on the ground that the debt which was the subject of those demands was genuinely disputed on substantial grounds. To the extent that the court on that occasion was concerned with the formal validity of the First and Second Demands, the Claimant contends that it cannot be said that this application is a collateral attack on his decision, nor that any issue estoppel arises since the Claimant does not rely on those demands in this application.

31. However the Defendant contends that it is clear from the note of the judgment of Judge Wales that he decided three issues that are raised in the application before this court:

    31.1. It is arguable that the Claimant cannot rely on a Certificate from a Director to prove the sums due under the Personal Guarantee since Clause 10 of the Personal Guarantee refers to sums due from the Company to the Claimant, not from the Defendant to the Claimant;

    31.2. The Defendant's contention for the existence of an estoppel is reasonably arguable;

    31.3. The Defendant has a realistic prospect of success in showing that the "entire agreement" clause in the Personal Guarantee is not effective to defeat the estoppel argument.

32. In so far as the instant application raises the question as to whether the Defendant has an arguable defence on any of these grounds, the Defendant contends that the Claimant is seeking to go behind the decision of Judge Wales and that the application should therefore fail, whether as an abuse of process, a collateral attack on the decision of another court or under the doctrine of *res judicata.*

Discussion

33. Three matters should be noted:

    33.1. I do not have an approved transcript of the judgment of Judge Wales, simply a note of that judgment. That is unfortunate because the note may not accurately record what the Judge had to say. In any event, it gives only brief reasoning for the decision. As I note below, this makes it difficult for the Defendant to identify the detailed basis of the decision.

33.2. At the time of the hearing before Judge Wales, the Defendant had not raised the collateral contract argument and accordingly he did not have to deal with this matter. To that extent, the principle of collateral attack or issue estoppel relied on cannot of itself defeat the Claimant's applications. However, to the extent that he dealt with the potential enforceability of the "entire agreement" clause, his finding of an arguable case must apply with equal force to the collateral contract argument as it does to the estoppel argument. Further, the collateral contract argument is advanced as a legal consequence of the arguable case that Judge Wales found that the Defendant had raised on the estoppel argument before him. Thus, the argument that the Defendant has no real prospect of success on that contention is (says the Defendant) just as much an attack on Judge Wales' decision as the attempt to reargue the issue of estoppel by convention and/or representation.

33.3. The Judge was clearly critical of the approach by the Claimant in the instant claim for the manner that they went about calculating the sums due under the Personal Guarantee. The Defendant contends that this criticism remains good in the application before me.

34. A useful starting point on this issue is the decision of the Court of Appeal in Allsop v Banner Jones [2021] EWCA Civ 7. In his judgment (with which the remainder of the Court of Appeal agreed), Marcus Smith J considered the distinction between the various concepts:

"*21. A* res judicata *is a decision pronounced by a judicial or other tribunal with jurisdiction over the cause of action and the parties, which disposes, once and for all, of all the fundamental matters decided, so that, except on appeal, they cannot be re-litigated between* ***persons*** *bound by the judgment. A party to a* res judicata *will be estopped, as against any other party, from disputing the correctness of the decision, except on appeal. This is known as "cause of action estoppel". The same is true – save to a narrower extent – of "issue estoppel". A final decision will create an issue estoppel if it determines an issue in a cause of action as an essential step in its reasoning.*

*22. I shall, for convenience, refer to both sorts as "*res judicata *estoppel".*

23. Res judicata ***estoppel*** *has as its rationale the importance of finality in judicial decision-making. In The Ampthill Peerage Case, [1977] AC 547 at 569, Lord Wilberforce put the point as follows:*

> *"English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. The principle which we find in the Act of 1858 is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution*

> *compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."*

24. There is, thus, a particular form of finality that attaches to final decisions at first instance. It is important to differentiate final decisions from interlocutory decisions, and appeals from decisions at first instance ...

27. Collateral challenges to prior decisions ex hypothesi do not give rise to res judicata estoppel. For the purposes of this judgment, a collateral challenge is one where – no matter how similar the issue in question – the parties to the later dispute are different from the parties to the earlier dispute that is the subject of the collateral challenge. As a matter of principle, collateral challenges should not give rise to an estoppel because – even though a dispute or issue has been determined by an anterior final judicial decision – that decision was binding only as between A and B, whereas the later claim arises between A and C. In short, whereas B could allege that A is estopped from bringing a later claim as against B C can make no such assertion, because C was not a party to the anterior decision. Generally speaking, where no res judicata estoppel arises, A is permitted to bring a claim without being fettered by what has been decided previously."

35. Since the parties to the hearing before Judge Wales are the same as the parties before this court, it is apparent that in principle the Defendant can raise the issue of *res judicata* estoppel, rather than being limited to the "*collateral challenge"* class of case. Since no cause of action was determined by Judge Wales, this is a case not of cause of action estoppel but of issue estoppel.

36. But it is further apparent from this passage that a difficulty arises in arguing the existence of an estoppel of this nature where the decision of the court relied on is interlocutory in nature. The authors of Phipson Evidence (20th Edition) say at paragraph 43-05 the rule that an estoppel will not apply to a judgment that is not

final in nature that "*has the important practical effect that the failure of an interim application is no bar to its renewal. Thus, the fact that an application for summary judgment has failed does not mean that the claimant is forever barred from renewing his application, at any rate if further material is put before the court.*"

37. The decision that there are substantial grounds for disputing a debt, just like a decision that there is a real prospect of success on an issue, is an interlocutory judgment rather than a final judgment. Accordingly, the issue of *res judicata* estoppel does not arise and the Claimant is not barred by that principle from raising in these proceedings issues that were considered by Judge Wales in the application to set aside the statutory demand.

38. That is not to say that the court cannot prevent a party from relitigating essentially the same issue on the ground that it is an abuse of process for the party to be allowed to do so, even where the previous litigation of the issue was in an interlocutory application. By way of example, where a party seeks to repeat an application in the same proceedings on grounds that have already been rejected by the court, the party will not normally be allowed to do so, at least in the absence of a material change in circumstances. Further, the decision of a court on an interlocutory issue such as whether there are substantial grounds for disputing a debt may be persuasive in a later hearing where the court is considering whether a defence to the debt has a real prospect of success. But there is no rule of law that, where a previous interlocutory order determined a case to be arguable, a later court may not conclude that the case is unarguable. Rather, the case falls within the collateral challenge class of case where it may be considered an abuse of process for the later court to redetermine an issue that was considered in earlier proceedings.

39. The proper approach to such arguments was considered by the Court of Appeal in Michael Wilson & Partners v Sinclair [2017] EWCA Civ 3. Having reviewed the authorities, Simon LJ went on:

"48. *The following themes emerge from these cases that are relevant to the present appeal.*

(1) In cases where there is no res judicata *or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in Hunter v Chief Constable , Lord Hoffmann in the Arthur Hall case and Lord Bingham in Johnson v Gore Wood . These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in Hunter v Chief Constable. Both or either interest may be engaged.*

(2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse, see Bragg v Oceanus; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the Arthur Hall case.

(3) To determine whether proceedings are abusive the Court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in Johnson v. Gore Wood and Buxton LJ in Taylor Walton v Laing.

(4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the Arthur Hall case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the Bairstow case; or, as Lord Hobhouse put it in the Arthur Hall case, if there is an element of vexation in the use of litigation for an improper purpose.

(5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in In re Norris.

To which one further point may be added.

(6) An appeal against a decision to strike out on the grounds of abuse, described by Lord Sumption JSC in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160 *at [17] as the application of a procedural rule against abusive proceedings, is a challenge to the judgment of the court below and not to the exercise of a discretion. Nevertheless, in reviewing the decision the Court of Appeal will give considerable weight to the views of the judge, see Buxton LJ in the Taylor Walton case, at [13]."*

40. At paragraph 75 of his judgment in Kamoka v Security Service [2017] EWCA Civ 1665, Flaux C said of abuse of process challenges on this grounds that:

"The touchstone for the application of the principle is not whether the earlier proceedings led to a final determination of a court of competent jurisdiction but

whether the pursuit of the subsequent proceedings is manifestly unfair to a party to the litigation or would otherwise bring the administration of justice into disrepute."

41. Given that there is no general principle that prevents the Defendant from raising abuse of process arguments but that such arguments need to be considered on a "*merits based"* analysis of the facts, it is not appropriate to deal with this issue in a blanket fashion. Rather, it is necessary to consider the assertion that the Claimant's application is an abuse of process by looking at each of the three issues (Issues 2, 3 and 4 identified above) where the abuse is said to arise.

ISSUE 2 – COLLATERAL CONTRACT

Submissions

42. The Defendant argues the collateral contract as arising from a comfort letter sent by the Claimant to the Defendant during the negotiations that led to the amendment to the facility limit and the execution of the Personal Guarantee:

    42.1. On 7 August 2017, the Defendant emailed Mr Hendrik Van Deventer, a Director of the Claimant, setting out "*thoughts and comments regarding the legals."* Having considered the basis of calculation of his prospective liability under the guarantee that was in contemplation, he goes on:

    "*a. My proposal is to change the Amendment Letter in 2.1(b)(G) to show that my PG should be 10% of all Utilisations outstanding at any time, subject to a maximum of $600,000…*

    b. Whilst I would expect it to be the case, I would also like it in writing that in a reality situation, all other avenues are exhausted before my PG is called in. The first remedial action would always be to collect-out the Book (with my help) until it had been thoroughly exhausted.

    I would like a) and (b) above to be reflected in the PG and the Amendment Letter.

    2. My lawyer is strongly advising that my liability be limited to $600k regardless of the circumstances, unless I have personally perpetrated a fraud, or indeed was aware that one of my staff were so doing. What he means is that I should not submit to unlimited liability about an event that I may have no control over, or indeed any knowledge of. Such circumstances should allow my liability to be limited to $600,000 as a maximum.

    3. My lawyer advises that interest would be applied at the same rate as "Early Repayment Rate". What is that please?

    Subject to these conditions and variations, I will sign the PG and the Amendment Letter."

42.2. In an email response on the same day, Mr Van Deventer replied:

"*Your requests below seem reasonable. The only point I can't agree without getting the lawyers involved is your ask for written confirmation that all other avenues will be exhausted before calling on the PG. We always try to act reasonably…We however don't know what the exact circumstances will be requiring such a collect out and therefore usually retain the ability to call on the PG at our discretion. I'm happy to try to adjust the PG to accommodate your request but there will be legal fees…*"

42.3. The Defendant responded by email (on the same day*):*

"I appreciate your stance but I am not sure what events might prevail that would warrant you pursuing me when the obvious and easier resolve would be to simply collect out the book debts. I don't think we need to get too hung up about employing lawyers when effectively we are in agreement…I would be happy with a 'Comfort' side letter, in the spirit of moving forward. However, if you do feel this warrants involving lawyers I will respect your decision."

42.4. Mr Van Deventer replied, again on the same day:

"*Agreed, I don't think it's necessary to involve the lawyers. Could you send me an example of the comfort letter you provide your clients?"*

42.5. On 8 August 2017, the Defendant emailed Mr Van Deventer in these terms:

"*I would be looking for something along the following lines:*

Whilst our legal rights under the terms of the Personal Guarantee are reserved, please be assured that in reality we would always endeavour to recover our investment through collections on the Assigned Book Debts before we commence any action against you personally.

In fairness this is more of a practical response than a legal one; if you consider that currently we are employing circa $3m of AGC funds, and our monthly collections are running at circa $1.5m, then in 2-3 months' of a 'collect-out' you would have your investment cleared through the Book, which would be many times quicker and cheaper than any attempt to take a Guarantor to court for $600,000. If a clean collect-out was not looking likely, I would argue that you would know within 3 months of attempting collect-out and then you could commence the action.

I hope that helps your thinking. In my view it's just a case of acknowledging the priorities in terms of a recovery process. You are not waiving your rights, you are just applying a practical, pragmatic (and frankly reasonable) process for extraction."

42.6. On 10 August 2017, Mr Van Deventer sent to the Defendant a revised amendment letter and Personal Guarantee, together with a letter (dated 21 July 2017) and signed by Mr Nathaniel Hartley, as CEO and a Director of the Claimant, in the following terms (so far as material):

> "*We note that we currently hold a personal guarantee from you dated 21st July 2017.*
>
> *Whilst our legal rights under the terms of the Personal Guarantee are reserved, please be assured that in reality we would always endeavor to recover our investment through collections on the Assigned Book of Debts before we commence any action against you personally*."

43. The Defendant pleads the collateral contract in the following terms within the Defence:

> *"35. As a matter of construction, and/or as an implied term of the Collateral Contract pursuant to the officious bystander test or the business efficacy test, the Claimant was obliged always to endeavour to recover its investment through collections of the assigned Receivables before making demand under the Guarantee and/or that any demand made prematurely was of no effect.*
>
> *36. Further or in the alternative, it was an express term of the Collateral Contract that the Claimant was obliged always to endeavour to recover its investment through collections of the assigned Receivables before commencing any action under the Guarantee.*"

44. The principles to be applied when determining whether a collateral contract arises are not controversial. The following statements are drawn from Chitty on Contracts (34th Edition), paragraphs 15-018 and 15-020:

    44.1. "*The courts are prepared in some circumstances to treat a statement intended to have contractual effect as a separate contract or warranty, collateral to the main transaction."*

    44.2. *"In particular, they will do so where one party refuses to enter into the contract unless the other gives him an assurance on a certain point or unless the other promises not to enforce a term of the written agreement*."

    44.3. "*Consideration for the collateral contract is normally provided by entering into the main contract*."

    44.4. "*Breach of the collateral contract will give rise to an action for damages for its breach*."

    44.5. "*The effect of a collateral contract may be to vary the terms of the main contract or to estop a party from acting inconsistently with it if it would be inequitable for him to do so.*

45. The Defendant contends that this is an archetypal case for the court to find the existence of a collateral contract, since it is clear from the communications set out above that the Defendant was not willing to enter into the Personal Guarantee unless the Claimant went to the formality of producing a comfort letter signed by its CEO.

46. The Claimant responds to this argument by raising three objections:

    46.1. The entire agreement clause at Clause 17 of the Personal Guarantee would prevent the Defendant from relying on a collateral contract, in particular when it is clear from the communications that the Defendant was taking legal advice on the effect of the documents he was contemplating signing.

    46.2. The terms of the communications between the Defendant and Mr Van Deventer make clear that the Defendant did not consider the Claimant's legal rights to be affected by the creation of the comfort letter. He says so in as many words in his email of 8 August 2017, when he states, "You are not waiving your rights." In those circumstances, an argument that the comfort letter was intended to create legal relations (or more accurately to vary the relations that would otherwise arise on execution of the guarantee) is unsustainable.

    46.3. In any event, the terms of the collateral contract would not prevent the Claimant from issuing and relying on the Third Demand, since the Claimant had, by the time of that demand, endeavoured to recover monies from the Company. In this respect, the Claimant points to paragraphs 31 and 32 of the witness statement of Mr Berkson:

    "*31. The Claimant notes that it has been over two years since demand was first made upon the Company. The Administrators' Progress Reports confirm that it is likely the Claimant will suffer a shortfall on its debt. Further, it can be seen that there has been a collection exercise on-going in respect of the Company's residual book debt since at least the sale of the Company's assets to the Purchaser in 2020. It appears from the Progress Reports that a debt collection agency, Cerberus, has been appointed since around February 2021 to progress the collection of the remaining book debts. It is also clear from the two most recent Progress Reports that no further realisations have been achieved on the collection of book debts during the previous six months.*

    32. As pointed out above, the Claimant has not received anything from the Administrators since April 2021."

47. On the first point, the Defendant draws attention to the terms of the Unfair Contract Terms Act and contends (as it was argued before Judge Wales) that the entire agreement clause is at least arguably unenforceable.

48. On the second point, the Defendant argues that the Claimant is seeking to go behind Judge Wales' judgment in that he found it arguable that the letter of comfort did give rise to legal consequences. As the note of the judgment puts it,

    "In relation to the estoppel argument, there is a realistic prospect that Mr Coombes could establish a defence here. That the letter of comfort was intended to be relied upon by Advance notwithstanding the first phrase of the comfort

letter. The contrast between the first phrase and balance of the letter of comfort raises a complicated area of law on which I have not been presented with any authority by either side, but it is not a matter that can be disposed of in a summary matter.

The Respondent knew of the letter of comfort and there is a realistic prospect that the Respondent did intend the letter to provide genuine comfort and this gives [counsel for the Company] a starting point for that argument."

Discussion

49. I have not heard detailed argument on the applicability of the Unfair Contract Terms Act (or other legislation dealing with allegedly unfair contract terms). The Claimant acknowledged in submissions that it might be arguable that the entire agreement clause could not be relied on in light of such legislative restriction on contract terms. In truth, where an express collateral contract is argued, the court will always scrutinise with some care an entire agreement clause that is said to render that contract unenforceable (see, for example, paragraph 15-031 of Chitty on Contracts). For the purpose of defeating the applications for summary judgment and/or strike out, the Defendant is clearly able to mount a sufficiently arguable case that the entire agreement clause would not prevent the alleged collateral contract from taking effect, whether on ground that the construction of the clause may not be effective in the manner alleged by the Claimant or that the statutory code relating to unfairness prevents reliance on it.

50. Turning to the second issue raised by the Claimant, namely the assertion that the letter of comfort was clearly not intended to affect the parties' legal relationship, the question of collateral attack and abuse of process clearly arises. Judge Wales made a determination that it was arguable that the letter was intended to have legal effect.

51. If one were to take the letter of comfort alone, this is probably arguable, since there might be scope for debate about what the "reservation" of legal rights might be intended to mean. It is true that some of the other material that the Defendant can rely on might also be thought to support an argument that the parties were contemplating varying their legal relations by these negotiations. But the note of Judge Wales' judgment does not refer to the Defendant's email of 8 August 2017. Indeed, from looking at the exhibit to Mr Coombs witness statement for the

purpose of this application, it would appear that the email was not in front of the Judge.

52. In that email, the Defendant, having suggested wording for the letter of comfort, makes three statements of note:

    52.1. *"In fairness this is more of a practical response than a legal one;"*

    52.2. *"If a clean collect-out was not looking likely, I would argue that you would know within 3 months of attempting collect-out and then you could commence the action;"*

    52.3. *"You are not waiving your rights, you are just applying a practical, pragmatic (and frankly reasonable) process for extraction.*"

53. The first and third of these statements are flatly inconsistent with a conclusion that, in entering in to the letter of comfort, the parties were agreeing in some way to vary their legal relations. It is entirely contradictory for the Defendant to say on the one hand that the Defendant's rights are unaffected by the letter and to say that the letter gives rise to some kind of collateral contract (or indeed estoppel). The second statement is of a somewhat different character – it would appear to lend support for an argument that any collateral contract and/or estoppel only prevented the Defendant from suing on the guarantee if it had attempted for 3 months to recover sums from the Company. That period of time has of course well expired.

54. In my judgment, there is no real prospect of success in an argument that the parties intended to vary the legal rights contained in the express words of the Personal Guarantee by a collateral contract. Even if that were wrong, I do not see that the terms of any collateral contract could be other than that the Claimant would not enforce its strict rights until it had spent at least 3 months attempting to recover the monies from the Company.

    54.1. Given the contents of the Defendant's email of 8 August 2017 it cannot be said that the parties intended that there be a legal commitment on the part of the Claimant through a collateral contract not to claim against the Defendant until all attempts to recover monies from the Company had been exhausted.

    54.2. Indeed, that is not the collateral term that is pleaded at paragraph 35 of the Defence, which is stated to be an obligation "*always to endeavour to recover its investment through collections of the assigned Receivables before making demand under the Guarantee."*

54.3. The uncontradicted evidence before the court in the witness statement of Mr Berkson is that the Claimant has attempted to recover monies from the Company over a period of well in excess of 3 months and that indeed it has been partially successful in those efforts. Whilst the exact extent of the obligation "*always to endeavour to recover*" might be the subject of some argument, the Defendant's own language in the email of 8 August 2017 demonstrates that the amount of time spent by the Claimant in seeking to recover monies from the Company is reasonable. The Defendant does not get close to showing any failure to use reasonable endeavours.

54.4. In those circumstances, the Defendant has failed to show any argument with a reasonable prospect of success that, even if the letter of comfort were intended to have some legal effect, it would bar the making of the Third Demand and bringing an action to recover under the Personal Guarantee. It should be noted that Judge Wales acknowledged that the passage of time made the estoppel argument less compelling.

55. It is of course correct that that the Defendant was not willing to enter into the Personal Guarantee unless the Claimant went to the formality of producing a comfort letter signed by its CEO. That would point in the opposite direction. But where, notwithstanding its request for such a letter, the Defendant made it clear that the letter was not intended to alter the parties' legal relations, there are no grounds for inferring from the production of the letter the very opposite result, namely a variation of the obligations that would otherwise exist.

56. I am also not dissuaded from this conclusion by the argument of collateral attack. The mere fact that the collateral contract argument was not advanced on the previous hearing does not bar this court from finding the Claimant's case to be a collateral attack since a finding that the letter of comfort was arguably intended to be legally binding would defeat at least the first ground upon which I have concluded that the Claimant shows that the Defendant's case has no real prospect of success. But as I have noted above, it would appear that Judge Wales did not have his attention drawn to what is clearly a significant document on the issue of an intention to create legal relations. To that extent the finding that the Claimant shows no real prospect of success for the Defendant on the issue is therefore based on differing material than was before Judge Wales. In any event, the argument that the collateral contract argument could not defeat a claim after the Claimant had used reasonable endeavours to collect the book debt defeats the Defendant's argument on the material before this court.

57. In conclusion, I am satisfied that the Claimant shows no real prospect of success in defending the claim on the Personal Guarantee on Issue 2.

ISSUE 3 – ESTOPPEL

Submissions

58. The contention that a party may be estopped from asserting his strict legal rights by reason of an estoppel by way of representation relies on it being shown that:

    58.1. The representation is of fact and is not merely a statement of intention or promise.

    58.2. The representation is precise and unambiguous;

    58.3. It was intended that the other party would act on the truthfulness of the representation;

    58.4. The party acted to is own detriment in relying on the representation;

    58.5. The misstatement was the proximate cause of the detriment (see Phipson on Evidence, paragraph 5-29).

59. The representation here is said to be that made in the Comfort Letter by Mr Hartley on behalf of the Claimant and that made by Mr Van Deventer in sending the draft and then the signed letter of comfort that in each case the person "*honestly believed and had reasonable grounds to believe that if the Defendant provided the Guarantee, the Claimant would always endeavour to recover its investment through collections of the assigned Receivables before making demand or commencing any action under the Guarantee*" (see paragraph 44(1) of the Defence). The evidence for such a representation is said to be in essence that the Claimant's conduct in serving the First and Second Demands and in defending the application to set aside the statutory demand shows that it never intended to seek to recover from the Company before pursuing the Defendant under the Personal Guarantee.

60. Again the Claimant denies that there was any representation or any reliance on it because the Defendant always knew that the letter for comfort was not intended to affect the parties' strict legal rights. There is little to be added to the arguments on collateral contract by that on estoppel. It is an alternative way of stating the legal consequences of the same factual scenario, namely the creation of the letter of comfort in circumstances in which it was intended to create legal relations. It

is met by the very same arguments on behalf of the Claimant that this is inconsistent with the communications that took place around the creation of the letter of comfort.

61. As to estoppel by convention, the most helpful summary of the law is that in Spencer Bower on Reliance-Based Estoppel and Related Doctrines (5th Edition) at paragraph 8.2:

> "*An estoppel by convention is an estoppel from denying a proposition established, not by representation or promise by B to A, but by mutual, express or implicit assent. The estoppel is not founded on A believing a representation by B, but on a common assumption of facts or law as a basis of their relationship, to which B has so assented as to make B responsible for A's reliance on it. When the parties have so acted in their relationship upon that shared assumption that it would be unfair on A for B to resile from it, then A will be entitled to relief against B. As to the relief, it is submitted that, for consistency with the related doctrines of estoppel by representation of fact, promissory estoppel and proprietary estoppel, it should be determined according to whether the estoppel relates to a matter of fact, a promise, and / or property."*

In Tinkler v Revenue & Customs Commissioners [2021] UKSC 39, the Supreme Court emphasised the importance of showing that any common assumption "crossed the line" between the parties.

62. Again, the Claimant contends that any argument for an estoppel fails on the express wording of the letter of comfort and the associated communications from which it is clear that the letter of comfort was not intended to affect the legal relations between the parties.

Discussion

63. The Claimant dismisses the claim based on estoppel by way of representation saying that none of the five requirements listed in paragraph 5-29 of Phipson on Evidence are made out. I disagree that the Defendant does not have a real prospect of success on at least two of them: the Defendant has a real prospect of success on showing that a representation of fact, as pleaded, was made and that it was sufficiently precise and unambiguous to be capable of giving rise to an estoppel along the lines pleaded.

64. However, the Defendant again has to deal with the terms of the communications between him and Mr Van Deventer pleaded above. Those communications make

it clear that the Defendant did not consider that the Claimant was under a legal obligation of the kind pleaded in the Defence to seek to collect money from the Company before turning to the Personal Guarantee. The email of 8 August 2017 is arguably inconsistent with the assertion that the Defendant relied on the truthfulness of the alleged representation and wholly inconsistent with the assertion that the Defendant acted to his own detriment in relying on the representation and/or that the misstatement was the proximate cause of the detriment. In truth, the Defendant knew full well that the terms of the comfort letter were not intended to affect the rights of the parties and therefore could not give rise to an estoppel, whether by representation or by convention, any more than it could give rise to a collateral contract.

65. In considering whether it is an abuse of process to allow the Claimant to raise this argument, it is to be noted that, unlike under Issue 2, the argument here was expressly considered by Judge Wales and ruled by him to be arguable. But, as noted above, I have very little of the detail of his reasoning and specifically it would appear that he did not have the email of 8 August 2017 drawn to his attention. It is that email which factually undermines the Defendant's argument that he has a real prospect of success on this issue and, in the absence of seeing that the document was considered and dealt with, it cannot be said there is any abuse of process in raising this argument now since it is brought on different material than that which was before Judge Wales.

66. I agree with the Defendant's argument that the "entire agreement" clause is not effective to defeat the argument as to estoppel. However the argument for summary judgment on this issue does not rely on the entire agreement argument; rather it involves the contention that the terms of the communications make it unarguable that the Defendant was relying on some representation that he considered to be binding. Had I needed to deal with the "entire agreement" clause, it might have been that I would have found some merit in the argument that it is an abuse to reopen that issue, though in any event I agree with the conclusion of Judge Wales that it is at least arguable that the clause does not defeat any argument based on estoppel.

ISSUE 4 – VALIDITY OF THE THIRD DEMAND

67. The Defendant contends that it is arguable the third demand is not valid such that a claim for summary judgment could not be brought on the back of it. This is on two (or possibly three grounds):

    67.1. That the Claimant is not entitled to rely on the certificate dated 9 November 2022 to determine the Defendant's liability under the Personal Guarantee;

    67.2. That the demand is for an amount that includes interest payable by the Company under the Facility Agreement, but such is not recoverable under the Personal Guarantee;

    67.3. That the Claimant has failed adequately to give credit for payments made by the Company.

68. On the first sub issue, namely reliance on the certificate dated 9 November 2022, the Claimant points to Clause 10 of the Personal Guarantee, set out above. Pursuant to that clause, the Defendant is bound by the certificate as conclusive evidence of the Company's and therefore his own indebtedness, absent manifest error which he is not able to demonstrate.

69. The Defendant responds:

    69.1. The Claimant has failed to provide clear evidence of the sums that are due and is using Clause 10 to evade the problem that arises from its inability to prove the actual liability;

    69.2. In any event, clause 10 of the Personal Guarantee is capable of being construed as a clause dealing with the certification of the sums due to the Claimant from the Company not from the Defendant.

    69.3. Again, this argument is an abuse of process since it was determined on the application before Judge Wales.

70. On the second point as to the inclusion of interest on the demand, the Defendant reasons as follows:

    70.1. The demand is for £177,257.40.

    70.2. That figure is calculated in the demand as of 31 October 2022 as 10% of Outstanding Utilisations totalling £1,772,574.04.

    70.3. The latter figure is calculated in the schedule to the certificate of amount payable as being, as of 31 October 2022, "outstanding utilisations" of £1,395,215.21 plus "outstanding interest" of £215,421.97 and "outstanding default interest" of £161,936.86.

70.4. The Company's liability to interest under the Facility Agreement is not terminated by a demand being made on the Personal Guarantee and accordingly, as between the Claimant and the Company, interest in this case continues to accrue at the Default Interest Rate.

70.5. However, by clause 7 of the Personal Guarantee, the Defendant is allegedly liable to pay interest on sums from the date of demand from the Company.

70.6. Since the Defendant continues to be liable to indemnify the Claimant in respect of the Company's liabilities, it follows that, on the Claimant's calculations, the Defendant is liable to interest twice over following the demand.

70.7. As it is put in the Defendant's skeleton argument, it would be "a commercial absurdity which could never have been contemplated by the parties" that the Defendant would be "required in effect to pay double interest."

70.8. This would only be avoided if the demand for payment from the Defendant brought to an end any continuing liability for interest that might be due from the Company. This is not the Claimant's pleaded case, though Ms Feng conceded this to be the position in her submissions.

70.9. If on the true construction of the Guarantee, the Claimant is only entitled to recover interest at the Facility Interest Rate coupled with interest at the Default Interest Rate until the date of demand from the Defendant, Mr Jagasia made the point in oral submission that the Claimant might benefit from delaying demanding money under the Personal Guarantee, since the Claimant would be entitled to default interest at the higher rate from the Company pursuant to the Facility Agreement (which liability the Defendant was guaranteeing) until the date of demand under the Personal Guarantee. This too would be a commercial absurdity.

70.10. Accordingly, it is arguable that the liability for the "*lesser (see above) of 10% of outstanding Utilisations*" in the Personal Guarantee is a reference to utilisations excluding interest. This would be a narrower meaning than that in the Finance Agreement but such is consistent with clause 18(2) of the Personal Guarantee since the "*context*" would "*otherwise require*."

70.11. If this is arguably correct, the Claimant should not be entitled to summary judgment (or strike out) on the ground that there is a real prospect of success in defending the claim.

71. On the issues as to the calculation of interest, the Claimant's case is that there is no risk of double recovery of interest because the demand of a sum due under the Facility Agreement crystallises the sum that the Defendant is guaranteeing, such that any further liability to interest under the Personal Guarantee is under the liability created by that agreement, not the liability in the Facility Agreement.

72. The Claimant has no specific case on the alternative suggestion raised by the Defendant in oral submission that this interpretation would incentivise the Claimant to delay making a demand under the Personal Guarantee because the interest rate following default by the Company would remain at the higher Default Interest Rate until demand was made of the Defendant under the Personal Guarantee.

73. The Claimant draws attention to authorities such as Arab Banking Corporation v Saad Trading [2010] EWHC 509 (Comm) which hold that a mere overstatement of the sums in the demand does not render the demand invalid. As Steel J said in paragraph 34 of his judgment in that case, "…*a request for more than is due does not invalidate a demand made against a guarantor*." Further, it notes that, apart from the issues noted above, the Defendant does not actively seek to dispute the figures asserted to have been advanced as utilisations to the Company.

74. Within paragraph 23 of the Defence, the Defendant raised another argument, that the Claimant has failed to give credit for payments made by the company of £78,700.28. Those payments can be seen in the Reconciliation attached to the Third Demand, but one can also see that they have been credited against outstanding fees. The Claimant does not seek to recover the fees under the Personal Guarantee and accordingly, unless the Defendant could show that the payments were wrongly credited to the fees column rather than to the utilisations (plus interest), they do not affect the calculations.

75. In oral submission, the Defendant appeared to concede the Claimant's point that in fact those payments related to the fees. But he raised other issues as to the schedule attached to the certificate, including whether there had been a draw down of funds after the Company went into administration and how it could be that the Claimant had received payments that exactly matched interest charges.

76. The Claimant responds that these payments are features of the process once the Company went into administration, including that payments were made by the Administrators on behalf of the Company and further that all utilisations were matched in a short space of time with corresponding credits. The certificate is determinative of the amount unless manifest error is shown, which it can not be.

Discussion

77. As to the argument that it is an abuse of process to permit the Claimant to rely on the certificate in circumstances where Judge Wales is said previously to have used "*smoke and mirrors"* in calculating the sum due in this case, it is notable that, within his judgment, Judge Wales identified actual errors in the figures as presented. In the circumstances before the court now, no actual error is asserted. In contrast, Judge Wales appears to have found the figure in the first demand to be "*manifestly wrong"* and to have considered the second demand to be parasitic on the first.

78. Given that we are not dealing with a new demand which is parasitic on an earlier demand, his findings on the "*manifest error*" issue could not be treated as preventing the Claimant making a fresh summary judgment claim based on the new demand.

79. In addition Judge Wales appears to have found it arguable that clause 10 of the Personal Guarantee does not permit the Claimant to certify the sums it is owed by the Defendant as opposed to the sums it is owed by the Company. The note of judgment says of clause 10 that "*it is couched in terms of the sums that Castle owes to Advance rather than Mr Coombes…"*

80. With respect, this is plainly wrong. A close reading of Clause 10 shows that it refers to the effect of the Claimant certifying "*the amount payable to* [the Claimant] *by* [the Company]" but says that the Defendant is bound by that certificate. He is so bound "*for such purpose"* this being a reference back to "*the purpose of determining* [the Defendant's] *liability under this guarantee and indemnity."* Since the Defendant's liability is inextricably tied to the Company's liability by the structure of the Personal Guarantee, there is no basis for concluding that clause 10 is not intended to or is not in fact so worded as to bind the Defendant to a certified amount for the purpose not only of determining the Company's liability to the Claimant but also the Defendant's liability under the guarantee.

81. Is it then an abuse of process for the Claimant to be allowed to pursue this point on a summary judgment application when exactly the same point was clearly

rejected in the application to set aside the statutory demand? The question of abuse through relitigating the same issue is acute where, as here, the issue is identical to that considered previously. But again the obvious difficulty is that this was an interlocutory hearing. Whilst one can expect a judge at a final trial to have considered all issues in detail, when a judge is dealing with a host of issues in an interlocutory hearing, in a context where appeals are discouraged on case management issues, it is not obvious that, if a later court thinks a decision on an issue to be obviously wrong in circumstances where the point appears not to have been fully argued, it should nevertheless decline to allow the point to be taken because of the earlier ruling.

82. On a merits based approach, the previous decision on this issue was clearly wrong. Whilst there is a public and private interest in achieving certainty and avoiding issues being relitigated, I do not see that in this case any manifest unfairness is shown in allowing the point to be relitigated where the previous judgment cannot be shown to have considered the point in detail and where the judge in the second case considers the first decision to be wrong. Equally, I do not see that it would bring the administration of justice into disrepute. In those circumstances, this court is not prevented from giving summary judgment by the earlier ruling.

83. This ruling equally deals with the third issue raised above, as to the alleged errors in calculation in the certificate. The Defendant does not argue that he is able to show manifest error in the Certificate. Given my finding on the effect of Clause 10 of the Personal Guarantee, it follows that it is not open to him within these proceedings to challenge the certificate produced by the Claimant.

84. On the second issue, I agree that the wording of the Facility Agreement and the Personal Guarantee taken together support the Claimant's interpretation that a demand under the Personal Guarantee gives rise to a liability on the Defendant's part to meet interest payments both before and after that demand, including interest at the Default Rate following any default by the Company. As I have indicated, the Claimant limits its case in respect of interest following the date of

the demand to interest at the Facility Interest Rate applied to the crystallised sum due from the Company as at the date of the demand of the guarantor.

85. The Defendant is correct that the Claimant's proposed construction of the obligation to pay interest might lead to a situation in which the Claimant is financially better off by delaying making a demand of the Defendant because of the right to Default Interest under the Facility Agreement. I have not heard detailed and focussed argument from the parties on the question of the true interpretation of the interest obligations, but, I accept that the Defendant shows sufficient prospect of success in showing not only that the Defendant's obligation to indemnify the Claimant in respect of interest crystallises at the time that a demand is made of the Defendant (as the Claimant concedes) but also that the Defendant's obligation to indemnify the Claimant for the Company's obligation to pay interest prior to that date is limited to interest at the Facility Interest Rate so as to avoid the allegedly perverse consequence that would follow if the Defendant were liable to indemnify in respect of interest at the Default Interest rate until the date of demand, with his liability to pay interest thereafter limited to interest at the Facility Interest Rate again. Accordingly, there is a real prospect of success of the Defendant showing that his liability is limited to interest at the Facility Interest Rate and that judgment should not be given in so far as it comprises a claim for interest at the Default Interest Rate.

86. I accept the Claimant's argument that, for the purpose of the summary judgment, it is not necessary for the Claimant to show a liability in the exact amount of the demand (see Arab Banking Corporation v Saad Trading). Accordingly summary judgment should be based on the lower figure of 10% of outstanding utilisations, that is to say £1,395,215.21 plus interest at the Facility Interest Rate of £215,421.97, a total of £1,610,637.18, of which 10% is £161,063.72.

CONCLUSION

87. For the reasons identified above, the Claimant shows that the Defendant has no real prospect of success on any part of the defence other than that the correct calculation of the 10% figure of utilisations which is the basis of one limb to the limit on the personal guarantee should be calculated without any element of

interest at the Default Interest Rate. I am not persuaded that there is any other reason why the claim should go to trial and accordingly judgment will be entered for £161,063.72, standing over the balance of the claim to trial.

88. Given this conclusion, there is no need further to consider the strike out application. Further, since the Claimant has largely succeeded on its summary judgment application and, to the extent that it has not, I consider it arguable that the Defendant has a real prospect of success in defending the claim, there is no scope for the making of an order for an interim payment.

89. Whilst the balance of the claim is well below the normal threshold for cases to proceed in the Circuit Commercial Court, I am doubtful that transfer to the obvious alternative venue, the County Court, is worthwhile. I will of course hear the parties on this issue but my provisional view is that the outstanding issues are likely to be suited to resolution in the Shorter Trials Scheme, with minimal disclosure and/or evidence.