Neutral Citation Number: [2020] EWHC 539 (Ch)

Case No: BL-2018-000068

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 13/03/2020

Before:

CHIEF MASTER MARSH

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Between:

PUNJAB NATIONAL BANK (INTERNATIONAL) LIMITED	**Claimant**
- and -	
(1) TECHTREK INDIA LIMITED **(2) NARESH MALHOTRA** **(3) AKSHAY MALHOTRA** **(4) TECHTREK TECHNOLOGIES (INDIA) LIMITED**	**Defendants**

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Geoffrey Zelin (instructed by **Stradbrooks Solicitors**) for the **Claimant**
Gareth Reeds (by **Direct Access**) for the **Third Defendant**

Hearing dates: 14 February 2020

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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 MASTER MARSH

Chief Master Marsh:

1. The claimant has applied for summary judgment against the third defendant under a personal guarantee dated 12 December 2013. The guarantee is subject to the law of India.

2. The claimant is a bank incorporated in England and Wales and carries on business from, amongst other places, its branch in the City of London. It provided loan facilities to Techtrek Limited ("Techtrek"), a company incorporated in England and Wales, under two facility agreements. The first agreement, which is of only peripheral relevance, was dated 22 December 2011. Credit facilities of £800,000 were made available. The third defendant, who is the second defendant's son, did not provide a guarantee in respect of the 2011 facility.

3. By a facility agreement dated 8 March 2013 ("the 2013 Facility") the claimant provided further credit facilities to Techtrek comprising a term loan of £2,900,000, an overdraft facility of £1,500,000 and a standby letter of credit facility of £2,500,000. The total facility therefore totalled £6.9 million. The claimant's case is that the 2013 Facility was preceded by a facility letter dated 9 November 2012 that was countersigned by the third defendant as one of the directors of Techtrek. The third defendant not only denies that he signed the facility letter but says he had never seen it before it was recently exhibited to a witness statement made on behalf of the claimant. However, little turns on this disputed issue of fact.

4. It is not in dispute that the 2013 Facility was executed on behalf of Techtrek by the third defendant and his father in the presence of a witness. The facility is subject to English law and has an English jurisdiction clause. It required Techtrek to provide "the Indian Personal Guarantees" in "Agreed Form" as part of the security. The second and third defendants are the Indian Personal Guarantors. The term Agreed Form was defined as meaning "as agreed between [Techtrek] and the Bank"; agreement by the guarantors was not required. Under Part C of Schedule 2 of the 2013 Facility Techtrek was obliged to provide the executed guarantees within one month of the date of execution of the 2013 Facility.

5. The claimant relies on a document that is described on its front sheet as "Agreement of Guarantee" ("the Guarantee"). The original was produced at the hearing. Although the third defendant does not deny that he signed it, he puts the claimant to proof that the signature appearing on the last page, which he agrees resembles his signature, was appended on the document that the claimant seek to rely on. He says he has no recollection of signing it.

6. The Guarantee is on any view an unsatisfactory document with a number of formal deficiencies:

   (1) It was prepared with spaces on the first page to be completed with (1) the place and date of execution, (2) the third defendant's age and (3) his address. They have all been left blank. The guarantee does include both the third defendant's name and the claimant's name (and its registered office) on the front page.

(2) The second recital refers to the facilities and to the facilities letter (described as a "letter of sanction") dated 9 November 2012. But when it comes to refer in the same recital to the 2013 Facility the space for adding its date is left blank.

(3) The execution clause is drafted in a form that anticipates execution by both the claimant and the third defendant using the following rubric:

"**IN WITNESS WHEREOF** the Guarantor and the Bank have set there [sic] hands hereunto this day of 2013."

(4) The date, 12 December, has been added in manuscript so that the execution clause states incorrectly that both the claimant and the third defendant signed the Guarantee on that date.

(5) The printed part of the execution clause as it relates to the third defendant includes a space for him to sign that is followed by:

"Name: **Mr Akshay Malhotra**

Occupation:

Address:"

(6) The Guarantee bears a signature in the space allotted to the third defendant and his occupation, described as "Management Consultant" and an address in London have been added in manuscript.

(7) There is provision for execution by the party to whom the Guarantee is given in the execution clause:

"**For and on behalf of PNB (INTERNATIONAL) LTD**[1]

Chief Manager

WITNESSES[2]**:**

1.

2."

(8) The claimant is not accurately named in the execution clause.

(9) The claimant did not sign the Guarantee and the third defendant's signature was not witnessed.

(10) None of the pages have been initialled.

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[1] Punjab National Bank (International) Limited is the correct name.

[2] It is reasonably clear that the witnesses were intended only to witness the signature of the Chief Manager of the claimant but it could have been intended they were to witness both the third defendant's signature and the signature of the Chief Manager of the claimant..

7. On any view, only limited attention was given by the claimant to the execution of the Guarantee.

8. It is right to add that the third defendant asked to see the original Guarantee long before the hearing. The request was made in the defence served in June 2018. The original guarantee is a single sided document on foolscap pink paper with staples along the left margin. It was produced with a number of pages in the wrong order and assembled upside down. The explanation given at the hearing, although there was no evidence about this, was that the document had been taken apart for scanning and had been incorrectly reassembled. Disregarding the issues of form mentioned above, the document has internal integrity with the content running naturally from page to page.

9. The guarantee contains the following provisions that are material:

    (1) By clause 2 the third defendant guaranteed to pay Techtrek's liabilities under the 2013 Facility on demand.

    (2) By clause 3 the third defendant agreed as principal and as a separate obligation to indemnify the claimant in full on demand against all liabilities and any failure on the part of Techtrek to perform or discharge its obligations.

    (3) By clause 4 the third defendant declared that the Guarantee was a continuing obligation to cover the ultimate balance due from Techtrek subject to the principal amount not exceeding £6.9 million together with interest, costs and other charges.

    (4) Clause 19 provided that an account signed by the claimant's manager was conclusive evidence of the amount due from the third defendant.

    (5) By clause 26.d the third defendant was obliged to pay on a full indemnity basis on demand all costs and expenses which the claimant incurred in connection with the preservation, exercise and enforcement of any rights under or in connection with the guarantee.

    (6) Clause 42 provided that the Guarantee was governed by and construed in accordance with Indian law.

Part 24

10. There is no issue about the law relating to applications for summary judgment under rule 24.2. The claimant must show that the third defendant has no real prospect of the defending the claim and there is no other compelling reason why this claim should go to trial. A convenient summary of the principles that are applicable is found in the judgment of Lewison J in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 Ch at [15]. The summary was approved by the Court of Appeal in *AC Ward & Son v Caitlin (Five) Limited* [2009] EWCA Civ 1098.

11. In addition, it is well-established that if the applicant adduces credible evidence in support of its case, the evidential burden shifts to the respondent and the respondent must prove some real prospect of success or some other reason for a trial. The

standard of proof the respondent must discharge is not high. It suffices merely to rebut the applicant's statement of belief. [3]

Claimant's case

12. The claimant's case is that the third defendant executed the Guarantee and that the form of the Guarantee is valid according to the law of India. The claimant seeks permission to rely on evidence provided by an expert in Indian law, Mr M L Ganesh. The Defendant seeks permission to rely on expert evidence from Mr S Agrawal. Both are experienced advocates who have provided written reports that comply with CPR rule 35.

13. The claimant also relies on its particulars of claim and four witness statements made by:

    (1) Mr Randeep Jandu a solicitor with Stradbrooks Solicitors.

    (2) Mr Pramod Kumar an Assistant Manager with the claimant.

    (3) Mr Muddor Nayak who was until he retired in May 2019 an Executive Director of the claimant.

    (4) Mr Andrea Angelillis a lawyer with Studio Legale Bird & Bird in Milan.

14. Mr Jandu deals with the claimant's application for summary judgment against the second third and fourth defendants. His evidence is largely formal. Paragraph 2 contains the type of rubric that is common. He says:

    > " I make this statement from matters within my own knowledge and from information that has been provided to me by officers of the Claimant and from a perusal of the documents in the Claimant's files and from other information that has come to me in the course of acting as the Claimant's solicitor. Matters within my own knowledge are true and all other matters are true to the best of my knowledge and belief."

15. The general rule about the evidence of witnesses is contained in CPR rule 32.2(1) to the effect that any fact which needs to be proved by the evidence of witnesses is to be proved, at any hearing a trial, "by their evidence in writing". Under CPR rule 32.2(2) the general rule is subject to any provision to the contrary contained in the CPR or elsewhere and to an order of the court.

16. CPR rule 32.6(1) provides a general rule that "… at hearings other than the trial evidence is to be by witness statement, unless the court, a practice direction or any other enactment requires otherwise." Hearsay evidence is generally admissible in civil proceedings by virtue of the Civil Evidence Act.

17. CPR rule 32.8 specifies that a witness statement must comply with the requirements set out in Practice Direction 32 and paragraph 18 of that practice direction sets out provisions specifying what must be contained in the body of a witness statement. Paragraph 18.2 requires that the witness statement contains a statement indicating

[3] The principle is summarised in this form at note 24.2.5 on page 781 in Civil Procedure 2019.

which of the statements are made from the witness's own knowledge and which are matters of information and belief. In addition, the witness statement must indicate "… the source for any matters of information or belief." The rule does not say whether the "source" of evidence in the case of a corporate entity must be identified by referring to a person or persons, or whether, as here, it suffices to identify "officers of the Claimant".

18. CPR rule 32.4(1) describes a witness statement as "a written statement signed by a person which contains the evidence which that person would be allowed to give orally. Whether the witness statement is intended for use at a trial or another hearing the form of the statement is the same and the requirements of CPR rule 32.8 and the Practice Direction must be complied with. It is important, however, that the maker of the witness statement makes it clear when the statement contains hearsay evidence and in doing so complies with the requirement to specify the source. As Patten J pointed out in *Clarke v Marlborough Fine Art Ltd* [2002] 1 WLR 1731 at [37] the failure to identify the source of hearsay evidence does not render the hearsay evidence inadmissible but it goes to the weight the court will give to that evidence.

19. As a general observation, it is a matter of considerable convenience that a legal representative is able to provide hearsay evidence for hearings, other than trials, based on instructions. One reason for this is that it is more economical for evidence to be gathered together in one place, rather than the court being provided with a series of witness statements from those who can give first-hand evidence. Another factor that will be in the minds of legal advisors is that hearsay evidence provided by a solicitor prevents the person who has knowledge of the relevant events being subjected to cross-examination at the trial on the content of a witness statement made at an early stage of the claim and before disclosure has taken place. The corollary, however, is that the requirements of paragraph 18 of Practice Direction 32 must be carefully complied with if the statement is to be given full weight. Where the applicant seeks summary judgment this is of particular importance.

20. In my judgment, where the maker of a statement is relying on evidence provided by a witness who is an officer of, or employed by, an incorporated body, the requirements of paragraph 18 of Practice Direction 32 to provide the source of evidence is not complied with merely by saying that the source is the entity or officers of the entity. If the source of evidence is a person, as opposed the source being documents, the person or persons must be identified and named. A corporate entity cannot experience events and can only operate through the medium of real persons. It follows that the source of evidence must be a named person or persons. A failure to identify the source in a manner that complies with paragraph 18.2 will mean the court has to consider whether to place any weight on the evidence, especially where it touches on a central issue.

21. CPR rule 32.6(2) provides an exception to this general principle and permits a party to rely on matters set out in a statement of case or the application if it is verified by a statement of truth. Under CPR rule 22.1(6) the statement of truth in a statement of case may be signed by a legal representative on behalf of the party. It is nevertheless the party's statement of truth. But there is nothing in CPR rule 22(1) that requires the legal representative when signing a statement of truth on behalf of an incorporated party to identify the source of instructions from which authority to sign came.

22. The particulars of claim assert that the guarantee was signed by the third defendant on 12 December 2013. Mr Jandu's witness statement says it was "given" on that date. The witness statement goes on to say that had the guarantees of first, second and third defendants not been given the claimant would not have continued the facilities. No evidence is provided on behalf of the claimant about the circumstances in which the third defendant signed the Guarantee (so far as they are known) and why the document was not completed or signed by the claimant.

23. The witness statements of Mr Kumar and Mr Nayak deal with a discreet point that arises from the defence. Mr Angellelis' witness statement provides explanatory evidence about the value of shares in an Italian company, Memar Monteassegni SpA ("Memar") which were pledged to provide security for the facilities. In fact, the point he deals with is academic because the third defendant is unable to set up the factual issue he raises in the defence because under the Guarantee he agreed:

    (1) Not to seek a set off or to counterclaim; and

    (2) Not to challenge the sale of the shares in Memar.

24. In addition, the certificate of liability is binding on him. As at the date of the hearing, the certificate showed a total liability of £6,944,212.32. If the claimant is able to establish liability, there can be no dispute about the sum for which judgment will be entered.

The third defendant's defence

25. The third defendant filed and served a full defence on 6 June 2018. The points of importance that arise from it are:

    (1) He admits that further facilities totalling £6.9 million were provided by the claimant and admits the 2013 Facility. He therefore accepts that the claimant imposed a contractual requirement on Techtrek to provide guarantees executed by the third defendant and his father.

    (2) He relies on the terms of Schedule 2 Part 2C(c) of the 2013 Facilty which state that the personal guarantee had to be provided within one month. He does not admit that he provided a guarantee but, if he did, he says it was unenforceable because it was executed well outside the one month period.

    (3) He also appears to take a point about consideration for the guarantee being past consideration.

    (4) He refers to a meeting in March 2013 with Mr Nayak, Mr Bhupinder Singh, an executive director at the claimant and Mr Sanjeev Gautam, a senior manager with the claimant. He says he told the claimant's representatives that he had no assets. He relies on three statements he alleges were made to him at the meeting: (i) That the only reason he was being asked to provide a guarantee was due to his father's age. It was part of what was described as 'succession planning'; (ii) That the signing of the guarantee was purely a formality; and (iii) Mr Gautam assured him that the loan was secured against the assets of Memar.

(5) His case about signing the guarantee is equivocal. He denies the paragraphs in the particulars of claim that assert he signed the guarantee and then says he does not admit that the purported guarantee "was the exact and complete documentation allegedly signed by him" and puts the claimant to strict proof that it is enforceable and the document now produced was what he is alleged to have seen in December 2013." He calls for inspection of the original guarantee and I am bound to remark that it is highly unsatisfactory he was not shown it until the morning of the hearing before me. That said, the third defendant was provided with a copy of the guarantee in 2015 and he obtained legal advice on it. The letter from Stephen Ede Legal Services describes the document as the purported guarantee. However, the issues taken with the guarantee were issues of liability rather than execution by him.

(6) He takes issue with the form of the guarantee although does not aver in terms that it was not in an "agreed form", although this may be inferred from paragraph 17 of the defence. He relies on a failure to complete the first and last pages, the delay in executing it, the absence of execution by the claimant and the absence of a witness to his signature and the fact that each page has not been initialled.

(7) He complains that he was not advised to obtain independent advice about the transaction and was not provided with a copy of the guarantee.

26. Two observations can be made at this point:

(1) The third defendant's position about signing the guarantee appears to have hardened over time. In a witness statement dated 21 February 2018, made in relation to a dispute about jurisdiction, he said:

> "8. I cannot remember this supposed signing [signing the guarantee] at all. I highlight this is not to call into question the original signature actually being made by me, but to draw attention to the lack of due process with which this document was signed, witnessed etc. There was no formal meeting between the bank and myself."

By the time he served his defence in June 2018, he put the claimant to strict proof that he had signed the guarantee.

(2) It is nevertheless surprising that when the claimant came to prepare its evidence for the Part 24 application over a year later (the application was issued on 26 August 2019) no evidence was provided about the circumstances in which the guarantee came to be signed in what is, on any view, a very unsatisfactory form. The bank was aware the third defendant said he did not recall signing it, required to see the original and did not accept the document he may have signed was necessarily in the form in which it is now produced. The claimant has not said where the guarantee was signed (for example whether it was done in this country or in the presence of bank officials) or why it is incomplete. Nothing has been said about whether the form of the guarantee was agreed with Techtrek.

27. The claimant disputes the third defendant's account of a meeting in March 2013 attended by Mr Gautam, Mr Nayak and another. The claimant's evidence casts doubt on the defendant's case. Mr Nayak has made a statement in response in which he says the third defendant's account cannot be right because Mr Gautam returned from London to India in September 2012. A statement from Mr Kumar exhibits records that appear to establish the date of his departure. The third defendant maintains his case.

28. However, this dispute of fact is of little significance because the third defendant's account does not, taken at its highest, amount to a defence. The meeting he relies on was proximate to the execution of the 2013 Facility which the third defendant accepts was signed by him as a director of Techtrek. According to the first recital to the 2013 Facility, the claimant had already made the facility available to Techtrek. The third defendant can be taken to know that the Facility agreement contained obligations to comply with the Conditions Subsequent that are set out in Part C of Schedule 2. It was a condition of the Facility that the third defendant provide a guarantee. Even if it was said to him at a meeting (assuming in favour of the third defendant that it was before 8 March 2013) that entering into the guarantee was a formality and was only needed as part of succession planning, those statements do not prevent the guarantee having legal effect and it is not said they were representations that were false. Similarly, a statement that the facility was secured against the assets of Memar merely reflected the pledge of Memar's shares as part of the security, the value of which the third defendant was aware.

29. There is a further dispute of fact concerning the facility letter dated 9 November 2012 which the third defendant denies signing. It is referred to in the 2013 Facility and the third defendant was a director of Techtrek. It seems unlikely he would not have known about it. Although nothing turns on this point, the third defendant is adamant that he never told the claimant that he had a net worth of £0.7 million as is recorded in paragraph 18 of the letter.

Expert evidence

30. It is plainly right to grant both parties be given permission to rely on expert evidence pursuant to CPR 35.4.

31. The court proceeds on the basis that the law of India is the same as the law of England and Wales unless it is proved to the contrary.

32. It is important to distinguish what is governed by the law of India and what is not. Indian law only governs matters of substantive law that affect the construction and enforceability of the guarantee. Matters of procedure and evidence are governed by the lex fori: see *Dicey, Morris & Collins* 15th ed. at 7R-0001, 7-005, 7-022, 7-023, 7-026 and 7-027. Thus, for example the procedural rules relating to this application and both the standard of proof and the burden of proof are established by the lex fori. Although it does not arise in this case, under Indian law an oral agreement for a guarantee will be enforceable[4] but the enforceability of the guarantee in England would be subject to the Statute of Frauds.

[4] Section 26 Indian Contract Act

33. Both expert's deal in some detail with matters of evidence and refer extensively to the Indian Evidence Act. However, when issues relating to form and proving the guarantee are set on one side there are few points of difference between them.

34. The claimant's expert, Mr Ganesh, is an advocate with 28 years of experience in banking cases. He says in his opinion:

    (1) There is sufficient consideration for the third defendant's promise.

    (2) The document is valid and enforceable.

    (3) The document has been properly stamped. In any event, Mr Agrawal expresses the view that the stamps are of no significance concerning the enforceability of the guarantee.

    (4) It does not matter that the demand incorrectly included sums for which the third defendant was not liable. This be an issue of Indian law when the court has regard to the meaning of a demand under the guarantee.

    (5) There are no issues of limitation under Indian law that would bar or extinguish the claim.

35. Mr Ganesh also opines on other issues which would appear to be issues for the lex fori rather than the lex causae. He says:

    (1) It does not matter that the guarantee was not signed by the bank.

    (2) In general, a guarantee ought to be signed on each page but in the circumstances of this case the absence of signatures or initials on each page does not matter.

    (3) The issues raised by the third defendant about the meeting in March 2013 would not support a defence under Indian law of duress, undue influence or misrepresentation.

36. Mr Agrawal's report is detailed and sets out both his case and a response to Mr Ganesh's report. The way his opinion is put forward is balanced and on occasion he disagrees with Mr Ganesh in a manner that is helpful to the claimant. For example, he expresses the view (at paragraph 23) that paragraph 42 of the Guarantee (under which the law of the guarantee is stated) does extend Indian law to the proper execution of the guarantee. He accepts that a question such as whether it was essential for the third defendant to obtain advice before entering the guarantee is a matter for the lex fori. Similarly, he accepts that the absence of a signature or initials on each page of the guarantee does not breach a requirement of the law of India. Rather it gives rise to an issue for the court in England when considering whether the unsigned pages were part of the guarantee that the third defendant signed. The guarantee is in his opinion a "dubious document" but that view is immaterial because he has in mind the evidence that is required to prove it was signed by the third defendant.

37. Mr Agrawal raises a number of further points that can be dealt with briefly:

(1) He suggests (at paragraph 24) that there is a requirement under English law for there to be a certificate as to the third defendant having legal advice about the meaning and effect of the guarantee. This is, of course, not correct.

(2) He discusses (at paragraph 27) clause 5 of the guarantee that concerns the effect of such matters are variation of the terms, forbearance, granting time and so on and considers section 133 to 135, section 139 and section 141 of the Indian Contract Act. However, the discussion is only of academic interest because no such points arise in this case. He refers in particular to the pledge of shares in Memar and the effect of section 141 of the Indian Contract Act. This is not a case where the claimant has lost or parted with part of its security thus risking discharge to the guarantee. Enforcement of security is not the same as discharge or release of the security.

(3) Mr Agrawal suggests that if the effect of the Indian Contract Act on clause 5 is to make the clause unenforceable, the guarantee as a whole may be vitiated. However, he does not cite any authority for that surprising proposition and it is not put forward with any conviction. He does not discuss what Indian law has to say on the subject of severance and Mr Reeds who appeared for the third defendant did not rely on it.

(4) He refers to the guarantee having been executed 9 months after the 2013 Facility but does not say that the delay had any effect on the validity of the guarantee.

(5) He advises that it would be difficult to enforce the guarantee in India but that is not a matter that is relevant to its enforceability in England.

(6) He agrees with Mr Ganesh that there is no point to be made about the absence of consideration which he describes as being "wholly inconsequential".

(7) He refers at paragraph 47 to Techtrek having been dissolved and suggests that (a) "the demand against the principal debtor has got dissolved" and (b) "the debt liability may not survive against the surety". He goes on to say that could not find any case law in India dealing with this proposition. However, I accept Mr Zelin's analysis that Mr Argawal's point, put in this tentative way, cannot have any substance because (a) the obligation under the guarantee was to pay on demand and the demand was made before Techtrek's dissolution and (b) clause 3 of the guarantee contained an independent covenant to indemnify the claimant and (c) in any event Techtrek could be restored to the register.

38. During the course of the hearing, the one point of substance raised by Mr Agrawal that was relied on in particular by Mr Reeds concerns the contractual requirement under the 2013 Facility for the Guarantee to be in the Agreed Form. Mr Agrawal notes correctly the way that term is defined but later, incorrectly, he states that it would have to be pleaded and proved at a trial that the Guarantee was agreed between the claimant and the third defendant. In fact, the requirement is for Techtrek to agree the form of the Guarantee. At paragraphs 14 to 17 of this report, Mr Agrawal discusses this point in some detail. However, it is of note that later, at paragraph 39 he does not say Indian law rejects unilateral execution of a contract. The point he pursues concerns that if the agreed form of the guarantee contemplated execution by both

parties, signature by one party does not lead to the guarantee complying with this requirement.

39. Mr Agrawal states:

> "16. Clause 34 of the Guarantee in question contemplates that the guarantee would be signed by both parties. The last page of the Guarantee in question also requires that the guarantee be executed by both the Bank and [the third defendant] and that for execution to be complete it had to be signed in the presence of the witnesses. Thus, unilateral signature of the guarantor and without it being counter-signed by the Bank, would not make the guarantee in question a concluded and/or enforceable contract between the parties.
>
> 17. In India, such documents ought to be signed by both the parties or if it is signed by one party and handed over to the other party, then it is counter-signed by the other party and transmitted back … to the first party. In the present case, only the signature of one of the parties exists on the Guarantee. In my view, if the contract is in writing, bears the signature of only one party, and not of the other party, nor of the witnesses, despite there being a specific place mentioned in the contract for the signature of such other party and the witnesses, it would be difficult to accept that the Guarantee in question in in "Agreed Form". The Bank should have counter-signed the relevant portion of the Guarantee in question and transmitted a copy thereof to [the third defendant] to constitute a binding contract."

40. As it seems to me there are two separate matters that are being conflated. The first is the form of the guarantee, that is the content of the document. The second matter is due execution of the guarantee. It does not appear to me that Mr Agrawal is saying as a matter of Indian law that a failure to execute the guarantee in the manner that the agreed form of the guarantee contemplated (which provided space for execution by the claimant) renders the document invalid under Indian law.

There is a separate point about whether the form of the guarantee was agreed by Techtrek. There is no evidence at all on this point. It does not suffice for the claimant to rely on the third defendant being a director. He was not the only director and the claimant will have to show approval to the form of guarantee by Techtrek.

Shares in Memar

41. The 2013 facility was used to purchase a 51% stake in Memar for €2.9 million. As a result of a rights issue in which Techtrek was unable to participate due to its insolvency its holding of shares was diluted to 19.64%. The shares were ultimately sold for €400,000. The circumstances in which this occurred are fully explained in the witness statement provided by Mr Angellis. The sale of the shares provided no basis upon which the third defendant may defend this claim either as to liability or as to the net sum that is due to him.

Conclusions

42. I am satisfied that most of the grounds of defence relied on by the third defendant do not have a real prospect of success. In summary:

(1) He is unable to rely on the delay in signing the guarantee. The 2013 Facility did not make time of the essence and, in any event, a failure to require him to sign the guarantee within the period of one month has no effect on the validity of the guarantee signed outside this period. The time limit for providing the guarantee was of course a provision for the benefit of the claimant, not the defendant.

(2) There was adequate consideration. Both experts agree on this point.

(3) No defence arises from the statements alleged to have been made to the third defendant in March 2013.

(4) The form of the guarantee complies with Indian law. If it was signed by the third defendant, He is not in a position to rely on the failure of the claimant to sign it.

(5) The guarantee is valid as a unilateral contract containing promises to the claimant.

(6) The absence of advice from a legal adviser and him not being given a copy of the document do not provide defences.

(7) There is nothing arising from the reports of the experts that provides a defence under the law of India.

43. I am, however, not satisfied that the claimant has discharged the burden of proof in relation to two matters.

(1) The claimant's evidence of the third defendant signing the document that was produced at the hearing is inadequate. The court may have regard to the particulars of claim, which provide some limited support for the claimant's case, but taken together with Mr Jandu's witness statement it does not suffice to discharge the evidential burden. I can only give very limited weight to Mr Jandu's evidence without the sources of his knowledge being provided and in the absence (a) any explanation of the circumstances in which the third defendant is said to have signed to guarantee, (b) confirmation of when and where he signed it (if known) and (c) that the document now relied on is the guarantee he signed. The need for this evidence is heightened by the unsatisfactory form in which the Guarantee was produced.

(2) The claimant has not established that the form of the Guarantee was agreed by Techtrek. There is not evidence at all on this point. The fact that the third defendant was a director of Techtrek does not suffice. Some communication between the claimant and Techtrek on the subject of the Guarantee would have to be produced.

44. I have considered whether to postpone handing down judgment and inviting the claimant to provide further evidence. However, such a course of action would be exceptional. It is not for the court to invite the claimant to improve on the case it put forward. These are not mere matters of form or points that might have taken the claimant by surprise. The third defendant put the claimant to proof of due execution

of the Guarantee in his defence. The claimant had an ample opportunity to prepare its evidence for the application for summary judgment that was issued a year after the defence was served.

45. Finally, although it is not a matter that directly affects the outcome of this application, it is unfortunate that the claimant did not make the original Guarantee available to the third defendant long before the hearing of the application for summary judgment.

46. I will dismiss the application.