Neutral Citation Number: [2025] EWHC 414 (Ch)

Appeal Ref: CF067/2024CA

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
CHANCERY APPEALS

On appeal from the County Court at Caernarfon
Order of District Judge Jones-Evans dated 13 September 2024
Case No. 0014 of 2023

In the Matter of the Insolvency Act 1986

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 28 February 2025

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

- -

Between:

GARETH WYN JONES	**Appellant**
- and -	
CITY ELECTRICAL FACTORS LIMITED	**Respondent**

- -
- -

Benjamin Lafferty (instructed by **Jolliffe & Co LLP**) for the **Appellant**
Claire Thompson (instructed by **Silverback Commercial Law Services Limited**) for the **Respondent**

Hearing date: 12 February 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 February 2025 by circulation to the parties or their representatives by email and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Introduction

1. On 31 October 2023 City Electrical Factors Limited ("the Respondent") presented a creditor's bankruptcy petition against Mr Gareth Wyn Jones ("the Appellant") on the basis that the Appellant was indebted to the Respondent in the aggregate sum of £190,449.97 pursuant to personal guarantees of the debts of Selectrical (Bangor) Limited ("the Company"). The petition had been preceded by a statutory demand that had neither been complied with nor been set aside.

2. The petition came on for a contested final hearing before District Judge Jones-Evans ("the Judge") in the County Court at Caernarfon on 13 September 2024. The Judge's order recited his finding "that the guarantees, which founded the basis of the Petition, were 'see to it' and 'indemnities' only which sounded in damages". He ordered that the grounds of opposition to the petition were dismissed. As the Respondent had failed to file a compliant list of creditors and a compliant certificate of continuing debt, he did not make an immediate bankruptcy order but instead adjourned the petition to a further hearing. The order provided:

> "IT IS DECLARED THAT:
>
> 1. The court will make a bankruptcy order at the next hearing of the Petition, having found that there was no substantial dispute to the Petition and that the court will make the order, notwithstanding that the guarantees are 'see to it' and 'indemnity' obligations only which sound in damages."

3. By an appellant's notice filed on 3 October 2024 the Appellant appeals against the Judge's order and seeks the substitution of an order dismissing the petition with costs.

4. By order dated 4 October 2024 Michael Green J granted the Appellant's application for a stay of further proceedings on the petition, pending consideration of the merits of the proposed appeal.

5. By further order dated 13 December 2024 Michael Green J granted the Appellant permission to appeal against the Judge's order. He also granted the Appellant permission to rely on amended Grounds of Appeal and the accompanying amended skeleton argument.

6. In the skeleton argument filed on behalf of the Respondent on 7 February 2025 (which, unfortunately, I did not see until the hearing of the appeal had commenced), the Respondent conceded the primary ground of the appeal. However, the Respondent sought permission to rely on a respondent's notice and, to that end, applied for relief from sanction for the late filing and service of the respondent's notice. For reasons given orally at the hearing, I granted relief from sanction and permission to rely on the respondent's notice. I also held that the matter raised by the Respondent was properly raised by a respondent's notice and did not require a cross-appeal. Accordingly, the issues for determination relate not to the reasons given by the Judge but to alternative reasons for upholding his ultimate conclusion that the grounds of opposition to the

petition should fail and that, subject to compliance with the requirements of the Insolvency Rules, a bankruptcy order should be made.

7. Nevertheless, I shall explain briefly the Judge's own reasoning before turning to the issues that fall for determination by me. First, however, I shall set out the basic facts giving rise to the petition and the legislative framework relevant to its disposition.

8. I am grateful to Mr Lafferty, who appeared below, and to Miss Thompson, who did not, for their clear and succinct submissions.

The Facts and the Guarantees

9. The Company had carried on the business of an electrical contractor and had entered into the credit agreements with the Respondent, a supplier of electrical equipment, in order to obtain a supply of necessary equipment for its business. The Company's business grew, and the credit limits were increased from time to time. Eventually, and partly as a result of adverse trading conditions caused by the Covid lockdowns, the Company became unable to service its borrowing, and in February 2023 it entered into creditors' voluntary liquidation. The Respondent sought to recover payment, both by proving in the liquidation and by pursuing the Appellant and another guarantor on their guarantees.

10. The guarantees on which the petition was based were contained in two documents headed "Credit Account Application". Each document contained a request by the Company, signed by the Appellant as director, to the Respondent for credit facilities. Each document included a box headed "Continuing Guarantee"; in each case the operative text was addressed to the Respondent.

11. The first document was signed by the Appellant on 10 June 2009. The text of the guarantee was as follows:

> "In consideration of your agreeing to grant credit facilities to the company or limited liability partnership described above ('the Company') I hereby unconditionally guarantee the due and punctual performance and observance by the Company of its obligations herein and under your Conditions of Sale overleaf and agree to indemnify and keep you indemnified against any breach or non-observance thereof by the Company."

12. The second document was signed by the Appellant (as director) and by Philip Nigel Roberts (as director and secretary[1]) on 31 October 2013. The text of the guarantee was as follows; in two places the printed "I" had been crossed through in pen and "we" had been inserted in manuscript:

> "In consideration of the Seller agreeing to grant credit facilities to the Buyer, ~~I~~ we hereby unconditionally guarantee the due and punctual performance and discharge of all the Buyer's

[1] According to Companies House's online service, it was the Appellant who was the Company secretary, having been appointed on 22 May 2009.

> obligations under or pursuant to the Customer Agreement and the due and punctual payment on demand of all sums now or subsequently payable (including any interest or late payment charges upon such sums) by the Buyer to the Seller under or pursuant to the Customer Agreement or otherwise and ~~I~~ we agree to indemnify the Seller against all losses, damages, costs and expenses which the Seller may incur through any breach by the Buyer of such obligations.
>
> By signing this guarantee you accept personal liability for the debts of the buyer. Please read the additional terms of guarantee overleaf before signing this guarantee."

I shall say something about "the additional terms of guarantee" below.

The Legislative Framework

13. The appeal turns on the construction of the guarantees and the application to them of section 267 of the Insolvency Act 1986, which provides in relevant part:

> "267 *Grounds of creditor's petition*
>
> (1) A creditor's petition must be in respect of one or more debts owed by the debtor, and the petitioning creditor … must be a person to whom the debt or (as the case may be) at least one of the debts is owed.
>
> (2) Subject to the next three sections, a creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented—
>
> …
>
> (b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor … either immediately or at some certain, future time, and is unsecured; …"

14. The critical question is whether the debts on which the petition was based were "for a liquidated sum", within the terms of section 267(2)(b). The Judge held that the debt under each guarantee was indeed for a liquidated sum for the purposes of the section. The Respondent now accepts that the reasons he gave for that decision were wrong in law. (I shall explain below what those reasons were and why they were wrong.) The Respondent also accepts that the liability under the first guarantee was not for a liquidated sum. However, the Respondent contends that the position is different in respect of the second guarantee and that a different analysis would have confirmed the Judge's conclusion that the grounds of opposition to the petition failed.

The Judge's Judgment

15. The Judge delivered an extempore judgment, of which there is an approved, though very imperfectly revised and corrected, transcript. He recorded that the Appellant opposed the petition on the basis that the debt was disputed on substantial grounds. He noted, however, that there had never been any dispute as to the amount due and owing by the Company to the Respondent. The Judge recorded that the Respondent had come to terms with Mr Roberts, who had made provision for half of the debt under the second credit agreement. He recorded that one ground of the Appellant's opposition to the petition was that the compromise between the Respondent and Mr Roberts discharged him, the Appellant, from liability under the guarantee in the second credit agreement. At paragraphs 40 to 43 the Judge rejected that ground of opposition. It has not been renewed on this appeal. Another ground of opposition, challenging the very validity of the guarantees, was also rejected and has not been renewed on appeal.

16. The substantial point taken on behalf of the Appellant before the Judge was that his liability under the guarantees could sound only in damages and did not constitute a liquidated debt. It is that point and the Judge's response to it that lie at the heart of the appeal. The relevant part of the judgment is as follows.

> "30. … [T]he first question is whether the guarantees are capable of founding liquidated debt, section 6(m)(ii)(b) [scil. section 267(2)(b)] of the Insolvency Act 1986. It is trite law that it must be a liquidated debt. A claim for damages, even supported by a guarantee, cannot found the basis of a petition unless those sorts of damages are ascertained and have been crystallised or become a liquidated debt which are capable of being enforced by the most draconian order.
>
> 31. Mr Lafferty has expanded upon his argument and his interpretation of the wording of the guarantee is that these are 'see to it' obligations and are indemnities. They are not putting Mr Gareth Wyn Jones in the situation of the principal debtor where the obligation of his company Selectrical, because of the undisputed figures on the accounts of the petitioning creditor, are capable of being proceeded with or enforced immediately as a liquidated debt because they are clear and unambiguous [and] are easily ascertained.
>
> 32. There is a significant weight to Mr Lafferty's argument that the guarantees as drafted are 'see to it' agreements, are not indemnities, and indeed he has case law in his favour being the case of *McGuinness v Norwich and Peterborough Building Society* [2011] EWCA Civ 1286, which makes it clear that these types of arrangements are giving rise to a claim for damages and not a liquidated debt.
>
> 33. Mr Arabeh states that in relation to the second agreement especially, that the wording of the agreement is improved upon by the terms and conditions on the back of the agreement which puts the position under Clause 8A of Mr Jones being in the

position of a principal debtor. It comes within, therefore, the case law of *McGuinness* whereby the statement that Mr Lafferty relies upon is a strong statement that it is a damages claim but the findings of Briggs J, and held on appeal, was that the principal debtor applied that the guarantors were in the position of principal debtor and therefore the appeal against the making of a bankruptcy order was ultimately dismissed.

34. So even after succeeding on those points in the case of *McGuinness*, the bankruptcy order was still made at the end of the case, and Mr Lafferty says that on the basis of that decision, this case can be distinguished on the basis that the principal debtor clause or the finding of Mr Gareth Wyn Jones as principal debtor cannot be established because of a defect in the link between the front page of the agreement only being produced and no linking to the other one, and if the court does find that Mr Gareth Wyn Jones is a principal debtor in this case, that is a matter for a trial; that is a matter for a further scrutiny on the papers and the further testing of the evidence so that the findings that as were made in the Court of Appeal in the case of *McGuinness* can be made or cannot be made in relation to that matter.

35. That is a complex argument that has been put forward in this case as a basis for the defence in this case. But the reality of what the court faces in this case is that there is an undisputed sum due by Selectrical to City Electrical Factor which is known and not contested in the amount due.

36. In relation to bankruptcy proceedings as a whole, the question is whether the court should approach it as liquidated debt, notwithstanding the wording of the guarantee, but it seems to me the argument on behalf of Mr Jones is this: that before a petitioning creditor can enforce a guarantee, even if the existence of a debt by the principal debtor is not disputed or denied in any way, a further step must be taken to go to a County Court or a High Court to obtain a judgment, which may be uncontested or may be defaulted or to which there may be no defence whatsoever, and therefore that until that event has occurred or a concession or some admission of the debt by the guarantor, it is unenforceable as a liquidated debt and therefore further steps and further proceedings must be taken before the guarantor in these circumstances could petition upon a judgment in their favour. Until then it is not a liquidated debt and remains a damages claim under the guarantee.

37. I do not think that that is the approach that would find favour with the court in the modern era. On the basis that Mr Lafferty may well be correct in relation to the position that the guarantee gives the right to damages on the ‘see to it’ basis and on an indemnity basis, the definition of liquidated debt under Section

> 267 must mean something that is incapable of being denied and something that is clearly ascertainable and arithmetically available in this matter because ultimately in this case the damages of the guarantee will be exactly the same sum as an undisputed sum.
>
> 38. On that basis and on the clear evidence of this case, which is not disputed, that the sum is easily ascertainable, not contested, that in my view this will come within the definition of liquidated damages within Section 267. The damages and the indemnity are the undisputed sum due to City Electrical Factor in the liquidation. Exactly the same figure, not contestable, and therefore within the context of this case it is a liquidated debt within the meaning of 267 and that is the approach that I believe that the court should or would take moving forward in these cases.
>
> 39. You cannot dress up a debt as being something due and owing in another way and avoid responsibility and create further litigation which will inevitably lead exactly to the same answer. That is not in my view how the court should approach these cases in the modern era when proportionality is an issue. I find it is a liquidated debt within Section 267 and can be proceeded with by the petitioning creditor."

The Appeal

The Grounds of Appeal

17. The Appellant advanced two grounds of appeal; permission to appeal was granted for both of them.

    1) The Judge erred in law in that, despite having held that the guarantees were "see to it" and indemnity obligations only, which sounded in claims for unliquidated damages, he wrongly found that the Appellant owed a debt because his liability would be in the same amount as the undisputed debt owed by the Company.

    2) The Judge erred in law in that he held that a modern and proportionate approach gave the court a discretion to make a bankruptcy order even where there was no liquidated debt, if the underlying debt and thus the guarantor's liability were capable of immediate quantification.

18. The second ground of appeal seems to me to rest on a (perhaps understandable) misconstruction of the Judge's reasoning. As I read the judgment, the Judge was not saying that, even in the absence of a liquidated debt, a bankruptcy order could be made if it would be disproportionate and productive of pointless litigation to require the liability to be converted into a liquidated debt by means of a judgment in Part 7 litigation. Rather, he was making a subtly but significantly different point: that, in the modern world where the courts are concerned with proportionality and are astute to

avoid unnecessary legal procedures, section 267 is to be construed in such a manner that a liability such the Appellant's liability in the present case constitutes a liquidated debt. The critical question, therefore, concerns the first ground of appeal.

19. The Respondent conceded the first ground of appeal and was right to do so. By way of explanation, I need only refer briefly to the analysis by the Court of Appeal in *McGuinness v Norwich and Peterborough Building Society* [2011] EWCA Civ 1286, [2012] 2 All E.R. (Comm) 265. Patten LJ, with whom Moses and Ward LJJ agreed, said:

> "7. It is common ground that a guarantee of a loan may impose one or more of the following types of liability on the guarantor. These are:
>
> > (1) a 'see to it' obligation: i.e. an undertaking by the guarantor that the principal debtor will perform his own contract with the creditor;
> >
> > (2) a conditional payment obligation: i.e. a promise by the guarantor to pay the instalments of principal and interest which fall due if the principal debtor fails to make those payments;
> >
> > (3) an indemnity; and
> >
> > (4) a concurrent liability with the debtor for what is due under the contract of loan.
>
> 8. The obligations in classes (2) and (4) create a liability in debt. But it is well established that an indemnity is enforceable by way of action for unliquidated damages: see *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1 at pages 33–36. The liability arises from the failure of the indemnifier to prevent the person indemnified from suffering the type of loss specified in the contract. A guarantee of the 'see to it' type has also been held by the House of Lords to create a liability in damages. The obligation undertaken by the guarantor is not one to pay the debt but consists of a promise that the debt will be paid by the principal debtor: see *Moschi v Lep Air Services Ltd* [1973] AC 331."

Patten LJ's extensive survey of the legislative history and the relevant authorities confirmed the position as set out in this passage; see in particular [36]-[43] and [51].

20. The Judge held that the Appellant's liability under each guarantee arose under class (1) (a "see to it" obligation) and class (3) (an indemnity). On the basis of that reasoning, the Judge ought, as the Respondent accepts, to have held that the liability did not constitute a debt for which a bankruptcy petition could be presented. His reason for reaching a contrary conclusion appears, as I have indicated, to have been that in the culture prevailing in the courts nowadays a wider definition of "a liquidated sum" was

appropriate. With respect, that is not a sufficient reason for departing from any clear and binding decision of the Court of Appeal, let alone such a recent one.

The Respondent's Notice

21. The Respondent accepts that the liability under the first guarantee did not constitute a debt for which a bankruptcy petition could be presented. However, it contends that the Judge was right to conclude that the Appellant's liability under the second guarantee was for a liquidated sum and therefore capable of grounding a bankruptcy petition, albeit that the Judge's reasons for that conclusion were wrong.

22. Section 6 of the respondent's notice reads:

> "The respondent wishes the appeal court to uphold the order on different or additional grounds because:
>
> The Judge asserted in his judgment that the debt upon which the petition was based may well arise as a result of a 'see to it' and indemnity obligation only. There then appears a recital to the effect that the Guarantees both give rise to 'see to it' and indemnity obligations only.
>
> The Respondent asserts that the Judge was wrong in this assertion as [sic] the petition debt arose from a 'see to it' and indemnity obligation. The Respondent asserts that the second of the guarantees from 2013 gave rise to a conditional payment obligation by the Appellant to the Respondent and thus part of the petition debt (far in excess of the bankruptcy threshold) is a liquidated debt and thus debt upon which the petition could be presented pursuant to section 267(2)(b) of the Insolvency Act 1986.
>
> In the circumstances, the Respondent seeks to uphold the order dismissing the notice of opposition but on the basis that the second guarantee gives rise to a liquidated debt."

23. The basis for the case advanced in the respondent's notice appeared from Miss Thompson's accompanying skeleton argument. In summary it is as follows:

1) The obligation in Patten LJ's class (2) (conditional payment obligation) creates a debt. (Skeleton argument, paragraph 40)

2) In distinguishing between class (1) and class (2), the question is, "Upon whom does the guarantee impose the payment obligation?" As Patten LJ said in *McGuinness* at [60], with reference to the contractual clause in that case:

> "The real question is paid by whom? If what the guarantor is promising is that he will pay them [the moneys owing] as they fall due should the borrower fail to do so then one has a conditional payment obligation. But if the concluding words of

> clause 2.2 mean no more than they will be paid by the borrower when due, one is dealing with a 'see to it' liability in damages."

3) In the present case, by the second guarantee the Appellant guaranteed "the due and punctual payment on demand of all sums now or subsequently payable (including any interest or late payment charges upon such sums) by the Buyer to the Seller under or pursuant to the Customer Agreement or otherwise".

4) Those words create a conditional payment obligation (not a "see to it" obligation) because: (a) the natural meaning of the words is that it is the guarantors who would pay; (b) the background knowledge available to the parties would include the language of the first guarantee and would imply to the parties a different and wider obligation; (c) clause 5(d) in the Conditions of Sale on the rear of the credit agreement stipulated that the Company must pay for goods or services within a specified timescale; whereas (d) the guarantee specified payment on demand, which is inapt for the Company as Buyer but apt for the guarantor.

24. I note that the skeleton argument in support of the respondent's notice referred to the Conditions of Sale on the back of the second document but did not refer to the final words of the guarantee on the front page of the second document ("By signing this guarantee you accept personal liability for the debts of the buyer. Please read the additional terms of guarantee overleaf before signing this guarantee") or to "the additional terms of guarantee", which are found in clause 8 of the Conditions of Sale. In those circumstances, I have concluded (for reasons explained below) that the Conditions of Sale on the back page of the document fall to be considered as part of the entire text of the contract when construing the words relied on in the skeleton argument, but that the respondent's notice does not permit reliance on the final words on the front page (set out in parenthesis earlier in this paragraph) or the additional terms of guarantee in clause 8 as being themselves the words of obligation, as they were not identified either in the respondent's notice or in the supporting skeleton argument. Accordingly, the words to be construed, albeit in the context of the entire agreement, are the following (emphasis added):

> "<u>we hereby unconditionally guarantee</u> the due and punctual performance and discharge of all the Buyer's obligations under or pursuant to the Customer Agreement and <u>the due and punctual payment on demand of all sums now or subsequently payable (including any interest or late payment charges upon such sums) by the Buyer to the Seller under or pursuant to the Customer Agreement or otherwise</u> and we agree to indemnify the Seller against all losses, damages, costs and expenses which the Seller may incur through any breach by the Buyer of such obligations."

Discussion of the Respondent's Notice

25. The central principles pertaining to the construction of a written agreement are now well established. In short summary, "The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is

reasonably available to the person or class of persons to whom the document is addressed": *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215, per Lord Bingham of Cornhill at [12]. The law so summarised has been explained in detail by the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36, [2015] AC 1619; and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173. In *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645, [2021] BLR 97, Carr LJ referred to the recent authorities and said at [18]-[19]:

> "18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:
>
> i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;
>
> ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;
>
> iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone

> constructing, drafting infelicities in order to facilitate a departure from the natural meaning;
>
> iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;
>
> v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;
>
> vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.
>
> 19. Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

26. "However, there are also numerous cases at the highest level which support a rule that contracts of this kind [suretyship] must be strictly construed so that no liability is imposed on the surety which is not clearly and distinctly covered by the terms of the agreement": Andrews and Millett, *Law of Guarantees,* 7th edition, at 4-002. Even so, the court will always attempt to give effect to the true intention of the parties as it

appears from the words of the contract. In *Coghlan v S.H. Lock (Australia) Ltd* (1987) 3 B.C.C. 183, Lord Oliver, delivering the judgment of the Privy Council, said at 187:

> "At the outset Mr. Bennett Q.C. on behalf of the appellants has reminded their Lordships of certain well-known principles of construction in relation to guarantees. Such a document falls to be construed strictly; it is to be read *contra proferentem*; and, in case of ambiguity, it is to be construed in favour of the surety. But these principles do not, of course, mean that where parties to such a document have deliberately chosen to adopt wording of the widest possible import that wording is to be ignored. Nor do they oust the principle that where wording is susceptible of more than one meaning regard may be had to the circumstances surrounding the execution of the document as an aid to construction."

27. For the Respondent, Miss Thompson submitted that the entire agreement, in the context of which the words set out in paragraph 24 above fall to be construed, included the Conditions of Sale said to be on the back of the document that was signed by the Appellant. She referred in particular to clause 5, headed "Payment", which provided so far as relevant:

> "(a) The Seller shall be entitled to invoice the Buyer for the price of the Goods and/or the Services (as the case may be) at any time prior, on or following delivery of the Goods and/or performance of the Services (as the case may be) …
>
> (b) Until a Credit Account has been opened by the Seller in favour of the Buyer, the Buyer shall pay the price for the Goods and/or the Services (as the case may be) on or prior to delivery and (where applicable) upon receipt of the Seller's invoice.
>
> …
>
> (d) A Buyer in whose favour a Credit Account has been opened shall, unless otherwise agreed in writing by the Seller, pay the price for the Goods and/or the Services (as the case may be) on or before the 28th day (or the next working day if the 28th day of a particular month is a Saturday or a Sunday) of the month following the date of the Seller's invoice.
>
> …
>
> (f) Where payment is not made by the due date, regardless of its other remedies, the Seller shall be entitled to (i) cancel the contract between the Seller and the Buyer or suspend any further deliveries to the Buyer; and (ii) claim interest and /or compensation for reasonable debt recovery costs under the European Communities (Late Payment in

> Commercial Transactions) Regulations 2002 and any amendments to said legislation thereafter."

28. For the Appellant, Mr Lafferty submitted that the court ought not to proceed on the basis that the Conditions of Sale were incorporated into the credit agreement; he said that the question of incorporation was an issue that could only be determined at trial. He observed that the statutory demand and the petition exhibited only the front page of the document, containing the wording set out in paragraph 12 above; the supposed back of the document was not exhibited. He also observed that the witness statement dated 3 May 2024 of Charlotte Arnold, a paralegal employed by the Respondent's solicitors, stated (paragraph 7) that "[t]he credit application containing the [2013] guarantee" was exhibited to the statutory demand. Similarly, the witness statement dated 3 May 2024 of Daniel McSheffrey, an accountant employed by the Respondent, made no reference to the supposed back page. Similarly, when the Appellant exhibited the credit agreements to his witness statement he exhibited only a front page. Mr Lafferty submitted that, in these circumstances, the Respondent had not shown that there was no issue as to either the existence of Conditions of Sale on the back of the document or the terms of any Conditions of Sale there might have been. He also submitted that the Judge had made a finding that there was indeed such an issue; in this regard he relied on paragraph 34 of the judgment, where the Judge was considering the applicability of further guarantee provisions in clause 8 on the back of the credit agreement:

> "34. So even after succeeding on those points in the case of *McGuinness*, the bankruptcy order was still made at the end of the case and Mr Lafferty says that on the basis of that decision, this case can be distinguished on the basis that the principal debtor clause or the finding of Mr Gareth Wyn Jones as principal debtor cannot be established because of a defect in the link between the front page of the agreement only being produced and no linking to the other one and if the court does find that Mr Gareth Wyn Jones is a principal debtor in this case, that is a matter for a trial; that is a matter for a further scrutiny on the papers and the further testing of the evidence so that the findings that as were made in the Court of Appeal in the case of *McGuinness* can be made or cannot be made in relation to that matter."

29. I reject Mr Lafferty's submission, for the following reasons.

30. First, on the front of the credit agreement, immediately above the Appellant's signature on behalf of the Company ("the Customer") in the application for credit, is this text:

> "The Customer requests credit facilities with the Seller and consents to the Seller disclosing information supplied to conduct commercial/credit searches at any time. If credit facilities are granted by the Seller by opening a Credit Account, the Customer agrees to settle the Credit Account in accordance with the Conditions of Sale contained overleaf. I confirm that I have carefully read and understood the Conditions of Sale and, in particular, the exclusions and restrictions of the Sellers' liability generally, the retention of title clause contained in condition

> number 7 and the credit terms. I acknowledge and accept that the Conditions of Sale are part of the Contract and confirm that the Customer agrees to be bound by them. I certify that I have checked the particulars on this form and, to the best of my knowledge and belief, they are correct."

Thus the form purported to have Conditions of Sale on the back ("overleaf") and the Appellant purported to have read them and to be binding the Company to them. Therefore it is likely that there were Conditions of Sale on the back; indeed, the Appellant cannot say that there were not. Another indication that there was something on the back of the form is the reference, immediately above the guarantors' signatures, to "the additional terms of guarantee overleaf".

31. Second, as a matter of common sense there must have been terms and conditions on the back of the document.

32. Third, the Appellant's own witness statement shows that on 21 February 2024 his solicitors wrote to the Respondent's solicitors, stating that the personal guarantee provided with the statutory demand was "only 1 page long and does not contain any terms and conditions of any agreement", and asking them to "provide sufficient documentation to support your client's claim." The Appellant's witness statement also showed that on 23 February 2024 the Respondent's solicitors sent by email the terms and conditions relating to each credit account. The Appellant did not exhibit the documents that his solicitors were sent, but they are exhibited to Charlotte Arnold's witness statement, and they are the documents relied on by the Respondent, including not only the credit account applications but also the Conditions of Sale. The Conditions of Sale themselves refer to the credit account application "overleaf", which is what one would expect. Thus each side of the document refers to the other side: the credit application to the Conditions of Sale, and the Conditions of Sale to the application for the supply of goods and services on credit.

33. Fourth, despite having received the requested documents, the Appellant has not advanced any case that there were no terms and conditions on the back of the credit agreement or that the terms and conditions produced by the Respondent are different from terms and conditions that were on the back of the credit agreement. No positive case to that effect was made in evidence, and Mr Lafferty did not advance such a case on the basis of an analysis of the evidence or the terms of his instructions. Again, although a credit agreement must have some terms as to the nature of the credit, the Appellant has not said that there were terms different from those produced by the Respondent; indeed, his witness statement dated 27 March 2024 mentions that the Company had "kept up with all monthly payments", which is consistent with the terms relied on by the Respondent. The most that is said is that the Respondent has failed adequately to establish the connection between the terms and conditions produced and the credit agreement relied on. I do not consider that the Appellant comes anywhere close to establishing a dispute on substantial grounds.

34. Fifth, I regard Mr Lafferty's reading of paragraph 34 of the Judge's judgment as plainly wrong. The Judge was simply recording Mr Lafferty's argument. If there were otherwise any doubt about that (which there ought not to be), it would be dispelled by what immediately follows in the judgment:

> "35. That is a complex argument that has been put forward in this case as a basis for the defence in this case. But the reality of what the court faces in this case is that there is an undisputed sum due by Selectrical to City Electrical Factor which is known and not contested in the amount due."

Thus the Judge did not express any view on the submission that the terms and conditions had not been shown to be incorporated into the credit agreement and guarantee. He simply proceeded to decide the case on the basis that the terms of the guarantee on the front of the document, as set out in paragraph 12 above, gave rise to a liquidated liability.

35. Accordingly, I regard any issue concerning the incorporation of the Conditions of Sale as fanciful, rather than real, and purely tactical. It follows that they form part of the document to be construed. (I have already explained why, nevertheless, I do not permit the Respondent to rely on the "Additional Terms of Guarantee" in clause 8 of the Conditions of Sale as constituting the words of obligation to be construed.)

36. So far as concerns the factual matrix in which the second guarantee is to be construed, Miss Thompson relied, first, on the difference between the wording of the first guarantee and that of the second guarantee and, second, on the fact that the second guarantee was entered into at a time when the Company was already trading on credit terms with the Respondent. I do not regard the first point as significant, for two reasons: (i) the argument seems to me to be circular, because a difference in wording is only significant in a relevant way if and to the extent that the new words actually have a materially different effect from the old words; (ii) where, as here, the contract is on the creditor's standard terms of trading the particularities of the counter-party's prior experience can have little if any bearing on the construction of the contract: were it otherwise, the same standard-form guarantee would, or might, have different effect as against different sureties. What is relevant, however, as the context in which the wording has to be construed, is the simple fact that the guarantee supported an agreement for the supply of goods and services to the buyer (the Company) *on credit*.

37. The words to be construed (see paragraph 24 above) contain three parts:

(i) "we hereby unconditionally guarantee the due and punctual performance and discharge of all the Buyer's obligations under or pursuant to the Customer Agreement"; and

(ii) "we hereby unconditionally guarantee … the due and punctual payment on demand of all sums now or subsequently payable (including any interest or late payment charges upon such sums) by the Buyer to the Seller under or pursuant to the Customer Agreement or otherwise"; and

(iii) "we agree to indemnify the Seller against all losses, damages, costs and expenses which the Seller may incur through any breach by the Buyer of such obligations".

Part (i) is a "see to it" obligation. Part (iii) is an indemnity obligation. The question is whether Part (ii) is guaranteeing the due and punctual payment on demand by the Buyer or, rather, the due and punctual payment on demand by the guarantor of the moneys

owed by the Buyer. In my judgment, the latter is the correct construction, for the following reasons.

38. First, any construction of the agreement ought to take account of the distinction between Part (i) and Part (ii). It is true that Part (ii) contains the words "or otherwise". That, however, hardly explains the inclusion of two distinct provisions. The reference to "demand" in Part (ii) indicates that contractual obligations are in question; therefore the possible existence of other sources of obligation could easily have been brought within the "see to it" obligation.

39. Second, there is good reason to construe Part (ii) not as guaranteeing payment by the Buyer to the Seller but, rather, as guaranteeing payment *by the surety* of what is payable by the Buyer to the Seller. The guarantee is in consideration of the Seller's agreeing to grant credit facilities to the Buyer. Sales on credit do not generally provide for payment on demand, and clause 5(d) provides, as is common, for payment not on demand but at a given time after the date of the relevant invoice. A guarantee of payment by the Buyer is sufficiently dealt with under Part (i). The reference to "demand" is appropriate not for the Buyer but for the surety. Part (ii) is naturally read as an agreement to pay, when called upon, the moneys that are payable by the Buyer.

40. Third, this construction of Part (ii), which has merit on other grounds, is confirmed if the words are read in the context of the entire agreement, including the final words on the front page ("By signing this guarantee you accept personal liability for the debts of the buyer. Please read the additional terms of guarantee overleaf before signing this guarantee") and clause 8 on the back. The words on the front are by themselves suggestive of a primary rather than merely secondary liability. If it might be said that they are consistent with a personal though merely secondary liability, the matter is put beyond doubt by clause 8(a) on the back, which provides:

> "(a) All sums of money which may not be recoverable from the Guarantor on the footing of the Guarantee whether by reason of legal limitation on the Buyer or any other circumstance shall nevertheless be recoverable from the Guarantor as principal debtor and shall be paid on demand."

I have made clear that I would not allow the Respondent to rely on these words as themselves the words of obligation to be construed. However, their presence in the contract confirms, if confirmation be needed, that the construction of Part (ii) given above is the correct one.

41. It follows that the Judge was correct that the second guarantee created a liquidated debt for the purposes of section 267 of the Insolvency Act 1986, although the reason he gave for that conclusion was incorrect. As it is common ground that the amount of the debt was sufficient to ground a bankruptcy order, the appeal will be dismissed.