Neutral Citation Number: [2021] EWHC 2200 (Comm)

Case No: CL-2020-000204

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/08/2021

Before :

SIR NIGEL TEARE
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

ADL Advanced Contractors Limited	**Claimant**
- and -	
Avnish Patel	**Defendant**

- -
- -

Mr James Medd (instructed by **Candey Limited**) for the **Claimant**
Mr Seb Oram (instructed by **Clarkslegal LLP**) for the **Defendant**

Hearing dates: 19 July 2021

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Approved Judgment

I direct that 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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SIR NIGEL TEARE SITTING AS A JUDGE OF THE HIGH COURT

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00 am on Wednesday 04 August 2021."

Sir Nigel Teare :

1. This application, at its inception, was an application by a creditor for summary judgment against a guarantor of the liability of the principal debtor. After the exchange of evidence the application was altered to one in which the creditor sought the determination of three issues as against the guarantor, which issues were said to be issues of law. Objection was taken to this re-framed application. It was said that the reframed application was an application for the determination of preliminary issues in circumstances where the court had not determined that the issues were suitable for determination as preliminary issues. Accordingly counsel for the Claimant, the creditor, applied for permission to have the three issues determined summarily upon the grounds that the Defendant, the guarantor, had no real prospect of succeeding on them, that the issues were issues of law and that no issue of fact was relevant to their determination. The application was opposed and the hearing of that application took most of the morning of the hearing. I reserved judgment on that application and invited argument on the issues of law so that, if I decided the application for permission in favour of the Claimant, the court would be able to determine the issues in question. In the event, by reason of pressure of time, only the first issue was argued orally. However, I had the benefit of the parties' written submissions on the other two issues.

The background to the claim

2. The background to the claim was described in this way by counsel for the Claimant, ADL Advanced Contractors Ltd. Both the Claimant and Verdi Construction Limited ("Verdi"—a company now in liquidation) are building contractors. The Defendant is a director of Verdi. The Claimant carried out extensive building works for Verdi on 6 different sites between 2016 and 2019 pursuant to various sub-contracts. Except in respect of one of the sites known as the High Trees site, the work related to sites which were being developed by SPVs set up by Mr Ashank Patel—"Ashank", Mr Iqbal and Mr Haq under the umbrella of the Equity Real Estate Group of Companies. On the Equity sites, the contractual chain was from the relevant SPV to Verdi to the Claimant.

3. Verdi did not pay the Claimant promptly and by November 2017 there were considerable sums owed. The Defendant entered into a guarantee on 10 November 2017—"the 2017 Guarantee"—by which he, jointly with Ashank and Mr Iqbal, guaranteed to pay Verdi's debts and liabilities to the Claimant, which at that time were substantial. The Defendant's evidence is that the reason for Verdi's indebtedness is that Verdi was not being paid by the SPVs.

4. Following the entering into of the 2017 Guarantee, the level of Verdi's indebtedness to the Claimant initially improved, but it then deteriorated again.

5. As a result, in January 2019 the Claimant entered into various other agreements—"the 2019 Agreements". The Claimant entered into two loan agreements with two of the Equity Group SPVs, "Omega" and "Sigma". The effect of the loan agreements was that the SPVs took on £1.5m of Verdi's debt to the Claimant and £1.5m of that debt was deemed satisfied in full.

6. The Claimant also entered into two further guarantees—"the 2019 Guarantees". These were:

i) a joint guarantee—"the Joint Guarantee"—which was entered into by Ashank, Mr Iqbal and Mr Haq by which they guaranteed Omega's liability to the Claimant up to a maximum of £350,000.

ii) a further guarantee—"the Iqbal Guarantee"—by which Mr Iqbal guaranteed the remaining £750,000 of Omega's liability to the Claimant.

7. The Joint Guarantee released and discharged Ashank and Mr Iqbal from their liability under the 2017 Guarantee, but it expressly provided that the Defendant was not so released. The Iqbal Guarantee also released Mr Iqbal from his liability under the 2017 Guarantee but did not contain an express reservation in respect of the Defendant's liability under the 2017 Guarantee (though the Joint Guarantee expressly referred to the Iqbal Guarantee in the release clause).

The Claim

8. The Particulars of Claim describe the claim against the Defendant in these terms. By letters before action dated 25 February 2020 and 1 April 2020, served by the Claimant's solicitors, the Claimant made written demand under the 2017 Guarantee for payment of Guaranteed Obligations in the total sum of £826,869.78, calculated as follows:

1. Principal: for work done under the Contracts £1,718,442.95

2. Interest: statutory interest of £269,663.64.

3. Retention: £300,219.08.

4. Unpaid Construction Industry Scheme advance payments of the Claimant's tax liability: £38,544.11.

5. LESS £1.5 million deemed satisfied under the Omega Loan and the Sigma Loan.

6. Sub-total of Guaranteed Obligations due and owing under the Guarantee: £826,869.78.

9. Additional sums by way of costs and interest are also claimed.

10. In circumstances where the 2017 Guarantee was a joint guarantee by the Defendant, Ashank and Mr. Iqbal and where the latter two were released from liability by the 2019 Guarantees to which the Defendant was not party it is not surprising that amongst the points taken by the Defendant by way of defence to the claim is that the effect in law of the release of the other two guarantors is to discharge the Defendant from liability under the 2017 Guarantee; see paragraph 15 of the Defence.

11. The Claimant disputes that that is the effect in law of the 2019 Guarantees and seeks summary determination of the following issue:

> "1. Whether, as the Defendant contends, the effect of the 2019 Guarantees was to release him from the 2017 Guarantee?"

12. The other two issues upon which summary determination is sought are:

> "2. What if any, was the effect of 2019 Agreements on the cap on the Guarantor's liability of £1.8m which cap was provided for by clause 2.4(b) of the 2017 Guarantee? The Defendant's case is that it reduced the maximum amount for which the Defendant could be liable from £1.8m to £300,000.
>
> 3. What, if any, was the effect of clause 2.3 (b)(i) of the 2017 Guarantee if Verdi failed to dispute a valuation within 5 days? The Defendant contends that if Verdi raised a dispute about a valuation at any time, that triggered the requirement in that clause for the parties to undertake a dispute resolution process."

13. Issues 1 and 3 go to liability but it is important to note that the Claimant does not seek summary judgment on liability with the quantum of that liability to be determined. Even if issues 1 and 3 are determined in favour of the Claimant it would not be possible to say that the Claimant is entitled to judgment on liability. That is because, for reasons explained by counsel for the Defendant, there remain issues as to whether there is any outstanding indebtedness. The issues mentioned by counsel for the Defendant were, first, the effect of the 2019 Agreements by which £1.5m of Verdi's debt was extinguished, second, the effect of the termination of the sub-contracts in 2019 and, third, the extent to which sums arising from variations were part of the Guaranteed Obligations. It is unnecessary to explain these points any further because counsel for the Claimant accepted that they demonstrated the wisdom of the Claimant's decision not to seek judgment on liability with damages to be assessed.

14. Thus the question arises whether it is appropriate for the Claimant to seek summary determination of three issues which arise in connection with the Claimant's claim. The Claimant submits that it is, on these grounds:

    i) CPR Part 24.2 provides that the court may give summary judgment "*on the whole of a claim or on a particular issue*".

    ii) The notes to Part 24 in the White Book at 24.1.1 suggest that issue means any issue in the case.

    iii) The three issues are issues of construction and hence of law which are not dependent upon any issue of fact.

    iv) The Defendant has no real prospect of succeeding on these issues. The determination of the issues will assist the parties to resolve the claim brought by the Claimant against the Defendant. There is no other compelling reason why the determination of these issues should await trial.

15. On behalf of the Defendant it was submitted that the application for the determination of these issues is misconceived. In *Anan Kasei Co. Ltd. and another v Neo Chemicals & Oxides (Europe) ltd and others* [2021] EWHC 1035 (Ch) Fancourt J. explained the scope of Part 24 as follows:

> "**The summary judgment application**

79. There was no application for the trial of preliminary issues. Mr Mitcheson said that Rhodia would strongly have objected to a suggestion that there should be preliminary issues determined at this stage, but it was content to take the summary judgment application on the chin on the basis that, in relation to each point of law, Rhodia clearly has at least a realistic prospect of success at trial. Mr Cuddigan implied that the difference between preliminary issues and summary judgment was of no consequence because, since Order 14A of the Rules of the Supreme Court 1965 was introduced, it has been possible to seek summary judgment on a question of law and the court will make a final determination of the question raised in an appropriate case.

80. The difference is not however a matter of semantics, nor has the difference been erased by the development of a broader summary judgment jurisdiction. A party is free to issue a summary judgment application, subject to compliance with the rules, and the court will determine it, whether it depends on an issue of law, fact or mixed fact and law. Whether a preliminary issue should be determined is a matter for the court to decide, and any party may apply for a direction in that regard. The court has various case management considerations and guidance from appellate courts to weigh when deciding whether the overriding objective is best served by directing the trial of a preliminary issue at that stage. The likelihood that resolution of such an issue may assist the parties to settle the claim or part of the claim is one of the relevant considerations, in modern case management.

81. The justification for allowing the parties to bring forward a summary judgment application is the asserted strength of the case against the respondent and the fact that a final trial of at least part of the claim will be disposed of (CPR 24PD, para 2(3): "*The application notice or the evidence … must – …(b) state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates, and … states that the applicant knows of no other reason why the disposal of the claim or issue should await trial*").

82. The "issue" to which rule 24.2 ("the claimant has no real prospect of defending the claim or issue") and PD24 refers is a part of the claim, whether a severable part of the proceedings (e.g. a claim for damages caused by particular acts of infringement or non-payment of several debts) or a component of a single claim (e.g. the question of infringement, or the existence of a duty, breach of a duty, causation or loss). It is not any factual or legal issue that is one among many that would need to be decided at trial to resolve such a claim or part of a

> claim. If the determination of an issue before trial has no consequences except that there is one fewer issue for trial then the court has not given summary judgment and the application was not for summary judgment. If it were otherwise, parties would be able to pick and choose the issues on which they thought their cases were strong and seek to have them determined in isolation, in an attempt to achieve a tactical victory and cause the respondent to incur heavy costs liability at an early stage.
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> 83. The fact that the summary judgment application raises for determination issues of law does not make a relevant difference. Legal issues are often the only relevantly disputed question in a claim or part of a claim. Where the issue of law is relatively straightforward and the court is satisfied that it has before it all relevant material and that a trial judge would be in no better position to decide it, the court generally decides the issue of law finally, on a balance of probabilities, and not merely on the basis of whether the respondent has a realistically arguable case: see per Lewison J in Easyair v Opal Telecom [2009] EWHC 339 (Ch) at [15]. That does not mean that any issue of law can properly be the subject of a summary judgment application."

16. Counsel for the Claimant submitted that this was too restrictive an approach and that "issue" in CPR Part 24 should be given a broader meaning to include any issue which arises in the case. Counsel invited the court to depart from the reasoning of Fancourt J. Counsel accepted that the court would retain a discretion whether to grant summary judgment on such an issue. Indeed, he submitted that it would be odd if the court lacked the power, in its discretion, to determine on a summary basis the question whether the Defendant had been released from liability under the 2017 Guarantee by the 2019 Guarantees.

17. Counsel for the Defendant submitted that I should follow the approach of Fancourt J.

18. Fancourt J.'s analysis of the scope of the summary judgment jurisdiction was followed by Steyn J. in *Vardy v Rooney* [2021] EWHC 1888 (QB) notwithstanding a substantial argument to the contrary; see paragraphs 69-75.

19. I am not persuaded that Fancourt J.'s analysis is wrong. "Issue" in CPR Part 24 must be construed in the context of there being a significant difference between an application for summary judgment and an application for the determination of preliminary issues. The latter requires the court to form the view, upon an application for the determination of a preliminary issue, that it is desirable to decide a preliminary issue, notwithstanding the well-known dangers in so doing. If the court agrees that it is desirable to do so then a date is fixed for the trial of the preliminary issue, whether it be of law, fact or mixed law and fact. By contrast a claimant may seek summary judgment without seeking the permission of the court to do so. The justification for so doing is that the claimant believes that that there is no real prospect of a defence and no reason why the "claim or issue" should await trial. Bearing that difference in mind I agree with Fancourt J.'s understanding of "issue" in CPR Part 24 as explained in paragraph 82 of

his judgment. In any event, where the matter has been considered by two High Court judges I consider that I should follow their decisions.

20. In the present case the three issues sought to be determined on a summary basis are not determinative of the claim or any part of it. They are issues in the case and an application could have been made for their determination as preliminary issues. Had any such application been made, the court and the parties would have had an opportunity to consider whether it was desirable to do so. Instead an application was made for summary judgment on the claim. Shortly before the hearing of that application the Claimant recognised that summary judgment on the claim was unrealistic and instead sought summary judgment on three issues which were not determinative of the claim or any part of it and had been, in the words of counsel for the Defendant, "*unilaterally selected by the Claimant*". For the reasons given by Fancourt J. I do not consider that such an application is within CPR Part 24.

21. However, in case I am wrong to follow Fancourt J. and Steyn J. on the scope of CPR Part 24 and "issue" in CPR Part 24 includes any issue in the case I would nevertheless consider it inappropriate in the exercise of my discretion to determine the issue of release (issue 1) on a summary basis.

22. Before explaining my reasons for so concluding it is necessary to summarise the careful and impressive submissions which were made on both sides as to the suggested release.

23. The starting point is the reason or reasons why the 2019 Guarantees arguably released the Defendant from liability under the 2017 Guarantee. Counsel for the Defendant identified two such reasons.

    i) First, where there is a joint liability the release of one guarantor releases the other because the joint liability is a single cause of action, which single cause of action is destroyed when one of the joint guarantors is released from liability. In support of this proposition reference was made to *In re Hodgson* (1883) 31 Ch. Div. 177 at pp.188-189 per Bowen LJ, *Watts v Lord Aldington* [1999] L&TR 578 at p.589-591 per Neill LJ and p.594 per Steyn LJ (who, although criticising the rule as absurd, accepted that it survived) and *Johnson v Davies* [1999] Ch.117 at p.124 per Chadwick LJ.

    ii) Second, whether the liability is joint or not, if the effect of the release is to affect injuriously the surety's equitable right to seek contribution from a co-surety, then the surety is released. In support of this proposition reference was made to *Ward v The National Bank of New Zealand* [1882) 3 HL and PC 755 at pp.763-764 and *Smith v Wood* [1929] 1 Ch. 14 at p.23,25 and 31.

24. In response counsel for the Claimant submitted that where there was a joint or a joint and several liability, the question whether the release of one surety or debtor released the other now depended upon the approach adopted in *Watts v Lord Aldington* [1999] L&TR 578. The question is whether, on the true construction of the later document which released one surety, the intention was to release the other or to reserve the right to sue the other; see pp.588-589 per Neill LJ. In the present case one of the 2019 Guarantees reserved the right to sue the Defendant expressly and it was submitted that such reservation was to be implied in the other 2019 Guarantee.

25. It was further submitted that even if the 2019 Guarantees would otherwise have released the Defendant from liability the Defendant cannot take advantage of that because, on the true construction of the 2017 Guarantee, and in particular clause 3.2(k), he had agreed not to take such a point.

26. Counsel for the Defendant accepted that in the light of the approach in *Watts v Lord Aldington* the Defendant's equitable right to seek contribution from the other two sureties who had been released was likely to have been preserved. However, he submitted that the extent of that right and how it had been affected by the 2019 Agreements requires examination at trial. Further, he submitted that nothing in *Watts v Lord Aldington* affected the Defendant's right to say that the 2019 Guarantees had destroyed the single cause of action created by the 2017 Guarantee with the result that he was released from liability under the 2017 Guarantee. (In this regard, and with regard to Steyn. LJ.'s criticism of the common law rule based on a single cause of action, it is to be noted that in *Gladman Commercial Properties v Fisher Hargreaves Proctor and others* [2014] PNLR Briggs LJ suggested that the concept of a reservation of right to sue might be thought "*illogical, if there really is a single cause of action*".)

27. Counsel for the Claimant submitted that the notion of a destroyed cause of action was illusory and could not survive *Watts v Lord Aldington*.

28. *Watts v Lord Aldington* was not a case of sureties, whether joint or joint and several. But *Johnson v Davies* did concern joint sureties and Chadwick LJ held that the approach of Neil LJ in *Watts v Lord Aldington* applied; see p.127 E-H. In *Lombard Natwest Factors v Koutouzas* [2003] BPIR 444 Field J. also noted what Chadwick LJ had said and concluded, at paragraph 40:

> "In my view, it is clear from the judgment of Chadwick LJ that for there to be a release of a joint obligor that discharges another joint obligor (whether the liability be joint or joint and several) the release must be immediate (or have become operative) and must be without reservation of rights against the other joint obligor."

29. Thus the approach of Chadwick LJ in *Johnson v Davies* and of Field J. in *Lombard* provides cogent support for the submissions of counsel for the Claimant, notwithstanding the "logic" of the argument that a release of one joint guarantor destroys the "single cause of action".

30. The response of counsel for the Defendant was that in *Johnson v Davies* the ratio of the decision was that the later event in that case, an IVA (an Individual Voluntary Arrangement), did not amount to an immediate or absolute release of the debts owed; see p.127 H – p.128 A. It was therefore submitted that in *Lombard* (which also concerned an IVA) Field J. was wrong to say, following *Johnson v Davies*, that in the context of joint sureties where there was an immediate or absolute release of the debt the other debtor would not be released if there was a reservation of rights against that debtor.

31. Whilst the submissions of counsel for the Claimant are supported by the approach of the Court of Appeal in *Johnson v Davies* and by the High Court in *Lombard* there has as yet been no case in which (i) a surety has undertaken a joint liability with another

surety, (ii) the liability of the other surety has thereafter been immediately and absolutely later released by the creditor, (iii) the release expressly states that the right to sue the first surety was reserved but (iv) the first surety was not party to the later release. To hold that in such circumstances the first surety was not released (and so to give no effect to the previously established common law principle that a joint debt is destroyed when one surety is released) would be a further development in this area of the law. (The discussion of this subject in *Chitty on Contracts* 33rd.ed. at paragraphs 45-091-097 and 45-117 has the flavour of a developing area of the law; see the references to the "traditional approach" being "*challenged by the Court of Appeal in two more recent decisions*" and the submission that the approach of the Court of Appeal should be "extended" to cases of joint suretyship). Where the law is to be developed or extended it is safer that it be done after all the facts have been found. In this context two particular matters have been mentioned. First, as explained by counsel for the Defendant, the effect of the 2019 Agreements may have a bearing on the extent of the Defendant's equitable right of subrogation against the co-sureties; see paragraph 42 of his Skeleton Argument. Second, there is an issue as to the Defendant's contemporaneous knowledge of the 2019 Guarantees; see paragraphs 14 and 15 of the Defence and paragraphs 10-11 of the Reply. If the law on joint sureties is to be developed or extended in the manner suggested by counsel for the Claimant (though he would not use the word "develop" or "extend" but would say that the law is already clear) it would be prudent to do so after the facts with regard to both of these issues have been found at trial.

32. Further, if the issue of release is to be determined on a summary basis, it is particularly important that the court is satisfied that it has before it all relevant material and that the trial judge would be in no better position to decide the issue than this court. Counsel for the Defendant has explained that there is evidence that not all of the 2019 Agreements may be before the court (see paragraphs 24 and 25 of his Skeleton Argument). I cannot therefore be satisfied that this court has before it all the relevant material which the trial judge would have, though the inter-creditor agreement sought was provided one working day before the hearing.

33. The other limb to the argument of counsel for the Claimant was that even if the 2019 Guarantees would otherwise have released the Defendant from liability the Defendant was unable to take the point because of clause 3.2(k) of the 2017 Agreement which provided as follows:

> "3. Creditor protections
>
> 3.2 The liability of the Guarantor under this guarantee shall not be reduced, discharged or otherwise adversely affected by:
>
> (k) any other act or omission except an express written release by deed of the Guarantor by the Creditor."

34. Although the 2017 Guarantee defines the sureties as "together the Guarantor" it was submitted that clause 3.2(k) should be construed as if it referred to each Guarantor individually. On that basis it should be read as saying "The liability of *a* Guarantor ..shall not be adversely affected by ….any other act or omission except an express

written release by deed of *that* Guarantor by the Creditor." There had been no release by deed by the Defendant and accordingly he was not released by the 2019 Guarantees.

35. Counsel for the Defendant submitted that this was an impermissible rewriting of the agreed definition (and of clause 3.2(k)) and that clause 3.2(k) should be construed in accordance with the agreed definition of "the Guarantor" so that any discharge must affect the sureties together. If, as contended by counsel for the Defendant, there is a principle that where a single cause of action is destroyed by the release of one joint surety the other joint surety is also discharged, such principle can only be overridden by clear words. Clause 3.2(k) does not contain such clear words. The words "act or omission" do not clearly encompass the destruction of a single cause of action

36. It seems to me that if the continued existence of the principle relied upon by counsel for the Defendant can only safely and prudently be determined at trial then this question of construction should also await trial since they are linked.

37. For these reasons, if CPR Part 24 allows for the determination of preliminary issues, I would have decided that it was not appropriate to determine issue 1 on a summary basis.

38. I heard no oral argument with regard to issues 2 and 3. So far as issue 2 is concerned this issue is bound up with the effect of the 2019 Agreements and so, even if CPR Part 24 allows for the determination of preliminary issues, I would have decided that this issue must also await trial. This is particularly so in the light of (a) the apparent change in the Claimant's case with regard to the effect of the 2019 Agreements (see paragraph 54 of the skeleton argument of counsel for the Defendant) and (b) the evidence that all of the 2019 Agreements may not have been disclosed (see paragraphs 55, 24 and 25 of the same skeleton argument). So far as issue 3 is concerned it appears to be a simple point of construction of clause 2.3(b)(i) of the 2017 Guarantee. As I understand the facts Verdi did not dispute the valuation or valuations within 5 working days. If those are the facts then, if CPR 24 allows for the determination of preliminary issues, I would have determined the issue of construction in favour of the Claimant. The reference to an expert was surely only required in the event that Verdi disputed the valuation or valuations within 5 working days.

Other matters:

39. Payment into court by the Defendant of £50,000 was sought as condition of defending. However, since the issue of release must be determined at trial (even if CPR Part 24 applies) there is no basis for making the order sought.

40. It was suggested by the Claimant that "quantum issues" might be more suitably determined by the TCC, certainly if liability is determined in its favour. This a claim under a guarantee. Such claims are commonly brought in the Commercial Court. Whilst the TCC might well be the more appropriate court to determine issues of quantum arising from the underlying construction contracts I am reluctant to direct that any such issues be determined by the TCC because the Claimant's claim is not large and it makes economic sense for all issues to be resolved in one court.