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Neutral Citation Number: [2022] EWHC 1783 (Ch)

Case No: CR-2022-002142

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
In the matter of PME Cake Limited
And in the matter of the Insolvency Act 1986

Date: 20 July 2022

Before :

Deputy Insolvency and Company Court Judge Kyriakides

Between :

PME Cake Limited

- and -

**(1) June Penny Craig (a Protected Party by her
 Litigation Friend Barry Woods) (2) Loraine Julie
 Craig (3) Stepanie Alice Woods**

Applicant

Respondents

Philip Judd (instructed by **Perrin Myddelton**) for the **Applicant**
Simon Lane (instructed by **Stephen Rimmer LLP**) for the **Respondents**

Hearing dates: 16 June 2022

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.

Deputy Insolvency and Company Court Judge Kyriakides :

1. This is an application by PME Cake Limited (“**the Company**”) to restrain the Respondents, June Peggy Craig, Loraine Julie Craig and Stephanie Alice Woods, from presenting a petition to wind up the Company based on the debt alleged in a statutory demand served by the Respondents on the Company on 8 April 2022 (“**the Statutory Demand**”).

Background

2. The Company is a manufacturer of cakes and baking products and was previously known as Knightsbridge Bakeware Centre (UK) Ltd.
3. The Respondents are the freehold owners of the property known as 3 Brember Road, South Harrow, Middlesex HA2 8UN (“**the Property**”). Prior to 2006 the freehold owner was the First Respondent. In 2006 the Second and Third Respondents acquired an interest in the freehold reversion of the Property, although the First Respondent also retained an interest.
4. By a lease dated 31 October 2001 the First Respondent demised the Property to Precision Machining Engineers (Harrow) Limited (“**PME Harrow**”) for a term of ten years (“**the Lease**”). The Lease was guaranteed by the Company.
5. Although the 10 year Lease expired on 30 October 2011, it continued pursuant to section 26 of the Landlord and Tenant Act 1954 until no later than 18 June 2019 when PME Harrow yielded up possession to the Respondents who, by that time, were the freehold owners of the Property. It is not in dispute between the parties that after 30 October 2011 the Company continued to occupy the Property on the terms of the Lease.
6. For the purposes of the Company’s application, the relevant provision of the Lease is paragraph 2 of schedule 3, which provides as follows:

“The Guarantor COVENANTS AND GUARANTEES with and to the Landlord that at all times during the Liability Period while the Tenant is bound by the tenant covenants of this Lease the Tenant shall punctually pay the rents and perform and observe the covenants and other terms of this Lease and if at any such time the Tenant shall make any default in payment of said rents or in performing or observing any of the covenants

or other terms of this Lease the Guarantor will pay the rents and perform or observe the covenants or terms in respect of which the Tenant shall be in default and make good to the Landlord on demand and indemnify the Landlord against all losses, damages, costs and expenses arising or incurred by the Landlord as a result of such non-payment, non-performance or non-observance ...” (“the Guarantee”)

7. The “Liability Period” is defined by paragraph 1.1 of schedule 3 (insofar as is relevant) as:
“In the case of Knightsbridge Bakeware Centre (UK) Limited the period during which Precision Machining Engineers (Harrow) Limited is bound by the tenant covenants of this Lease”
8. Pursuant to paragraph 33 of schedule 3 of the Lease the Company covenanted at the end or sooner determination of the Lease to yield up the Property with vacant possession and in such good and substantial repair as accorded with the terms of the Lease. The Respondents allege that PME Harrow breached this covenant.
9. Proceedings were subsequently brought by the Respondents against PME Harrow based on the alleged breach of covenant, the Respondents claiming that they had suffered loss and damage in the region of £558,000 and were entitled to reimbursement of costs in the sum of £4,500 plus VAT incurred in preparing a schedule of dilapidations (“**the Proceedings**”). PME Harrow defended the Proceedings primarily on three bases: first, liability was denied; secondly, it was claimed that the Property was damaged by squatters who occupied the Property after 18 June 2019; and finally, quantum and causation of the losses claimed were disputed.
10. About two months prior to the date fixed for the trial of the Proceedings, a mediation took place between the parties which resulted in their reaching a settlement. The settlement was incorporated into a Tomlin Order dated 7 December 2021 (“**the Tomlin Order**”) and the Schedule to that order.
11. The Tomlin Order was in the usual form and provided for the Proceedings to be stayed upon the terms of the Schedule except for the purposes of carrying out those terms into effect for which purpose the parties had permission to apply. The order also provided for

the trial to be vacated and for PME Harrow to pay the Respondents costs in the agreed sum of £55,000 (inclusive of VAT).

12. There was only one paragraph in the Schedule. This provided as follows:

“On or before 4pm on 5 January 2022, the Defendant shall pay the Claimants the sum of £245,000 (inclusive of VAT) in full and final settlement of all claims against the Defendant in respect of its lease dated 31 October 2001 of 3 Brember Road, South Harrow HAZ BAX”.

13. PME did not pay either the costs agreed or make the agreement payment of £245,000. Pursuant to an application made by the Respondents on 21 January 2022, on 28 January 2022 Mr Justice Waksman ordered the stay imposed by the Tomlin Order to be lifted for the purposes of enforcing the Schedule and for PME Harrow to pay forthwith the sum total of £300,000 to the Respondents and an additional amount of £2,208.60 by way of summarily assessed costs (“**the Enforcement Order**”). PME Harrow did not comply with that order.

14. On 17 February 2022, the Respondents served the Company with a demand claiming that the sum of £302,208.60 was owed by the Company to the Respondents pursuant to the Guarantee. When payment was not made by the Company, the Respondents served on it the Statutory Demand.

The Law

15. The principles for restraining the presentation of a petition are well-known and are usefully summarised by ICC Judge Burton in the recent decision of *Sell Your Car with us Limited v Anil Sareen* [2019] EWHC 2332 (Ch) at [11] and [12] as follows:

“[11.] The court will restrain the presentation of a winding-up petition where it is satisfied that the company would succeed in establishing that the proceedings constitute an abuse of process. A petition founded on a debt that is disputed on genuine and substantial grounds would constitute an abuse of process. The Companies Court practice was clearly set out by Hildyard J in Coilcolor v Camtrex [2015] EWHC 3202 (Ch):

[32.] The Court will restrain a company from presenting a winding-up petition if the company disputes, on substantial grounds, the existence of the debt on which the petition is based. In such circumstances, the would-be petitioner's

claim to be, and standing as, a creditor is in issue. The Companies Court has repeatedly made clear that where the standing of the petitioner, and thus its right to invoke what is a class remedy on behalf of all creditors, is in doubt, it is the Court's settled practice to dismiss the petition. That practice is the consequence of both the fact that there is in such circumstances a threshold issue as to standing, and the nature of the Companies Court's procedure on such petitions, which involves no pleadings or disclosure, where no oral evidence is ordinarily permitted, and which is ill-equipped to deal with the resolution of disputes of fact.

[33] The Court will also restrain a company from presenting a winding-up petition in circumstances where there is a genuine and substantial cross-claim such that the petition is bound to fail and is an abuse of process: see e.g. Re Pan Interiors [2005] EWHC 3241 (Ch) at [34] – [37]. If the cross-claim amounts to a set-off, the same issue as to the standing of the would-be petitioner arises as in the case where liability is entirely denied".

[12.] The learned judge continued at paragraphs 34 and 35:

[34] Further, it is an abuse of process to present a winding-up petition against a company as a means of putting pressure on it to pay a debt where there is a bona fide dispute as to whether that money is owed: Re a Company (No 0012209 of 1991) [1992] BCLC 865 .

[35] However, the practice that the Companies Court will not usually permit a petition to proceed if it relates to a disputed debt does not mean that the mere assertion in good faith of a dispute or cross-claim in excess of any undisputed amount will suffice to warrant the matter proceeding by way of ordinary litigation. The Court must be persuaded that there is substance in the dispute and in the Company's refusal to pay: a "cloud of objections" contrived to justify factual inquiry and suggest that in all fairness cross-examination is necessary will not do".

[13.] Consequently, if the court decides that there is a substantial ground for the dispute, it will usually prevent a winding-up petition from being presented and will usually take the same approach where there is a genuine and substantial cross claim or set-off."

The grounds relied upon by the Company in support of its application

16. The Company submits that there is a genuine and substantial dispute that it has been discharged from the Guarantee and/or its liability under the Guarantee, and that it therefore does not owe the Respondents any monies. The grounds relied upon in support of that contention are summarised below.

17. It was submitted by Mr Judd, counsel for the Company, that a Tomlin Order creates a settlement contact between the parties to litigation on the terms of the order and the schedule. The settlement agreement brings into existence a new legal relationship, which replaces the previous relationship of disputation. Its effect is to end the disputes, which

were the subject of the litigation with the result that, unless the agreement shows a contrary intention, the parties may no longer have recourse to their original claims; they are only entitled to seek the assistance of the court in the event that one of them breaches the terms of the compromise.

18. It was contended therefore that, in this case, the claims, which were the subject of the Proceedings, were compromised by the settlement agreement contained in the Tomlin Order pursuant to which in exchange for agreeing to pay the sum of £245,000, the Respondents agreed to settle all claims under the Lease. The effect of the agreement, it was said, was to create a new agreement between the parties, which replaced the Lease so that the Respondents could no longer rely upon any of the covenants contained in the Lease, but were restricted to seeking recourse pursuant to the provisions of the Tomlin Order itself. PME Harrow had, accordingly, been released from all liability it may have had for any failure to deliver up the Property in good and tenantable repair. Its only liability was to pay the sum total of £300,000 pursuant to the provisions of the Tomlin Order.
19. Mr Judd then submitted that if the Tomlin Order had substituted the previous arrangements that existed between the parties, namely, the Lease under which the Guarantee was provided and/or had released PME Harrow from its liabilities under the covenants in the Lease or, at the very least, those contained in paragraph 33 of schedule 3, the consequence according to the law governing guarantees was that the Company, which was not bound by the Tomlin Order as it was not privy to the settlement, was also released from its liabilities under the Guarantee, or, at the very least its liability under paragraph 33 of schedule 3 to the Lease.
20. Alternatively, Mr Judd argued that the Tomlin Order effected a material variation of the Lease, by giving new rights to the Respondents and/or by changing the nature of the instrument itself and that the consequence of this material variation, as a matter of law, was to discharge the Company from the Guarantee.
21. Secondly, Mr Judd argued that the Liability Period expired on 18 June 2019 when the Lease expired and the Property was yielded up to the Respondents and, therefore, that as the Tomlin Order and the Enforcement Order were made well after the expiration of the

Liability Period, the liabilities arising under them were not covered by the terms of the Guarantee.

22. Finally, it was argued that the doctrine of election applied so that the Respondents had a choice in respect of PME Harrow's breach of the covenant under the Lease either to demand payment from PME Harrow as principal or the Company as surety and that by pursuing PME Harrow and obtaining an order in the terms of the Enforcement Order, the Respondents had made an election and were now estopped from pursuing any alternative rights and/or remedies against the Company.

23. I deal with each of the arguments below.

Discussion

The effect of the Tomlin Order

24. The following principles are established by the cases and are not disputed by either of the parties:

24.1. it is trite law that a Tomlin order constitutes a contract between the parties settling their disputes upon the terms contained in the schedule to the Tomlin order and the order itself and can include matters which were not part of the litigation between them (see: *Doris Bridget Hollingsworth v Hewett Nathaniel Humphrey* (1987) 12 WLUK 11).;

24.2. it is also well-established that once a compromise by way of a Tomlin order has been concluded, a new legal relationship comes into existence replacing the previous relationship of disputation. Therefore, the disputes that existed between the parties come to an end and, unless the Tomlin order provides otherwise, the parties are not entitled to have the stay lifted on their original proceedings and the disputes in those proceedings litigated before the court. As *Foskett on Compromise, 9th ed.* states at [6-01]:

“An unimpeached compromise represents the end of the dispute or disputes from which it arose. Any issues of fact or law that may have formed the subject matter of the original dispute are buried beneath the surface of the compromise.

The court will not permit them to be raised afresh in the context of a new action”
(see also: *Prudential Assurance Co. Ltd v McBains Cooper* [2000] 1 WLR 2000
at 2005F-G and *Knowles v Roberts* (1888) 38 Ch.D 263 at 272);

24.3. if one party to a Tomlin order acts in default of what has been agreed, the other party is entitled to apply to the court in the same proceedings under the permission to apply provision in the Tomlin Order in order to enforce the order or the schedule. Consequently, if a party is required to pay a certain sum by a certain date, but fails to do so, the innocent party may apply to the court for an order for payment of that sum;

24.4. unless a party is privy to a settlement agreement incorporated into the Tomlin order, he cannot be bound by its terms (*Foskett on Compromise, 9th ed.* at [6-63]).

25. Consequently, the effect of the Tomlin Order in this case was to settle once and for all the disputes between the parties in the Proceedings on the terms of the order and the Schedule. These brought into existence a new relationship between the Company and the Respondents, which superseded the cause of action in the Proceedings.

What effect, if any, did the Tomlin Order have on the Guarantee?

26. There are various grounds on which a guarantor may be discharged from liability. These include, subject to any provisions in the guarantee, circumstances where the principal itself is released from liability by a valid and binding legal agreement. The rationale for this rule is described in *Andrews and Millett on Law of Guarantees, 7th ed.* at 9-010 in the following way:

“There are two reasons for this rule:

(1) As a matter of basic principle, since the contract is one of guarantee (as opposed to indemnity), the surety’s obligation being to pay the debt or perform the obligation of another, once the payment or the obligation has been released, there is nothing left in respect of which the surety can be liable.

(2) The effect of the release would deprive the surety of his right to pay off the creditor and sue the principal in the creditor’s name.”

27. However, paragraph 9-010 continues by adding that the above reasons do not have any application if, as a matter of construction of the guarantee, the guarantor remains under a liability, notwithstanding the release of the principal.

28. In the present case, the issue which arises for consideration is whether, as a matter of construction of the Guarantee, the Company was, in fact released from liability.
29. Mr Lane, counsel for the Respondents, submitted that the Tomlin Order cannot be divorced from the liability arising under the Lease, which was the subject-matter of the Proceedings. He argued that there was a straight line between the breach alleged by the Respondents and the sum agreed to be paid by PME Harrow in the Tomlin Order and that as a matter of construction of the Guarantee, the Company was liable to pay to the Respondents the sum of £300,000. In support of his submissions, Mr Lane relied on the Court of Appeal authority of *Collin Estates Limited v Alain Robert Buckley* 1992 WL 893876.
30. In that case the plaintiff landlords, Collin Estates Limited (“**the Landlords**”), had granted a three-year lease of premises to a company, Jukebox Clothing Limited (“**the Tenant**”). The lease was guaranteed by the defendant, Mr Buckley, who was a director of the company. The guarantee provided as follows:

“7. The Surety as principal covenantor and not merely as collateral covenantor in consideration of the demise hereinbefore contained being made at his instance and request ... hereby covenants with and guarantees to the Lessor that during the term hereby granted and any statutory or other continuation thereof (hereafter called ‘the total period’) the rents reserved hereby and any increased or higher rents payable during any such statutory or other continuation of the term hereby granted shall at all times be paid and in the manner and at the times herein appointed for the payment thereof And also that during the total period all the covenants and stipulations on the part of the lessee and conditions herein contained shall be duly observed performed and kept And that the Surety will at all times hereafter ... pay and make good to the Lessor on demand all losses costs damages and expenses occasioned to it by the non-payment of the said rents or any part thereof or the breach non-observance or non-performance of any of the said covenants stipulations and conditions ...”

31. The contractual tenancy came to an end on 23 June 1989, but was extended by a statutory tenancy to 5 June 1990. The landlords then sued the Tenant for interim rent to cover the above period. Those proceedings, together with other existing proceedings between the Landlords and the Tenant, were compromised by a consent order pursuant to which the proceedings were discontinued by consent on terms that the Tenant agreed to pay the Landlords the sum of £10,000 by four equal instalments “*in full and final settlement by both parties of all claims each may have against each other*”. The other proceedings were an action by the Tenant against the Landlords for a new tenancy under the Landlord and

Tenants Act 1954, an action by the Landlords against the Tenant and the defendant as guarantor for arrears of rent with a counterclaim in respect of repairing covenants and an action by the Landlords for possession of the property. The defendant was not a party to the consent order.

32. The Tenant failed to comply with the consent order and went into liquidation. The Landlords then sued the defendant under his guarantee for the sum of £10,000 relying on the surety covenant in the lease. Two arguments were raised before the Court of Appeal. The first was that the consent order comprised not just one but a number of disputes which involved not simply questions of rent, but roof repairs and alleged unlawful settling, the complaint about roof repairs having given rise to the counterclaim. After having found that claim for a new tenancy had been dropped, that the possession action was no longer relevant and that the Judge in the action for arrears of rent had found that there were no arrears, the Court of Appeal held that all that was left was a claim for interim rent by the landlords and a demand for money in the form of possible damages for breach of the covenant against sub-letting and a counterclaim against the landlords in respect of repairing costs. Lord Justice Nolan concluded from this as follows:

“It seems to me impossible to escape from the view that this sum, which may have been reduced by credit being given for the counterclaim of Jukebox, must have been a payment in satisfaction of sums due under the lease, a payment to discharge obligations of Jukebox under the lease either by way of breach of the underletting covenant or by way of interim rent during the extended period for which those obligations existed. That being so, it is hard to see how they can prevent the consent order from being an order which, at any rate on its face, dealt with matters covered by the appellant’s guarantee under the lease.”

33. The second argument raised was that the consent order was a decisive move away from the lease, that it was made without admission of liability by the Tenant under the lease (which Nolan LJ accepted as being correct) and it created a whole new legal relationship, relying on a passage in Halsbury’s Laws of England Fourth Ed., vol 37 at page 391 where one of the effects of a compromise there mentioned was that the compromise superseded the original cause of action. It was submitted that the defendant guarantor could not therefore be saddled with the liability under the consent order as he was not a party to the order and it was not a term of the lease to which his guarantee obligations attached.

34. The Court of Appeal rejected this argument. In so doing, Lord Justice Nolan stated as follows:

“The conceptual problems which may arise in this field are of some complexity. There is a number of variations of fact which may affect them. Supposing the action in the Bloomsbury County Court for interim rent had run its course and the judge had given judgment in favour of the landlords: no-one doubts that the sum that was ordered to be paid by Jukebox would be a liability of the guarantor of Jukebox to pay. If during the course of hearing Jukebox decided to throw its hand in and accept judgment for a particular sum of rent, plainly the same consequences as regards the guarantor must follow. If Jukebox without admission of liability agreed that the action should be discontinued upon the payment of a certain sum, I find it very difficult to see how a different view could be taken in relation to a guarantor in any ordinary case. Here, of course, we go one step further - and this is Mr. Livingston’s second point - and have an agreement which, however little it may draw upon other actions, is on any view a new contract and one to which the guarantor is not a party. But the answer to that submission as it seems to me, at any rate in the circumstances of the present case, lies in the breadth of the language of clause 7 of the lease. I repeat that it is, as its terms plainly show, not one limited to obligations directly to be found in the lease itself, but to make good to the lessor on demand all losses, costs, damages and expenses occasioned to the lessors by the non-payment of rent or the breach of any covenants. Those terms seem to me to be amply wide enough to impose upon the guarantor an obligation to reimburse the lessor for loss sustained through the non-payment to the lessor of the £10,000, which quite plainly on the evidence was due in respect of rent and possibly breach of covenants under the lease, and nothing else.”

35. The above case is almost on all fours with the matter before me. Although the Tomlin Order settles “*all claims*”, the reality is that the only claim that existed between the parties was the claim in the Proceedings for breach by PME Harrow of the covenant to deliver up the Property in good and tenable repair. In light of this, it would, in my judgment, be artificial to regard the sum of £245,000 payable pursuant to the Tomlin order as being anything other than a payment to be made by PME Harrow in satisfaction of its liability to deliver up the Property in good and tenable repair.

36. Further, the Guarantee was not restricted to covenants directly to be found in the Lease itself, but, as in the case of *Collins Estates Limited*, included an obligation to make good to the Respondents on demand and indemnify them against all losses, damages, costs and expenses arising or incurred by the Respondents as a result of non-performance or non-observance of any covenant. In my judgment the scope of this provision is wide enough to impose on the Company an obligation to indemnify the Respondents for their losses sustained as a result of the failure by PME Harrow to pay the sum of £300,000 pursuant to

the Tomlin Order. As stated above, on the evidence, the only conclusion that can be reached as to why this sum was payable under the Tomlin Order was because of PME Harrow's breach of the covenant to deliver up the property in good and tenable repair. There was no other reason. Further, it was not contended by the Company, as part of its submissions, that it had any real prospect of establishing that PME Harrow had not breached this covenant or that, other than the arguments raised by Mr Judd which are dealt with in this judgment, there were any other reasons why the Company should not be liable to the Respondents under this wide provision of the Guarantee.

37. Accordingly, I reject the Company's primary argument that as a result of the Tomlin Order it was discharged from its Guarantee.

38. The alternative argument raised by Mr Judd was that the terms of the Tomlin Order effected a material variation of the Lease without the Company's consent and that the Company was accordingly discharged from its Guarantee under the rule in *Holme v Brunskill* (1878) L.R. 3 Q.B.D. 495. The short answer to this contention is that the Tomlin Order did not purport to vary any term of the Lease; all it did was to settle the secondary liability for damages arising on a breach of its terms. I, therefore, reject this submission.

The Liability Period

39. The Guarantee guaranteed performance of the various tenant covenants for the period that PME Harrow was bound by the tenant's covenants in the Lease. At the expiry of the Lease on 18 June 2018, PME was bound by the covenant to deliver up the Property in good and tenable repair. If it failed to do so, the Company as guarantor was liable to the Respondents for its default and to indemnify the Respondents for all losses, damages, expenses and costs arising or incurred as a result.

40. The argument raised by Mr Judd stands or falls with whether the obligations and liabilities arising under the Tomlin Order and the Enforcement Order flow from the breach of covenant in the Lease, which would fall within the Liability Period, or create wholly new obligations and liabilities which have no causal connection with that breach of covenant, in which case, they would fall outside of the Liability Period. In my judgment, and for the reasons set out above in relation to Mr Judd's first argument, the only conclusion that can be reached is that payments agreed to be made pursuant to the Tomlin Order were payments

flowing from the breach of covenant alleged; as the breach of covenant occurred within the Liability Period and, as I have found, the loss arising from PME Harrow's failure to discharge the sums due under the Tomlin Order flow from the breach of covenant, in my judgment, Mr Judd's argument cannot succeed.

The doctrine of election

41. The principles of the doctrine of election are helpfully summarised by Jeremy Cousins Q.C sitting as a Deputy Judge of the Chancery Division in the case of *Twinsectra Limited, Haysport Properties v Lloyds Bank plc* [2018] 672 (Ch) at [72]. The parts of that paragraph relevant to this case are as follows:

“(i) Where an election has been made between rights, it cannot be retracted. Thus, where a contract has been affirmed by the innocent party, following repudiatory breach by the other party, the innocent party cannot later go back upon his affirmation. His decision stands, and so does the contract. For this purpose, election, whether intended or not, by an unequivocal act communicated to the other party, is conclusive; Scarf v Jardine , pages 359-361, per Lord Blackburn. It is, therefore, possible for the making of a claim against one party, even though it does not proceed to judgment, to represent an unequivocal manifestation of an election between inconsistent rights which might affect a claim against another party; see Scarf v Jardine, per Lord Blackburn at page 362.

(ii) The entry of a judgment, at least a final one, against one person in an action against two persons in a case of alternative liability, will constitute such a conclusive step; Morel v Earl of Westmorland , pages 76-77 in the Court of Appeal, per Collins MR, later affirmed in the House of Lords.

(iii) A claimant cannot have both alternative and inconsistent remedies. He must elect between them, when judgment is given, but need not do so before; United Australia , at pages 18-19, and 29-30, respectively per Viscount Simon LC, and Lord Atkin. See also Tang Man Sit , at pages 521-522, per Lord Nicholls.

.....
(v) In the case of cumulative remedies, against the same or several parties, a claimant is not obliged to choose between them; he can pursue them against all relevant parties to judgment, and by enforcement, until the judgment has been fully satisfied; United Australia , page 30, per Lord Atkin, and Tang Man Sit, at page 522, per Lord Nicholls. It is only when full satisfaction has been received that the claimant will be barred; United Australia , page 21, per Viscount Simon.”

42. The issue that arises for consideration in this case is whether by obtaining a Tomlin Order against the principal debtor, PME Harrow, the Respondents are debarred from pursuing the Company as guarantor. This will depend upon whether suing the principal for the principal debt and suing a guarantor on his guarantee are alternative liabilities. In my judgment, they are not. This is not a case like that of *Morel Brothers & Co. Ltd v Earl of Westmorland*

[1903] 1 KB 64 referred to in the *Twinsectra* case at paragraph 72(i), where judgment against one party as a principal to a contract precludes suing another person as principal on the basis that the first party was, in fact, an agent. Where, as here, security is taken to secure any liability, the remedies that a creditor has against the principal debtor and the surety are not alternative remedies; they are cumulative remedies so that if the creditor obtains judgment against one party, he is not precluded from pursuing the other party. No authority was cited to me by Mr Judd to show otherwise.

43. In my judgment, this argument also fails.

Conclusion

44. For all the above reasons, in my judgment the debt claimed in the Statutory Demand is not disputed on substantial grounds and I, therefore, dismiss the Company's application.