



Neutral Citation Number: [2023] EWHC 2927 (Ch)

Appeal No: CH-2023-000162

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**CHANCERY DIVISION**

Case No 42 of 2021

**ON APPEAL FROM THE COUNTY COURT AT CROYDON**

Royal Courts of Justice  
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 17 November 2023

**Before :**

**GRAEME MCPHERSON KC**  
**Sitting as a Deputy High Court Judge**

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**Between :**

**CHARLES ROBERTS**

**Appellant**

**- and -**

**(1) KSEYE CAPITAL NO.1 LIMITED**

**(2) KSEYE CAPITAL NO.2 LIMITED**

**Respondents**

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MR DUNCAN MACPHERSON (instructed by Treon Law) for the Appellant  
MS BRIDGET WILLIAMSON (instructed by Anthony Gold LLP) for the Respondent

Hearing dates: 7 November 2023

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## **APPROVED JUDGMENT**

This judgment was handed down remotely at 10.00am on Friday 17 November 2023 by circulation to the parties or their representatives by email and release to the National Archives.

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**Mr Graeme McPherson KC:**

**(A) Introduction**

- 1) In September 2017 the Respondents (*'Kseye'*) provided bridging finance in the sum of £2,083,000 (*'the Loan Facility'*) to GBQ Investments Limited (*'GBQ'*). The purpose of the Loan Facility was to assist GBQ with the funding of the purchase of a number of properties. Kseye took various securities from GBQ and certain third parties for the sums drawn down by GBQ under the Loan Facility.
- 2) GBQ did not repay the sum outstanding under the Loan Facility when it fell due on 7 March 2018. Although a substantial repayment was subsequently made in April 2018, a significant balance continued to be due and owing from GBQ.
- 3) GBQ remained in default under the Loan Facility. In August 2019 the Appellant (*'Mr Roberts'*) agreed with Kseye to provide a guarantee to Kseye in respect of GBQ's obligations under the Loan Facility. The guarantee that Mr Roberts provided was contained in
  - a) A Deed of Guarantee dated 16 August 2019 (*'the Guarantee'*), and
  - b) A side letter dated 1 August 2019 (*'the Side Letter'*). The Side Letter recorded (amongst other things)

*'It has been agreed that ...  
I [Mr Roberts'] liability under the Guarantee shall be limited to £1,000,000 plus interest from demand and costs of enforcement'.*
- 4) The Recitals to the Guarantee recorded
  - a) That Kseye had agreed to provide the Loan Facility to GBQ, and
  - b) That Mr Roberts had agreed to enter into the Guarantee *'for the purpose of providing credit support to [Kseye] for [GBQ's] obligations under the [Loan Facility]'.*
- 5) Clause 2 of the Guarantee (titled *'Guarantee and Indemnity'*) then recorded

*'2.1 In consideration of [Kseye] entering into the [Loan Facility] [Mr Roberts] guarantees to [Kseye], whenever [GBQ] does not pay any of the Guaranteed Obligations when due, to pay on demand the Guaranteed Obligations.'*

2.2 *If the Guaranteed Obligations are not recoverable from [GBQ] by reason of illegality, incapacity, lack or exceeding of powers, ineffectiveness of execution or any other reason, [Mr Roberts] shall remain liable under this guarantee for the Guaranteed Obligations as if [Mr Roberts] were a principal debtor.*

2.3 *[Mr Roberts] as principal obligor and as a separate and independent obligation and liability from [Mr Robert's] obligations and liabilities under clause 2.1 agrees to indemnify and keep indemnified [Kseye] in full and on demand from and against all and any losses, costs, claims, liabilities, damages, demands and expenses suffered or incurred by [Kseye] arising out of or in connection with any failure of [GBQ] to perform or discharge any of its obligations or liabilities in respect of the Guaranteed Obligations.*

2.4 *This guarantee shall not be discharged or affected by any failure of or defect or informality in the [Loan Facility] or by any legal limitation, disability or incapacity or lack of any borrowing powers of [GBQ] or lack of any authority of any person appearing to be acting for [GBQ] in connection with the [Loan Facility].'*

'Guaranteed Obligations' were defined in the Guarantee as meaning

*'all present and future payment obligations and liabilities of [GBQ] due, owing or incurred under the [Loan Facility] to [Kseye] (including without limitation under any amendment, supplement or restatement of the [Loan Facility] or in relation to any new or increased advances or utilisations).'*

6) Clause 17 of the Guarantee (titled '**Notices**') recorded:

*'17.1 Each notice, request, demand or other communication given under or in connection with this guarantee shall be in writing, delivered personally or sent by pre-paid first class letter, fax or email and sent*

*17.1.1 to [Mr Roberts] at*

*17.1.1.1 [The Specified Address]*

*17.1.1.2 Email: [INTENTIONALLY BLANK]*

...

*17.2 Any notice or other communication shall be deemed to have been received:*

...

*17.2.3 if posted, on the second Business Day after the day it was sent by pre-paid first class post.'*

7) On 6 November 2020 GBQ entered into administration. No further repayments were made to Kseye under the Loan Facility.

- 8) On 19 March 2021 Kseye served (by substituted service) a statutory demand on Mr Roberts and on 9 September 2021 Kseye served (also by substituted service) a bankruptcy petition on Mr Roberts (*'the Petition'*). Mr Roberts responded to the Petition by a Notice of Opposition dated 22 September 2021 supported by a witness statement dated 20 October 2021. Together those documents set out a number of bases which, Mr Roberts contended, demonstrated that the Petition Debt was genuinely disputed by him on substantial grounds.
- 9) Kseye served evidence in response from Nisha Rayvadera (*'Ms Rayvadera'*), a solicitor employed by the Kseye Group. Kseye denied that Mr Roberts had any substantial grounds for disputing the Petition Debt.
- 10) On about 22 July 2022 Mr Roberts served
- a) A Further Notice of Opposition, and
  - b) A second witness statement.
- Those documents identified additional bases which Mr Roberts contended demonstrated that the Petition Debt was genuinely disputed on substantial grounds.
- 11) A hearing to determine whether there were in fact any substantial grounds for disputing the Petition Debt was listed to take place on 28 July 2022 before District Judge Coonan in the Croydon County Court. By the time of the hearing it was clear from the witness evidence that one of the bases on which Mr Roberts contended that the Petition was genuinely disputed on substantial grounds was that
- a) The Petition Debt was said by Kseye to be based on his liability under the Guarantee
  - b) Liability under Clause 2.1 of the Guarantee was not triggered unless and until a demand for payment had been validly made of him under the Guarantee
  - c) Clause 17 of the Guarantee required any such demand to be made in a particular way (for present purposes, to be sent to him by prepaid first-class post at the Specified Address)
  - d) Kseye had not sent any demand to him under the Guarantee, alternatively had not sent any demand to him under the Guarantee in a manner that complied with Clause 17 of the Guarantee
  - e) No liability had thus arisen under Clause 2.1 of the Guarantee as at the date of the Petition.

- 12) In this Judgment I refer to the issue that I have summarised in the previous paragraph as *'the Demand Case'*. In reality the Demand Case at all times comprised two elements:
- a) Was a demand under the Guarantee sent at all to Mr Roberts prior to the date of the Petition?
  - b) If so, was that demand sent in accordance with Clause 17 of the Guarantee i.e. by prepaid first class post to the Specified Address?
- 13) Although the District Judge heard submissions from both parties on 28 July 2022 as to whether there were substantial grounds for genuinely disputing the Petition Debt (including submissions on the Demand Case), the hearing was not completed. Instead, the District Judge adjourned the hearing part-heard so as to permit Kseye to amend the Petition in the light of an objection (irrelevant for present purposes) taken to the content of the Petition by Mr Roberts. An amended petition (*'the Amended Petition'*) was then served by Kseye on 3 August 2022.
- 14) Mr Roberts served a third witness statement dated 2 August 2022 in which (amongst other things) he continued to object to the form of the Amended Petition. On 31 August 2022 Mr Roberts served a Third Notice of Opposition to the Amended Petition. Paragraph 2(a)(ii) of that Third Notice of Opposition expressly pleaded the Demand Case as a ground on which Mr Roberts opposed the Amended Petition in the following terms
- 'Even if the Guarantee provides security for the Loan, my liability thereunder has not been triggered as:*
- ... Even if [Kseye] gave notice to GBQ, which is denied, they failed to serve me with a demand under the Guarantee as required by clause 2.1 of the Guarantee'.*
- 15) The parties continued to serve evidence supporting and opposing the Amended Petition. Kseye served two further witness statement from Ms Rayvadera and Mr Roberts served four further witness statements. In those witness statements Mr Roberts
- a) Maintained his objections to the Amended Petition
  - b) Maintained his position that the Petition Debt was genuinely disputed on substantial grounds. The Demand Case remained live in that regard
  - c) Maintained that Kseye had unreasonably refused offers of security made by him.

16) The 28 July 2022 hearing was finally concluded at a further hearing before the District Judge on 30 May 2023. By that time Mr Roberts no longer maintained that Kseye had unreasonably refused offers of security made by him and (it would appear) was also no longer pressing his objections to the content of the Amended Petition. The central question at the restored hearing was thus whether

- a) (As Kseye contended) a bankruptcy order should be made against Mr Roberts on the Amended Petition, or
- b) (As Mr Roberts contended) the Amended Petition should be dismissed on all or any of the various grounds on which he relied in his Notices of Opposition and witness evidence as demonstrating that the Petition Debt was genuinely disputed on substantial grounds.

17) At the 30 May 2023 hearing the District Judge

- a) Reminded herself of the submissions that had previously been made on 28 July 2022 by the parties (including on the Demand Case)
- b) Allowed newly-instructed Counsel acting for Mr Roberts (Mr Macpherson, who appeared for Mr Roberts on this appeal) to make further submissions on two matters that had already been canvassed at the 28 July 2022 hearing. One of those matters was the Demand Case
- c) Heard submissions on those matters that had arisen since the 28 July 2022 hearing.

18) By Order dated 7 July 2023 the District Judge ordered that Mr Roberts be adjudged bankrupt (*'the Order'*). The Judge's reasons for the Order are to be found in her judgment dated 6 July 2023 (*'the Judgment'*). I consider the Judgment below but for the moment I simply record

- a) That (for the reasons set out in paragraphs 19 to 23 of the Judgment) the District Judge concluded that the Demand Case did not justify dismissing the Amended Petition, and
- b) That in the final paragraph of the Judgment the District Judge stated

*'In summary [Mr Roberts] has failed to satisfy me that he has any genuine dispute on substantial grounds to the matters pleaded in the [Amended Petition] and has failed to satisfy me that the [Amended Petition] should otherwise be dismissed in order that there be cross-examination at trial'.*

**(B) The scope of this appeal**

19) Mr Roberts now appeals against the Order. Permission was granted for him to do so (on three grounds) by Order of Edwin Johnson J dated 9 August 2023. Each of those grounds concerns the Demand Case:

- a) Ground 1 asserts that the District Judge applied the wrong test when determining the Demand Case. In particular, it is said that instead of asking herself whether there was a genuine dispute on substantial grounds whether (in light of the Demand Case) the Petition Debt was due from Mr Roberts as at the date of the Petition, the District Judge had wrongly applied a ‘balance of probabilities’ test to determine the Demand Case.
- b) Grounds 2 and 3 assert that, if, contrary to Ground 1, the District Judge had in fact applied the correct test,
  - i) She had made a number of erroneous and unjustifiable factual findings,
  - ii) She had failed to apply the relevant test correctly, and
  - iii) Had she applied the test correctly she ought to have found that there was a genuine dispute on substantial grounds as to whether a demand under the Guarantee had been sent to Mr Roberts in accordance with Clause 17 of the Guarantee prior to the date of the Petition.

20) On 6 September 2023 Kseye filed a Respondent’s Notice. In that Respondent’s Notice Kseye asked this Court to uphold the Order on different grounds, namely

- a) That by Clauses 2.2 and 2.3 of the Guarantee Mr Roberts had assumed liability for GBQ’s debts as principal debtor/obligor
- b) That it is ‘*well established that in the case of primary obligations expressed to be payable on demand the debt arises immediately and is not contingent upon the making of a demand*’
- c) That accordingly a bankruptcy order could properly have been made on the Amended Petition by the District Judge even if no demand had in fact been sent to Mr Roberts (whether in accordance with Clause 17 of the Guarantee or at all) prior to the date of the Petition and so even if Mr Roberts were to succeed on his appeal against the District Judge’s conclusions on the Demand Case, the Order should be upheld.

I refer to that as ‘*the Primary Obligor Case*’.

21) The Primary Obligor Case was not one that Kseye had sought to advance before the District Judge. It was thus a new point, taken for the first time on this appeal. In his skeleton arguments filed for the appeal Mr Macpherson objected on behalf of Mr Roberts to Kseye advancing the Primary Obligor Case as a new argument on appeal.

22) Additionally

- a) Under CPR Part 2.13(2)(b) & 5(b) Kseye had had 14 days from the date on which it was served with notice that permission to appeal against the Order had been granted to file any Respondent's Notice
- b) Kseye's Respondent's Notice was not filed within that 14-day period. Kseye accordingly applied in its Respondent's Notice
  - i) For an extension of time for filing its Respondent's Notice, and
  - ii) For relief from sanction
- c) In his skeleton arguments for the appeal Mr Macpherson did not oppose either application.

23) Shortly before the hearing of this appeal

- a) Mr Roberts filed an application for permission to amend his Grounds of Appeal to add two further Grounds. Those further Grounds were said to arise in response to the Primary Obligor Case set out in the Respondent's Notice
- b) Ms Williamson served a Further Updated Skeleton Argument on behalf of Kseye in which she advanced an argument to the effect that, even if Mr Roberts were to succeed on his appeal on the Demand Case and Kseye were to fail on the Primary Obligor Case, this Court
  - i) Would still have a discretion to refuse to set aside the Order, and
  - ii) Should exercise that discretion so as to keep the Order in place.I refer to that as '*the Discretion Case*'.

24) At the start of the hearing before me I was told that following discussions between the parties

- a) Kseye would no longer be relying on Clause 2.3 of the Guarantee for the purpose of its Respondent's Notice and would be relying solely on Clause 2.2 of the Guarantee for the purpose of the Primary Obligor Case
- b) Mr Roberts
  - i) Was content for Kseye to be permitted to pursue the Primary Obligor Case on this appeal on that narrowed basis, despite the Primary Obligor Case not having been raised by Kseye before the District Judge
  - ii) No longer sought to amend his Grounds of Appeal to add either of the two further Grounds of Appeal.

25) I was content to allow the appeal to proceed on that basis and I commend the parties for having reached the sensible agreement summarised in the previous paragraph. Their actions resulted in a saving of costs and Court time and enabled the appeal to focus on the three substantive issues in the appeal, namely the Demand Case, the Primary Obligor Case and the Discretion Case. I therefore now turn to consider each of those matters.

### **(C) The Demand Case**

26) It was common ground between the parties (both before the District Judge and on this appeal) that, unless and until a demand was validly made of Mr Roberts under the Guarantee, no debt became due from Mr Roberts under Clause 2.1 of the Guarantee. That was because the making of a demand in accordance with Clause 17 of the Guarantee was a pre-condition to liability under Clause 2.1 of the Guarantee.

#### *i) Materials relevant to the Demand Case that were before the District Judge*

27) The Petition asserted

- a) (at paragraph 9(a)) that Kseye had demanded repayment from Mr Roberts, and
- b) (at paragraph 9(b)) that Kseye had sent a demand letter to Mr Roberts on 22 August 2018 (sic) requiring him 'to pay the outstanding liability of [GBQ] pursuant to the guarantee'.

28) Mr Roberts

- a) Did not raise the Demand Case in his Notice of Opposition, but
- b) Did take issue with the assertion made in paragraph 9(b) of the Petition at paragraph 40(d) of his first witness statement in the following terms:

*‘... no letter of demand was sent to me as alleged in paragraph 9(b) of the Petition. If such letter was sent to me, it was not served in accordance with the notice provisions of clause 17 of the Guarantee to my [Specified Address]’.*

29) Kseye responded to that evidence (at paragraph 21 of Ms Rayvadera’s first witness statement) in the following terms:

*‘As to paragraph 40(d), I exhibit a copy of the demand letter sent to Mr Roberts by [Kseye’s] instructing solicitors [**Brecher**] dated 5 February 2020.’*

30) The Brecher letter dated 5 February 2020 letter exhibited to Ms Rayvadera’s first statement (*‘the 5 February 2020 Demand’*) was indeed a demand for payment by Mr Roberts under the Guarantee. I note the following features of the 5 February 2020 Demand:

- a) It was on Brecher’s headed paper, bore a solicitor’s reference and was signed on behalf of Brecher by an individual who gave a Brecher email address and telephone number
- b) It was dated 5 February 2020
- c) It was addressed to Mr Roberts at the Specified Address
- d) Immediately below the Specified Address it recorded *‘By first class post’*
- e) At its foot it recorded

*‘cc: Kiran Phull, K&K Solicitors  
By email: Kiran.phull@kandksolicitors.co.uk’.*

I was told by Mr Macpherson that K&K Solicitors were at that time acting for GBQ

- f) It stated that it enclosed a copy of the Guarantee.

31) Mr Roberts then responded to paragraph 21 of Ms Rayvadera’s first witness statement by paragraph 39 of his second witness statement. He said this:

*‘As to paragraph 21, I confirm that I never received the [5 February 2020 Demand]. The burden is on [Kseye] to prove it was sent in accordance with the Guarantee’.*  
And as I have set out above, paragraph 2(a)(ii) of the Third Notice of Opposition contained a denial in similar terms.

32) Ms Rayvadera responded by her second witness statement. At paragraph 7 she stated

*'I refer to paragraph 2(a)(ii) of the [Third] Notice of Opposition ... it is incorrect that [Kseye] failed to make demand upon Mr Roberts himself. [Brecher] sent a letter of demand dated 5 February 2020 which I specifically referred to at paragraph 21 of my first witness statement and exhibited thereto ... It is not clear why Mr Roberts is making the same incorrect point again'.*

ii) The District Judge's consideration of the Demand Case: the test applied by the District Judge

33) The Demand Case was a live issue before the District Judge at both the 28 July 2022 and 30 May 2023 hearings. As the Judgment makes clear, the District Judge considered the materials that I have summarised above before concluding that the Demand Case did not justify the dismissal of the Amended Petition.

34) It was common ground between the parties (both before the District Judge and on this appeal)

- a) That the correct test to be applied when considering whether a matter raised by the debtor justifies the dismissal of a bankruptcy petition is whether it raises a genuine dispute on substantial grounds. That test is analogous to the test for summary judgment under CPR Part 24: *Markham v Karsten* [2007] EWHC 1509 (Ch) per Briggs J at paragraphs 44-45 – does the debtor have a realistic prospect of success on the issue ?
- b) The District Judge ought to have determined the Demand Case by reference to that test.

35) On behalf of Mr Roberts Mr Macpherson submitted that the District Judge did not apply that test, and that instead of asking herself whether she was satisfied that the Demand Case raised a genuine dispute on substantial grounds, she wrongly applied a (higher) 'balance of probabilities' test to determine the Demand Case.

36) It is correct that in the relevant section of the Judgment (paragraphs 19 to 23) the District Judge makes reference to the 'balance of probabilities' on a number of occasions. In particular, in paragraph 23 of the Judgment (with emphasis added)

- a) The District Judge recorded '*I must ask myself whether on the available evidence I can reasonably and properly infer on the balance of probabilities that the notice was indeed sent by Brechers by first class post. If I am satisfied on the balance of probabilities then no triable issue has been raised'*

- b) After summarising her assessment of the materials before her, she concluded ‘*I am satisfied on the balance of probabilities that the [5 February 2020 Demand] was served by prepaid first class post by Brechers on [Mr Roberts] on 5 February 2020*’.

37) In response Ms Williamson for Kseye invited me to look beyond those discrete paragraphs and to have regard to the Judgment as a whole. When that is done, she submitted,

- a) It is clear that despite the references to ‘balance of probabilities’ in paragraphs 19 to 23 of the Judgment, the District Judge was fully aware that the correct test that she was to apply was whether any of the issues argued by Mr Roberts raised a genuine dispute on substantial grounds, and
- b) It is to be inferred that, despite the erroneous references to ‘balance of probabilities’ in the Judgment, the District Judge did in fact apply the correct test when determining the Demand Case. To that end Ms Williamson drew attention to the well-known passage from the speech of Lord Hoffman in *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372F-H:

*‘The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the district judge. These reasons should be read on the assumption that, unless he has demonstrated to the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly so when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by narrow textual analysis which enables them to claim that he misdirected himself.’*

38) My attention was also drawn to the fact that, in the section of the Judgment addressing the Demand Case, the District Judge also made references (albeit in short form) which were consistent with her having been aware of the correct test by which the Demand Case was to be determined and with her having applied that correct test. In particular (with emphasis added)

- a) At the conclusion of her summary of the submissions made on behalf of Mr Roberts, the District Judge expressly recorded

*‘Mr Macpherson asks the court to infer that the evidence of Ms Rayvadera is unreliable and therefore of sufficiently low weight to raise a triable issue. In summary he submitted that [Mr Roberts] had shown a real prospect in these proceedings that after further disclosure and cross-examination at a trial, on the balance of probabilities the demand letter was not sent to the debtor in accordance with the provisions of the guarantee’*

- b) At paragraph 23 of the Judgment the District Judge again made reference to the need for her to consider whether a *‘triable issue’* was raised by the Demand Case.

39) It is abundantly clear from the remainder of the Judgment that the District Judge was aware of the test to be applied by her when determining the issues raised by Mr Roberts in opposition to the Amended Petition, i.e. whether the relevant issue raised a genuine dispute on substantial grounds:

- a) In the introductory section of the Judgment the Judge made express reference to what she described as the *‘quite correct’* submission that had been made on behalf of Mr Roberts at the 28 July 2022 by his then counsel as she had *‘dealt with each point of dispute’* that

*‘it is not for the court to make findings but rather to determine whether [Mr Roberts] has raised issues which are genuinely disputed on substantial grounds. If so, the court should dismiss the Petition for the issue to be determined at trial’*

- b) The Judge also expressly recorded at paragraph 9 of that introductory section of the Judgment that it was Mr Roberts’ case

i) That if there was a need for cross-examination on an issue, that was a good indication that there is a substantial dispute, and

ii) That issues raised by him – including on the Demand Case, as the Judge recorded in paragraph 21 of the Judgment – did indeed require cross-examination

- c) When addressing the various other issues raised by Mr Roberts in response to the Amended Petition the Judge repeatedly asked herself in the Judgment

i) Whether such issues raised *‘triable issues’*, and

ii) Whether such issues amounted to genuine disputes on substantial grounds:

see for example paragraphs 12, 14, 15, 16, 17 and 18 (addressing what was described as the ‘Last Resort’ case), paragraphs 25 and 26 (addressing what was described as the ‘Service of a Demand on GBQ’ case, paragraph 28 (addressing a case argued by Mr Roberts as to whether Guarantee covered the Loan Facility), paragraph 31 (addressing a case argued by Mr Roberts as to whether Kseye was entitled to compound interest as it had under the Loan Facility) and paragraphs 33 and 35 (addressing a case argued by Mr Roberts as to whether his liability under the Guarantee was conditional on the sale of a particular property being achieved)

d) The District Judge concluded the Judgment with the following words (at paragraph 36)

*‘In summary [Mr Roberts] has failed to satisfy me that he has any genuine dispute on substantial grounds to the matters pleaded in the [Amended Petition] and has failed to satisfy me that the [Amended Petition] should otherwise be dismissed in order that there be cross-examination at trial’.*

40) When one reads the Judgment as a whole it is in my view plain that, although the District Judge erroneously made reference to the ‘balance of probabilities’ in that section of her Judgment addressing the Demand Case, she was fully aware that the correct test to be applied when determining each of the cases advanced by Mr Roberts in response to the Petition was whether each or any of those cases amounted to a genuine dispute on substantial grounds. There is nothing in the Judgment to suggest that the District Judge was of the view that the Demand Case was to be determined by reference to a different test to that used to determine the other cases being advanced by Mr Roberts. In my view it is inherently implausible that, having set out the correct test in the introductory paragraphs of her Judgment and at multiple points thereafter, and having applied that correct test when determining each of the other cases advanced by Mr Roberts (both before and after she addressed the Demand Case in the Judgment), the District Judge applied a wholly different test to determine the Demand Case. That possibility is so remote that in my view it can be readily dismissed. The observations of Lord Hoffman in Piglowska are apt in this case.

41) I therefore dismiss Ground 1 of the Grounds of Appeal.

*iii) The District Judge's consideration of the Demand Case: the challenge to her conclusions*

42) By Grounds 2 and 3 Mr Roberts challenges the correctness of the District Judge's conclusion that the Demand Case did not amount to a genuine dispute on substantial grounds. In doing so, he challenges

- a) Certain primary findings of fact said to have been made by the District Judge, and
- b) The District Judge's evaluation of her findings of primary fact.

43) The principles to be applied by an appellate court when considering challenges to findings of fact are well known: see for example

- a) As regards challenges to findings of primary fact, *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577 per Clarke LJ at paragraphs 15-16
- b) As regards challenges to an evaluation of findings of primary fact, *Re Sprintroom* [2019] EWCA Civ 932 at paragraph 76.

44) I turn first to the five challenges made in Ground 2 of the Grounds of Appeal to the findings of primary fact said to have been made by the District Judge. I accept that this is not a case where it can be said that the District Judge had any real advantage over me for the purpose of making findings of primary fact; her findings were made on the basis of the same documents as were before me. I therefore bear that in mind when considering the weight to be attached to the findings made by the District Judge

45) First it is said that the District Judge had erroneously had regard to the business model of Kseye and the involvement of Brecher when considering the Demand Case. That is not a point that materially assists Mr Roberts on this appeal. While I agree that such matters are likely of marginal relevance to the Demand Case and to questions of whether the 5 February 2020 Demand was sent, whether at all or in accordance with Clause 17 of the Guarantee, there was nothing objectionable in the District Judge

- a) Making the findings that she did in relation to such matters, or
- b) Setting out such matters as part of the factual background to the preparation and alleged service of the 5 February 2020 Demand, or
- c) Having regard to such matters as part of her consideration of the Demand Case.

46) I therefore reject Ground 2(a) of the Grounds of Appeal.

47) Secondly it is said that the District Judge wrongly found as fact that Ms Rayvadera had stated in her witness evidence that the 5 February 2020 Demand had been sent by prepaid first-class post by Brecher. In that regard Mr Macpherson drew attention to paragraph 22 of the Judgment in which the District Judge said this (with emphasis added)

*‘Mr Macpherson took issue with the weight I should attach to [Kseye’s] evidence before the Court in support of their contention that they had served the demand notice on the debtor through their instructing solicitors Brechers. He submitted that the evidence of service was “virtually nil”. He pointed out that Ms Rayvadera had failed to comply with CPR32PD18.2(1) by failing to identify the source of her information that the Demand had been sent by prepaid first-class post by the solicitors’.*

48) If the District Judge did in fact make a finding that Ms Rayvadera’s evidence positively asserted that the 5 February 2020 Demand had been sent by first class post, then that was incorrect. As I have set out above, Ms Rayvadera’s evidence

- a) Did positively aver that the 5 February 2020 Demand had been sent by Brecher, but
- b) Did not positively assert that the 5 February 2020 Demand had been sent by prepaid first-class post.

The only evidence before the District Judge as to whether the 5 February 2020 Demand had been sent by prepaid first-class post was the reference to ***‘By first class post’*** on the face of 5 February 2020 Demand itself, although as Ms Williamson submitted, the denials in Ms Rayvadera’s evidence that Mr Roberts had raised any matter in the Demand Case that amounted to a genuine dispute on substantial grounds were arguably pregnant with a positive assertion that the 5 February 2020 Demand had been validly served in accordance with Clause 17 of the Guarantee.

49) However, careful analysis of the Judgment shows that the District Judge did not in fact make any finding of fact to the effect asserted by Mr Roberts. The passage in paragraph 22 of the Judgment on which he relies does not record a finding of fact made by the District Judge to the effect that Ms Rayvadera had given positive evidence that the 5 February 2020 Demand had been sent by Brecher by first-class post to the Specified Address. Instead, that passage records the District Judge’s understanding (albeit Mr Macpherson explained, a misunderstanding) of a submission made on Mr Roberts’ behalf at the 30 May 2023 hearing as to the weight to be given to Ms Rayvadera’s evidence given that (as was correctly asserted by Mr Macpherson) the evidence that she in fact gave as to the preparation and

sending of the 5 February 2020 Demand was hearsay given that she had no first-hand knowledge of the sending of the 5 February 2020 Demand.

50) That conclusion is reinforced when the section of the Judgment addressing the Demand Case is considered as a whole:

- a) Elsewhere in paragraph 22 of the Judgment the District Judge records Mr Macpherson's submissions
  - i) that '*there was no evidence that the demand exhibited to Ms Rayvadera's witness statement had been sent by pre-paid first-class post*',
  - ii) that the reference to '*first class post*' in the 5 February 2020 Demand itself was no more than a statement of intent or expectation by the author of the letter that it would be sent by prepaid first-class post, and
  - iii) that without evidence as to how the 5 February 2020 was in fact posted, there remained a triable issue whether the 5 February 2020 '*if sent at all, was sent by first-class post*'.

The District Judge was thus well aware that there was no positive evidence from Kseye, other than the words appearing on the face of the 5 February 2020 Demand, that the 5 February 2020 Demand had been sent by first-class post

- b) The reasons why the District Judge reached her conclusion that the Demand Case did not entitle Mr Roberts to have the Amended Petition dismissed are set out in paragraph 23 of the Judgment. Nowhere in that paragraph does the District Judge make any reference to there having been evidence from Ms Rayvadera in the terms now relied on by Mr Roberts for the purpose of Ground 2(b) of the Grounds of Appeal. Had the District Judge reached her conclusions on the basis of a factual finding that there was evidence from Ms Rayvadera that the 5 February 2020 Demand had been sent by first-class post, she would doubtless have said so in that paragraph rather than analysing whether, in light of the submissions made on Mr Roberts' behalf as to the '*sloppiness*' of Brecher (which she rejected), she should be concerned that, despite the words appearing on the face of 5 February 2020 Demand, the 5 February 2020 Demand might not in fact have been sent by Brecher to Mr Roberts, whether at the Specified Address, by prepaid first-class post or all. That she did not in my view very substantially undermines this Ground of Appeal.

51) I therefore also reject Ground 2(b) of the Grounds of Appeal.

52) Thirdly Mr Roberts says that the District Judge erred in finding that, if the matter was to proceed to trial, there would be further evidence before the court relating to service of the 5 February 2020 Demand which would '*rectify the hearsay position*'. While the District Judge did make such a finding in the Judgment, in my view Mr Roberts seeks to read too much into the relevant sentence of the Judgment. On his behalf much had been made before the District Judge of the fact

- a) That it was Ms Rayvadera who introduced the 5 February 2020 Demand into evidence and who gave evidence that the 5 February 2020 Demand had been sent to Mr Roberts, not the author of that letter, and
- b) That any evidence given by Ms Rayvadera (and to be taken from the face of the 5 February 202 Demand) was accordingly hearsay evidence.

The District Judge was entitled to conclude that, should the matter proceed to trial, evidence would likely be given (by another individual) that was not hearsay evidence. What the District Judge did not do – and what she would not have been entitled to do – was speculate as to what evidence that other individual might give.

53) In any event however there is nothing in the Judgment to suggest that it was on the basis that hypothetical 'better' non-hearsay evidence might exist that the District Judge reached the conclusions that she did on the Demand Case. I am satisfied that the District Judge reached her conclusion on the Demand Case on the basis of the evidence that was before her, not on the basis of what the evidential picture might look like should the matter proceed to trial.

54) I therefore reject Ground 2(c) of the Grounds of Appeal.

55) Grounds 2(d) and (e) fall more naturally to be addressed with Ground 3. I therefore address those Grounds together.

56) Ground 3 asserts that, on the basis of the material available to her, the District Judge ought to have concluded that there was a genuine dispute on substantial grounds as to whether the 5 February 2020 Demand had in fact been sent to Mr Roberts at the Specified Address

by prepaid first class post on or about that date. By that Ground 3 Mr Roberts therefore seeks to challenge the decision reached by the District Judge after evaluating the facts as she found them to be that the Demand Case did not amount to a genuine dispute on substantial grounds. To that end, Mr Macpherson identified the following areas where, he submitted, the District Judge had made errors of the type identified by the Court of Appeal in *Re Sprintroom*.

57) First, he submitted that the District Judge had failed to appreciate, or give sufficient weight to the fact, that

- a) Because Mr Roberts had put in issue whether the 5 February 2020 Demand had ever been sent, and
- b) Because the evidence of whether the 5 February 2020 Demand had been sent (and if it had, whether it had been sent to Mr Roberts at the Specified Address by prepaid first-class post) lay exclusively within the knowledge of Kseye (and its agents, Brecher) the burden lay on Kseye to show to the requisite standard that the Demand Case did not in fact give rise to a genuine issue on substantial ground.

58) While the District Judge did not expressly identify the burden of proof in such terms in the Judgment, it is clear from the Judgment that that was how she approached the Demand Case. There is nothing in the Judgment from which it can be inferred that the District Judge misunderstood where the burden of proof lay. She approached the Demand Case by asking whether, in the light of the evidence and materials that had been put before her by Kseye, she was satisfied that the Demand Case did not in fact raise a genuine issue on substantial ground.

59) Secondly, Mr Macpherson submitted that the quality of the evidence submitted by Kseye on the Demand Case was so poor – because

- a) It failed to identify the source of the information in Ms Rayvadera's witness statement that the 5 February 2020 Demand had been sent by Brecher, or even whether Mr Rayvadera's statement constituted first hand or multiple hearsay
- b) It failed to explain why Kseye had not served evidence from the person who had provided Ms Rayvadera with the information contained in her witness statements about the sending of the 5 February 2020 Demand

- c) It failed to positively confirm that the 5 February 2020 Demand had in fact been sent by prepaid first-class post to the Specified Address
- d) It lacked detail
  - i) About when the 5 February 2020 Demand was said to have been posted and by whom it was said to have been posted, and
  - ii) About Brecher’s practice in February 2020 for the posting of letters marked ‘*by first class post*’

- that the District Judge could not have been satisfied to the requisite standard that the 5 February 2020 Demand had in fact been sent by prepaid first-class post to the Specified Address. Instead, he submitted, the District Judge should have drawn inferences from the deficiencies of Kseye’s evidence so as to lead her to conclude that whether or not the 5 February 2020 Demand had been served was a triable issue and that the Demand Case did accordingly raise a genuine issue on substantial grounds.

- 60) The District Judge made express reference at paragraph 22 of her Judgment to Mr Roberts’ criticisms of the quality of Kseye’s evidence on the Demand Case. The District Judge acknowledged in paragraph 23 of the Judgment that the quality of the evidence submitted by Kseye on the Demand Case could have been ‘*better*’ – for example, she recorded
- a) That ‘*it would have been better for [Kseye] to have obtained evidence from Brechers about the posting of the [5 February 2020 Demand]*’, and
  - b) That the breaches of the hearsay rule inherent in Ms Rayvadera’s evidence, and the consequential deficiencies in Kseye’s evidence identified by Mr Macpherson, were ‘*important*’.

However, in my view she rightly recognised that that was not the end of the matter for the purpose of the Demand Case; the question was not whether ‘*better*’ evidence might have been available from Kseye, or might in the future be available if the matter proceeded to trial, but rather whether on the evidence and materials available to her she could be satisfied to the requisite standard that the Demand Case did not in fact give rise to a genuine issue on substantial grounds. That is the question that the District Judge went on to consider in the remainder of paragraph 23 of the Judgment before reaching the conclusion that she did.

- 61) In those circumstances there was no ‘defective evaluation’ of the evidence by the District Judge of the nature described in *Re Sprintroom* that might justify me interfering on appeal with the District Judge’s evaluation of the facts as she found them to be:

- a) There were evidence and materials before the District Judge (in the form of Ms Rayvadera's witness statements and the 5 February 2020 Demand itself) from which she could be satisfied to the requisite standard that the 5 February 2020 Demand
- i) Had been sent by Brecher to Mr Roberts
  - ii) Had been sent to the Specified Address
  - iii) Had been sent by prepaid first-class post
- b) The District Judge was entitled to conclude on the basis of that evidence and those materials that the Demand Case did not give rise to a genuine issue on substantial grounds which justified dismissing the Amended Petition.

62) I therefore reject the remainder of Ground 2 and Ground 3.

iv) Conclusion

63) Having rejected each of the Grounds of Appeal relied on by Mr Roberts it follows that the appeal is dismissed.

**(D) The Principal Obligor Case**

64) In light of my findings above it is not strictly necessary for me to deal with the narrowed Principal Obligor Case relied on by Kseye in the Respondent's Notice. However, because each of the parties helpfully addressed it in detail in their skeleton arguments and orally, for completeness I do so briefly.

65) It was common ground between the parties that, while Clause 2.1 of the Guarantee imposed a liability on Mr Roberts *qua* guarantor, Clause 2.2 of the Guarantee imposed a (further) liability on him '*as a principal debtor*'.

66) In her skeleton argument for Kseye Ms Williamson summarised Kseye's position on the Principal Obligor Case succinctly:

*'22. It is well established that an agreement by a debtor to pay on demand does not require the service of a demand before liability arises: MS Fashions Ltd v BCCI [1993] Ch 425 at 435H-436D and 447H-448A. See also Levin v Tannenbaum [2013] EWHC 4457 (Ch) at paragraphs 23 to 25.*

23. Since [Mr Roberts] had accepted liability as principal obligor, the above principal applies. Accordingly, the question whether a demand had been served upon him was not one that needed to be answered in order to determine whether there was a valid petition for the purposes of section 271 Insolvency Act 1986’.

67) In his skeleton argument Mr Macpherson’s opposed the Principal Obligor Case on two bases:

- a) Firstly, on the basis that no liability on the part of Mr Roberts *qua* primary debtor had been triggered under Clause 2.2 of the Guarantee because any irrecoverability of the Guaranteed Obligations from GBQ had not occurred as a result of any of the causes listed in Clause 2.2 of the Guarantee
- b) Secondly, he took issue with Ms Williamson’s unqualified submission that ‘*an agreement by a debt to pay on demand does not require the service of a demand before liability arises*’. His skeleton argument therefore implicitly challenged Kseye’s assertion that it was entitled to petition for Mr Roberts’ bankruptcy based on Clause 2.2 of the Guarantee even if no demand in the form of the 5 February 2020 Demand had in fact been made by Kseye.

68) The second of those matters ultimately became a non-issue during the course of the appeal:

- a) Mr Macpherson’s skeleton argument had helpfully set out detailed submissions on how the more recent authorities relevant to the issue of whether (and if so when) a demand was needed to trigger the liability of a primary debtor in a case such as this – in particular, *MS Fashions Ltd v BCCI* [1993] Ch 425 (both at first instance and in the Court of Appeal); *TS & S Global* [2007] EWHC 1401 (Ch); *Levin v Tannenbaum* [2013] EWHC 4457; and *Barclays Bank v Price* [2018] EWHC 2719 (Comm) - should be construed
- b) Properly construed, he submitted, those authorities should be read not as affirming the existence of an inviolable principle that an agreement by a guarantor *qua* primary obligor to pay on demand does not require the service of a demand before liability arises, but rather as affirming that whether a demand is required before liability arises

in such a case will always depend on how the instrument said to give rise to the liability is properly to be construed, applying the well-established rules for interpreting a contractual document

- c) During her oral submissions Ms Williamson accepted that whether a demand was or was not required as a pre-condition to liability was essentially a matter of construction of the relevant instrument, albeit that she continued to submit that the line of authority referred to above provided a strong indication that the mere presence of the words ‘*on demand*’ in an instrument would seldom be sufficient to require service of a demand before the liability of a guarantor *qua* primary debtor was triggered
- d) Having heard that clarification of Kseye’s position Mr Macpherson indicated that he no longer saw any need to make submissions on the second of the two matters on which he had previously relied to oppose the Principal Obligor Case. That was because he accepted on Mr Roberts’ behalf that, on a proper construction of Clause 2.2 of the Guarantee, it was not in fact necessary for a demand to have been served on Mr Roberts in this case in order for him to have become liable as a primary obligor under the Guarantee.

69) As a result, the only point of contention between the parties on the Principal Obligor Case was whether in fact Clause 2.2 of the Guarantee applied so as to trigger a liability on the part of Mr Roberts to Kseye as a primary debtor in an amount sufficient to justify the bankruptcy order. The answer to that question depended, the parties agreed, on

- a) Whether the Guaranteed Obligations had ceased to become recoverable from GBQ ‘*by reason of illegality, incapacity, lack or exceeding of powers, ineffectiveness of execution or any other reason*’, and in particular
- b) Whether insolvency of GBQ occurring after the date of the execution of the Loan Facility and after the date of the Guarantee fell within the scope of the words ‘*any other reason*’.

70) Before I address that question, I should deal with one preliminary matter. As I have said above, the Principal Debtor Obligor was not raised by Kseye before the District Judge when, it is common ground, it could have been so raised by Kseye. Had it been raised before the District Judge she would have been tasked at the 30 May 2023 hearing not with

determining the Principal Obligor Case *per se*, but rather with determining whether there the Principal Obligor Case gave rise to any genuine issue on substantial grounds for Mr Roberts to oppose the Amended Petition. Since I am effectively being asked to consider the Principal Obligor Case for the first time, it seems to me that that is the test that I should apply, and that is the test that I do apply.

71) Clause 2.2 of the Guarantee is in the following terms (with emphasis added for the reasons explained below)

*'If the Guaranteed Obligations are not recoverable from [GBQ] by reason of illegality, incapacity, lack or exceeding of powers, ineffectiveness of execution or any other reason, [Mr Roberts] shall remain liable under this guarantee for the Guaranteed Obligations as if [Mr Roberts] were a principal debtor.'*

72) Kseye's position is that the underlined words of Clause 2.2 of the Guarantee should be construed expansively. In essence it contends that

- a) If for any reason, the Guaranteed Obligations are not recoverable by Kseye from GBQ, Mr Roberts becomes liable under the Guarantee for the Guaranteed Obligations as if he were a principal debtor, and
- b) Insolvency of GBQ subsequent to execution of the Loan Facility and the drawing down of sums under the Loan Facility, resulting in the Guaranteed Obligations thereby becoming irrecoverable from GBQ, suffices to trigger Mr Roberts' liability under the Guarantee for the Guaranteed Obligations as if he were a principal debtor.

73) Mr Roberts takes issue with Kseye's interpretation of the underlined words. His position is that, applying the Eiusdem Generis principle – that if one '*can find that the things described by particular words have some common characteristic which constitutes them a genus, you ought to limit the general words that follow them to things of that genus*': Lambourn v McLellan [1903] 2 Ch 268 per Vaughan Williams LJ @ 275-276 – the words 'or any other reason' should be interpreted restrictively and only in a manner consistent with the words '*illegality, incapacity, lack or exceeding of powers, ineffectiveness of execution*' that precede them.

74) The justification for, and modern application of, the Eiusdem Generis principle has been considered in a number of relatively recent authorities. A number of those authorities are helpfully summarised in Lewison on The Interpretation of Contracts (7<sup>th</sup> ed) at 7.130-

7.142). For present purposes the key matters to be derived from those authorities are as follows:

- a) The task of a court when interpreting a provision in a contract, especially a commercial contract, is to determine objectively what the parties meant and intended by the language used in the document in the light of the factual situation that existed (often called the ‘factual matrix’) at the time that the contract was entered into by the parties. The fundamental principles to be applied in that regard have been confirmed in recent years by the Supreme Court on a number of occasions: Rainy Sky SA v Kookmin Bank [2011] UKSC 50, Arnold v Britton [2015] UKSC 36, Impact Funding Solutions Ltd v Barrington Support Services Ltd [2016] UKSC 57 and Wood v Capita Insurance Services Ltd [2017] UKSC 24
- b) The Eiusdem Generis principle remains a valuable aid to carrying out that construction exercise in an appropriate case
- c) The primary justification for the application of the Eiusdem Generis principle is the presumption against surplusage:

*‘The Court should not give one word in an interrelated, overlapping list of expressions a meaning that is so broad as to be inconsistent with adjoining words or that renders those words irrelevant’* Lend Lease Real Estate Investments Ltd v GPT Re Ltd [2006] NSWCA 207 at paragraph 31
- d) There is no agreed view on the face of the authorities as to whether or not there is a presumption for or against the application of the Eiusdem Generis principle. The likelihood is that there is no presumption either way
- e) The Eiusdem Generis principle can only have any application when the words that precede the ‘*general words*’ can properly be described as having some common characteristic that constitutes them a genus; if there is no common genus, the Eiusdem Generis principle can have no application and words such as ‘*any other cause*’ or ‘*any other reason*’ cannot be limited by the principle: Tillmanns & Co v SS Knutsford Ltd [1908] 2 KB 385; CFH Clearing Ltd v Merrill Lynch International [2019] EWHC 963 (Comm)

- f) Defining how to determine what will and will not constitute a genus has on occasion proved challenging to the Courts. Paragraph 7.143 of Lewison on the Interpretation of Contracts cites the following test used by McCardie J in SS Magnhild v McIntyre Brothers and Co [1920] 3 KB 32:

*‘... whether the specified things which precede the general words can be placed under some common category. By this [is meant] that the specified things must possess some common and dominant feature’.*

75) Mr Macpherson submitted

- a) That each of the identified bases of non-recoverability of Guaranteed Obligations identified in Clause 2.2 of the Guarantee by the words *‘illegality, incapacity, lack or exceeding of powers, ineffectiveness of execution’* share two common characteristics:
- i) First, each concerns a characteristic of or quality of GBQ
  - ii) Secondly, each relates to a state of affairs that existed as at the date of execution of the Loan Facility, i.e. a historic state of affairs pre-dating the Guarantee
- b) That those words comprise a genus such that the words *‘or any other reason’* should be construed as being limited to other reasons, sharing those same common characteristics, that made the Guaranteed Obligations irrecoverable from GBQ from the very outset of the Loan Facility
- c) That Clause 2.2 of the Guarantee is thus to be construed as a backwards-looking provision directed at characteristics of GBQ or states of affairs that existed at the date of execution of the Loan Facility, meaning that the addition of the words *‘or any other reason’* should be interpreted as triggering a liability on the part of Mr Roberts as a principal debtor only if the irrecoverability of the Guaranteed Obligations was the result of some other ‘characteristic’ of GBQ or state of affairs that existed as at the date of GBQ’s entry into the Loan Facility
- d) That since the insolvency of GBQ occurred only subsequent to GBQ’s entry into the Loan Facility (and was not a state of affairs or a characteristic of GBQ that existed at the date of GBQ’s entry into the Loan Facility), GBQ’s insolvency is not an event

- i) that fell within the scope of the ‘*any other reason*’ provision in Clause 2.2 of the Guarantee, or
- ii) that triggered a liability on the part of Mr Roberts under Clause 2.2 of the Guarantee as if he was a principal debtor in respect of the Guaranteed Obligations.

76) Despite the attractive way in which Mr Macpherson presented his submissions, I reject the suggestion that the words ‘*or any other reason*’ in Clause 2.2 of the Guarantee should be construed in the manner for which he contends:

- a) First, as I have said above, the task for the Court is to construe Clause 2.2 of the Guarantee using the well-established principles of construction to be found in the authorities so as to ascertain the mutual intention of the parties at the date when the Guarantee was entered into. While that of course requires analysis of the words in question, it also requires a consideration of the Guarantee as a whole and the factual matrix which existed at the time the Guarantee was entered into
- b) As at the date of the Guarantee
  - i) GBQ had already made a substantial repayment to Kseye under the Loan Facility without asserting that the Guaranteed Obligations were irrecoverable from it by reason of any characteristic or state of affairs that had existed as at the date of entry into the Loan Facility, and
  - ii) GBQ was already substantially in default under the Loan Facility, suggesting that its financial position and ability to repay the Guaranteed Obligations as at that date and in the future were (at best) uncertain
- c) In those circumstances, in the absence of clear words to such effect it would seem inherently unlikely that Kseye and Mr Roberts intended to include a provision in the Guarantee that would trigger a liability on the part of Mr Roberts as a primary debtor
  - i) Only in the event that at some point in the future it was established that a historic state of affairs, dependent on a characteristic of GBQ, existing at the date of GBQ’s entry into the Loan Facility made the Guaranteed Obligations irrecoverable from GBQ, and
  - ii) Not in the event that the Guaranteed Obligations become irrecoverable from GBQ because GBQ had become financially unable to meet those Guaranteed Obligations.

As Ms Williamson put it, a key element of the factual matrix against the background of which the Guarantee was entered into was Kseye's wish to ensure that, one way or another, it would be paid the Guaranteed Obligations despite GBQ already being in default under the Loan Facility

d) Secondly, while the words '*illegality, incapacity, lack or exceeding of powers, ineffectiveness of execution*' certainly can relate to a characteristic of GBQ and/or a state of affairs in existence at the date of execution of the Loan Facility, it does not appear to me that it can be said that the parties must have intended those words to only relate to the same:

i) While '*illegality, incapacity, lack or exceeding of powers*' can refer to a state of affairs existing as at the date of GBQ's entry into the Loan Facility, any of those states of affairs could equally come into existence after the date of the Loan Facility. If Mr Roberts' position was the correct one, irrecoverability because one of those states of affairs had come into existence at any time after the date of entry into the Loan Facility (whether before or after the date of the Guarantee) would not suffice to trigger liability of Mr Roberts as a principal debtor. I see no logical reason for interpreting the words of Clause 2.2 of the Guarantee as drawing that distinction

ii) During the course of his submissions Mr Macpherson sought to contrast Clause 2.2 of the Guarantee with Clause 3.2 of the Guarantee (under the heading '**Lender Protections**') which, he suggested, was a 'forward-looking' provision identifying events that might occur and states of affairs that might come into existence after the execution of the Loan Facility (or after the execution of the Guarantee) which the parties had agreed would not adversely affect Mr Roberts' liability under the Guarantee. However

(1) Clause 3.2.6 of the Guarantee identifies '*incapacity*' of GBQ as one such occurrence or event. That is a state of affairs listed in Clause 2.2 of the Guarantee

(2) Clause 3.2.7 of the Guarantee identifies '*any invalidity, illegality, unenforceability [or] irregularity ... of any actual or purported obligation of, or Security held from, GBQ ... in connection with the Guaranteed Obligations*' as further such occurrences. Once again, those are states of affairs listed in Clause 2.2 of the Guarantee

iii) So, if Mr Macpherson was correct in his submissions, the same words would have to be construed as being only backward-looking for the purpose of Clause 2.2 of the Guarantee and being only forward-looking for the purpose of Clause 3.2 of the Guarantee. Absent the clearest possible wording (which is not present in this case), it cannot be inferred that that was the mutual intention of the parties. Rather, the words in Clauses 2.2 and 3.2 are in my view each to be construed as being both backward looking and forward looking, describing events and states of affairs both before and after the date of the Guarantee

e) Thirdly (although I accept that this is a factor of limited importance) there is nothing in the remainder of the Guarantee or in the Side Letter to support the interpretation of Clause 2.2 of the Guarantee for which Mr Roberts contends. There is nothing in the Guarantee and Side Letter consistent with the parties having intended Mr Roberts' liability to Kseye to be dependent on why GBQ could not or would not meet its liabilities under the Loan Facility. The Guarantee and Side Letter are consistent with the parties having intended that Mr Roberts' liability both *qua* guarantor and *qua* primary obligor would exist, irrespective of the reason why Kseye was unable to recover the Guaranteed Obligations from GBQ.

77) It follows from the above that I reject Mr Macpherson's submission that the words '*illegality, incapacity, lack or exceeding of powers, ineffectiveness of execution*' constitute a genus of the type contended for by him. In my view those words do not have a sufficient common and dominant characteristic of the type contended for by Mr Roberts to justify

- a) Classifying them as a genus, or
- b) Applying the Eiusdem Generis principle to limit the ambit of the words '*or any other reason*'.

In my view Kseye's position is the correct one – the words '*or any other reason*' are expansive, such that if for any reason the Guaranteed Obligations became irrecoverable from GBQ (whether that reason resulted from a state of affairs that existed as at the date of the Loan Facility, from an event or state of affairs that came into existence after the date of the Loan Facility or from an event or state of affairs that came into existence subsequent to the date of the Guarantee) Mr Roberts' liability under the Guarantee as if he were a principal debtor would be triggered.

78) Accordingly, had I had to determine the Principal Obligor Case I would have determined it in favour of Kseye and would have concluded that the Principal Obligor Case did not give Mr Roberts any genuine interest on substantial grounds for opposing the Amended Petition.

**(E) The Discretion Case**

79) In light of my findings above it is unnecessary for me to determine the Discretion Case. Furthermore, in my view it is undesirable for me to set out any finalised view on how I might have decided the Discretion Case had I needed to do so. There are three principal reasons for that:

- a) First, although my attention was drawn to the Court of Appeal decision in *Owo-Samson v Barclays Bank plc* [2003] EWCA Civ 714 and the decision of Miles J *Dusuruth v Orca Finance UK Limited* [2023] EWHC 1050 (Ch), each of those authorities concerned the ambit and exercise of the court’s discretion when considering whether to annul a bankruptcy order pursuant to section 282 of the Insolvency Act 1986
- b) In such cases it is the wording of section 282 (*‘The Court may annul a bankruptcy order ...’* (emphasis added)) that provides the court with its discretion. However, section 282 is of no application here. This is an appeal brought pursuant to CPR Part 52, and I am far from satisfied on the material before me that
  - i) Had I concluded that the decision of the District Judge was wrong because she ought to have concluded
    - (1) That Mr Roberts had satisfied her that there were genuine issues on substantial grounds, and so
    - (2) That the Amended Petition should therefore be dismissed, and
  - ii) Had I then allowed the appeal (as compelled to do in such circumstances by CPR Part 52.21(3) – *‘The appeal court will allow an appeal where the decision of the lower could was ... (a) wrong’* (emphasis added))

I would nonetheless have had power under CPR Part 52.20 to keep the Order in place. I certainly would not have been prepared to conclude that I did have such a power without more detailed argument on the matter

- c) Secondly, the factual basis for the Discretion Case was that ‘*there is no evidence that [Mr Roberts] is able to meet his liabilities*’. But
- i) Had Mr Roberts succeeded before me, it would have been on the basis
    - (1) that Mr Roberts’ Demand Case had succeeded, meaning that it was yet to be determined that Mr Roberts had any liability to Kseye *qua* guarantor under the Guarantee, and
    - (2) that Kseye’s Principal Obligor Case had failed, meaning that it was yet to be determined that Mr Roberts had any liability to Kseye *qua* principal debtor under the Guarantee
  - ii) It would have followed that I could not be satisfied what ‘liabilities’ Mr Roberts in fact had to Kseye at the present time, and so
  - iii) I struggle to see how in such circumstances I could have been satisfied that Mr Roberts was unable to meet his liabilities
- d) Thirdly there was little argument or evidence before me as to whether Mr Roberts could in fact meet whatever liabilities might in fact be owed to Kseye. In such circumstances, even if I had accepted that I had a discretion to do so, I would have been reluctant to keep the Order in place.

**(F) Conclusion**

80) I dismiss the appeal. Had I been minded to allow the appeal on the Grounds set out in Mr Roberts’ Notice of Appeal I would in any event have refused to set aside the Order on the ground that, in the light of Clause 2.2 of the Guarantee, the Order could properly have been made on the Amended Petition despite the absence of any demand being made of Mr Roberts.