Neutral Citation Number: [2020] EWHC 658 (Comm)

Case No: FL-2019-000002

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**
**FINANCIAL LIST**

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

Date: 19 March 2020

**Before** :

**MR JUSTICE ANDREW BAKER**

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**Between :**

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| **UNITED TRUST BANK LIMITED** | **Claimant** |
| **- and -** | |
| **KONSTANTINOS DIAMANTOPOULOS** | **Defendant** |

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**Nicola Allsop** (instructed by **Brecher LLP**) for the **Claimant**
**Paul Clarke** (instructed directly) for the **Defendant**

Hearing date: 19 February 2020

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ANDREW BAKER

## Mr Justice Andrew Baker :

1. This Claim was issued by mistake in the Financial List, the intention having been to issue it in the general Queen's Bench Division list. An explanation of sorts for the mistake was given, but I confess I remain unclear how it occurred. Ms Allsop, who appeared for the claimant, could not gainsay my assumption that the claimant's solicitors must have exercised an option by checking a box, selecting from a pull-down menu or the like, but I cannot say I got to the bottom of what happened (and indeed further information provided by Ms Allsop after this judgment was circulated in draft indicates that my assumption may not be correct).

2. If the Claim requires a trial, therefore, the only question would be to which court or list it should be transferred, initially for case management, and whether there should first be a stay for mediation or other ADR effort. Though nominally listed before me for *inter alia* a first CCMC, little of the preparatory work required for such a hearing in the Financial List had been undertaken before the hearing and the matter was simply not ready for case management. However, and that in turn was because, the claimant says the Claim does not require a trial. The primary application listed for hearing was the claimant's application by Application Notice dated 15 November 2019 seeking summary judgment on the entire claim, alternatively the striking out of certain parts of the Defence that had been served.

3. I did not decline to hear that primary application on account of the mistake as to venue, since the parties were ready and the preparatory cost had been incurred. This is my judgment on it.

4. Mr Clarke, who appeared for the defendant on a direct instruction under the Bar's direct access scheme, proffered during the life of the application several revised versions of a draft Amended Defence. Ms Allsop accepted that there was no objection to (any of) the proposed amendments if the claimant was wrong to say there was no triable defence. So the proposed amendment of the Defence gives rise to no separate issue; and the summary judgment / strike-out application falls to be considered by reference to the final iteration of the draft Amended Defence as representing the best articulation that can be offered of any defence(s) that would be asserted at a trial.

5. In the event, for reasons it is not necessary to set out, that final articulation of the defence for trial struck through all the lines of defence that the claimant sought, in the alternative, to strike out, *viz.*

    i) a plea of economic duress (Defence, para 7);

    ii) a plea of breach of the claimant's duties as mortgagee in relation to realising value from its primary security (Defence, para 8); and

    iii) a plea purporting to reserve a right to plead a defence or counterclaim by reference to alleged refusals by the claimant to allow the defendant to remortgage properties of his so as to refinance his personal debts (Defence, para 9).

    In fairness to the defendant, I should add that in relation to Defence, para 8, Mr Clarke made clear that the plea was struck through as an alleged defence in view of a 'no set-

off' clause identified and relied on by Ms Allsop after the hearing (at the end of which I asked for further assistance in writing on that aspect and on the legal analysis of the defendant's primary line of defence that remains). Mr Clarke indicated that, subject to the defendant's ability to fund doing so, the defendant reserved the right to apply to add a counterclaim, or to bring a separate claim, seeking damages by reference to the matters that had been pleaded.

6. That simplifies and shortens this judgment.

7. The claimant sues to recover the sum due under a personal guarantee executed by the defendant as part of the package of security taken by the claimant to secure repayment by Albert Bridge Properties Ltd ("the Company") of the loan it took from the claimant to fund the development of a luxury newbuild home known as Havona House at 57 Pembridge Villas in Notting Hill, London ("the Property"). The claim is for £4,118,335.85 as of the date of the Particulars of Claim, plus contractual interest due up to the date of judgment. No issue was raised over the claimant's calculations.

8. The Company was the defendant's property development vehicle for the Notting Hill project. It borrowed from the claimant, originally, under a facility agreement dated 2 July 2015 for up to £10,967,000, secured by a first legal mortgage over the Property, a debenture and a personal guarantee from the defendant limited to £2,500,000. The defendant was not asked to and did not provide any collateral security in respect of his liability as guarantor. His original guarantee was executed dated 25 July 2015.

9. Under the loan facility, the Company was obliged to repay in full by the earlier of 18 months after the first drawing on the facility and 3 February 2017. With the latter date in sight, in January 2017, the Company sought and obtained more time to pay and a substantial increase in the facility, to £13,629,000 (an increase of £2,662,000). There were further increases and/or deferments of the repayment date in December 2017, March 2018 and June 2018, such that the final total facility amount was £15,000,000 and the final repayment date was 29 June 2018.

10. The Company defaulted, leading to a demand under the facility on 8 October 2018 for the total sum then due from the Company, £15,713,084.82. Receivers over the Property were appointed by the claimant later that month. At the date of this judgment, the Property remains unsold, but it was the defendant's position at the hearing that it ought to fetch (and indeed ought by now to have fetched, if properly marketed) more than enough to clear the debt, even if he recognised that it would not attract the premium price to generate a handsome profit for the Company that he (and it may be the claimant too) envisaged would have been possible had the project gone smoothly. (In that regard, there was some evidence, for example, that before the Company defaulted it was envisaged that the Property should be marketed asking for offers in excess of £25,000,000.)

11. When the loan facility was amended in January 2017, that was on condition that the defendant's personal security be increased. The first priority mortgage over the Property and the debenture remained; but now the requirement for security from the defendant was for a personal guarantee limited to £4,000,000 (rather than £2,500,000) itself supported by first priority legal charges over five London properties of his. The defendant executed a fresh guarantee dated 10 March 2017. The first priority charges were not provided, however. Instead, under a variation of that security requirement as

part of an amendment to the loan facility dated 16 March 2017 the security to support his personal guarantee became second priority charges over the five properties listed in January, third priority charges over seven further properties, and unregistered charges over two more.

12. The only remaining defence asserted depends entirely upon a disputed factual allegation by the defendant that at a site meeting at the Property on or about 21 November 2016, Steven Brigly (a Property Development Director of the claimant) was asked by the defendant "*why he would need to sign a new guarantee for an increased amount secured by charges over his personal properties [and] Mr Brigly replied: 'In case after we sell Pembridge Villas the net proceeds are insufficient. The Bank can then call on the additional assets from your portfolio to cover the shortfall."*"

13. The defendant says he took this as an assurance that his personal guarantee "*would [not] be resorted to*", or "*the Bank would not take action against [him] under [it]*", until after the Property was sold (if there was then still a shortfall). He says he executed the fresh guarantee in March 2017 in reliance upon that assurance. The contention then is that:

    i) the claimant is estopped from enforcing the guarantee before the Property has been sold and a shortfall has arisen (strictly, that should be, a shortfall remains); and/or

    ii) the claimant has waived its strict legal right to enforce the guarantee before that; and/or

    iii) a collateral contract arose under which the claimant made an enforceable promise to like effect; and/or

    iv) the guarantee was induced by fraud, in that (1) Mr Brigly impliedly represented that (a) he believed and (b) he believed on reasonable grounds that the claimant would not take action against the defendant under the guarantee until the Property had been sold and there was then still a shortfall, and (2) Mr Brigly (a) did not believe that and (b) knew that there were not reasonable grounds for believing that.

14. There is no allegation that Mr Brigly realised that what he said in November 2016 involved the assurance the defendant claims to have taken away from the site meeting, nor is there any evident basis for any such allegation unless what the defendant claims was said amounted to that assurance, objectively, in the first place. On the other hand, if what was allegedly said amounted, objectively, to the assurance pleaded, and if the defendant reasonably relied on that assurance nearly four months later when executing his guarantee, though nothing further had been said about the point since, then I have no great difficulty, in principle, with the thought that there might be a defence. It could be that the court would then be able to find at trial a collateral assurance, to be given effect by way of an estoppel, as discussed in *Chitty on Contracts*, 33rd Ed. at paras.13-004 to 13-006. In *Bank Leumi (UK) plc v Akrill* [2014] EWCA Civ 907, the Court of Appeal did not find it difficult to see that there might be a good defence, so that summary judgment should not have been granted, if they disagreed (as in the event they did) with the judgment of HHJ Jarman QC at first

instance over the factual arguability for trial of allegations that the bank there had reassured Mr Akrill that other enforcement efforts would precede any call on his personal guarantee.

15. For present purposes, therefore, in my judgment the fraud allegation adds nothing – it cannot get off the ground unless there was an assurance, objectively, that the Property would be sold before any action was taken on the personal guarantee sufficient to mean that there is an arguable defence anyway – except additional difficulties of proof for the defendant and a difficulty of analysis as to whether it could give rise to a complete defence or only a partial defence to the increase in the defendant's liability under the March 2017 guarantee.

16. The sole issue for decision, therefore, is whether there is a real prospect of the defendant proving at trial (the burden of proof would be his) that Mr Brigly said something to him at the site meeting in November 2016 that amounted objectively to the assurance pleaded and that the defendant reasonably relied on that assurance in executing the enhanced guarantee in March 2017.

17. The claimant accepts, Mr Brigly having checked his Outlook Calendar and provided a statement for the summary judgment application, that there was a site meeting at the Property on 21 November 2016. Mr Brigly says he attended with Matthew Hawkins, the claimant's Case Manager for the loan, Mike O'Dell of Bond Davidson, the quantity surveyors appointed by the claimant, and the defendant's design team for the project. Factual issue is joined over whether anything was said at all about the defendant's personal guarantee of the loan or about any suggestion that it be increased. Mr Brigly says it was a meeting to discuss cost increases in the project following the appointment by the Company of a new contractor in the summer of 2016, all that was discussed was a project budget increase then standing at c.£750,000 (but possibly to be offset by c.£250,000 reduced engineering costs later in the build programme), and: "*Guarantees were not discussed at the meeting. I did not make any statement or give any assurance that the guarantee would only be resorted to once the Bank had sold the property at 57 Pembridge Villas. I also did not make any statement or give any assurance on any other occasion*" (not, I add, that the defendant suggests he did).

18. Mr Brigly says that the question of additional security was first raised with the defendant by an email on 20 December 2016, after the anticipated cost overrun as suggested by the contractor had almost doubled to £1.3 million and Bond Dickinson had reported to the claimant that they thought the overrun could be more like £1.9 million.

19. Contrary to a submission by Ms Allsop, at least in her skeleton argument for the hearing, I do not think it can be said that the email of 20 December 2016 disproves the notion that something may have been said about increasing and/or securing the defendant's personal guarantee at the site meeting four weeks before. There appears to be no reason to doubt – nor did I understand the defendant to challenge – that that email is the first written mention of such matters. But the email does not record in terms that it is the first time they were being raised with the defendant, nor is it in terms that otherwise contradict the defendant's case, which would have to be that it was a written follow-up to that aspect of the site meeting.

20. It is right to note also that there is nothing in the email suggesting, in the defendant's favour, that it was raising something that had been mentioned before, let alone that the claimant might have given or been willing to give the sort of assurance the defendant claims to have taken away from the site meeting. Nonetheless, the question whether something along the lines of that which the defendant has pleaded may have been said at the November site meeting cannot be resolved without a trial.

21. The insuperable difficulty for the defendant, however, is that what he claims was said does not arguably amount, objectively, to the assurance he needs for there to be any possible defence to the claimant's claim. The question and answer the defendant says he recalls does not unequivocally indicate that, as a matter of chronology, the claimant would never sue the defendant to judgment on his personal guarantee, which is all it now seeks to do, until after a sale of the Property had completed and there was then still a net shortfall.

22. The focus of what the defendant claims to have been concerned about was an increase in his guarantee amount – not itself surprising as the claimant was being asked for a substantial increase in its commitment – and particularly the suggestion that it now be secured, when the existing guarantee was not. The answer cannot be said unequivocally to have been about sequence (the order in which things would occur) rather than concept (why security was now required for the guarantee). Security for the guarantee was needed since (*ex hypothesi*) the defendant's personal covenant alone was no longer seen as a good enough credit, and the sale of the Property might not clear the whole debt. The personal guarantee liability was only ever going to be a substantial minority percentage of the indebtedness under the loan; the Property would need to be sold to clear the debt, if the Company defaulted, whether or not the defendant first made good on his guarantee. What was said, as alleged, does not come close, in my view, to a clear promise that the Property would be sold before any action would ever be taken on the defendant's guarantee.

23. Were there room for an interpretation more generous to the defendant than that, on no view did the conversation as pleaded give him an unequivocal signal that he would not receive a demand, or court proceedings, to enforce his personal guarantee promise. At most, if there were any arguable assurance at all about chronology, it concerned the taking of enforcement steps against the collateral properties. That would not give rise to a defence to the claim now before the court, although it might be a matter to take into account if an application were made for a stay of execution pending the sale of the Property.

24. There is no defence here with any prospect of success. The claimant should have summary judgment for the entire sum claimed. I shall ask counsel for help with up to date calculations and invite consideration of the possibility of a stay of execution and/or the use of mediation even at this stage, i.e. even though there will now be final judgment on the guarantee claim as brought.