



Neutral Citation Number: [2020] EWHC 1670 (QB)

Case No: QA-2019-00368

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT**  
**HIS HONOUR JUDGE MONTY QC**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 26/06/2020

Before :

**THE HONOURABLE MR JUSTICE JOHNSON**

Between :

**MISHCON DE REYA LLP**

**Appellant/  
Claimant**

- and -

**RJI (MIDDLE EAST) LIMITED**

**Respondent/  
Defendant**

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Zoë Barton QC (instructed by Mishcon de Reya LLP) for the Appellant  
Andrew Blake (instructed by Rosling King LLP) for the Respondent

Hearing date: 23 June 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 Johnson:**

1. The issue on this appeal is whether the Appellant was precluded from securing summary judgment on monies due under a guarantee because it had not adduced in evidence the executed counterpart of the guarantee. In a detailed judgment given on 17 November 2019 HHJ Monty QC dealt with a raft of applications and cross-applications. Only one of his decisions is challenged on this appeal: his refusal of the Appellant's summary judgment application. Even that refusal is only challenged in part. The Appellant does not now challenge the Judge's decision that, at best, the claim could only succeed to the extent of about a third of the amount claimed. The Judge's reasons for refusing summary judgment in respect of that balance are succinctly set out in the last substantive paragraph of his judgment:

...there is no counterpart of the Guarantee executed by MDR in evidence. It seems to me that in the absence of such evidence, there is no basis to grant MDR summary judgment... since there is no evidence before the court that the Guarantee is enforceable... [C]lauses 8.7 and 8.8 indicate that enforceability is contingent upon mutual execution and delivery. Without that evidence, the application by MDR for summary judgment fails.

2. The Appellant's primary arguments in support of its appeal are that:
  - (1) There was no pleaded issue as to enforceability of the guarantee under the law of England and Wales.
  - (2) Clauses 8.7 and 8.8 of the guarantee do not have the effect that the enforceability of the guarantee is contingent upon mutual execution and delivery.
3. The Respondent counters:
  - (1) No complaint about the pleading was made before the Judge in the terms that are now advanced. The Appellant should not be permitted to advance the complaint, for the first time, on appeal.
  - (2) The Judge was correct to find that clauses 8.7 and 8.8 of the guarantee require mutual execution and delivery as a condition of enforceability.
4. Other issues as to the enforceability of the guarantee in equity, and whether there had been a waiver of any requirement for the provision of the counterpart, were extensively canvassed in the written arguments. They fell by the wayside in the course of the hearing.

**The facts**

5. In 2014 Dr John Waller was paid almost US\$0.5M to organise and direct a campaign of street protest, online publication and sticker distribution to denounce Issam Hourani (and two others) as being responsible for the torture, drugging, beating, sexual assault and murder of Anastasiya Novikova – see *Hourani v Thomson and others* [2017] EWHC 432 (QB) *per* Warby J at [1]-[2]. It was alleged by Mr Hourani that this campaign was undertaken at the behest, ultimately, of the authorities in

Kazakhstan. It is alleged by the Appellant in these proceedings that at least part of the payment to Dr Waller was made via Arcanum Global Inc (“Arcanum”, described as “a global intelligence firm”), which is said to be a subsidiary of the Respondent.

6. Mr Hourani brought proceedings in libel and harassment under the Protection from Harassment Act 1997. The defendants (who included Dr Waller) secured an arrangement whereby their litigation costs would be funded by Arcanum. The defendants were represented by the Appellant (having been introduced to the Appellant by Arcanum). The Appellant contends that it made considerable efforts (“at concomitant expense”) to ensure that Arcanum “remained unnamed” throughout the litigation.
7. The trial of the libel and harassment claim was heard between 1 and 14 February 2017. In the course of the pre-trial litigation the Appellant invoiced its clients (ie the defendants in the litigation) for the work done. These fees were then paid by Arcanum (or an associated company) to Dr Waller (or his company) and the fees were then paid over to the Appellant. By mid-2016 arrears had accumulated. As the trial approached, the Appellant became concerned about payment of its fees. In early January 2017 the Respondent offered to “underwrite the payment of £800,000 of legal fees.” The Appellant responded by providing what it described as a “standard form guarantee”. It was in the form of a deed, albeit a deed to be executed both by the Respondent as guarantor, and by the Appellant.
8. The parties agreed some amendments to the “standard form guarantee” including that the Respondent’s guarantee would be limited to £550,000 (the Respondent having, by then, paid £250,000 of the £800,000 it had agreed to underwrite). The final written guarantee is dated 2 February 2017 (so the second day of the trial). It states (the Guarantor being the Respondent, and “Project George” being the defence of the claim brought by Mr Hourani, typing errors in the original):

#### **“RECITALS**

- A. Mishcon de Reya have been instructed to act on behalf of various clients (the “Clients”) in Project George (the “Proceedings”).
- B. The Guarantor wishes to enter into this Agreement in order to secure the services of Mishcon de Reya and Counsel.

#### **1. DEFINITIONS**

- 1.1 In this Agreement, the following definitions shall apply:

“Counsel’s Fees” means the fees payable to Counsel, whether payable by the clients or by Mishcon de Reya to Counsel on behalf of the clients in relation to this matter.

“Mishcon de Reya’s Fees” means such fees and disbursements invoiced by Mishcon de Reya to the Clients in relation to this matter.

## **2. GUARANTEE AND INDEMNITY**

- 2.1 The Guarantor guarantees to pay Mishcon de Reya (and to their successors, transferees or assigns) immediately upon demand the amount of any invoice raised and/or any liability of the Clients to Mishcon de Reya to cover Mishcon de Reya’s Fees and Counsel’s Fees, , but in any way not to exceed a previously agreed total amount of £550,000.

...

## **8 GENERAL PROVISIONS**

...

- 8.7 This Agreement may be executed and delivered in any number of counterparts, each of which is an original and which together have the same effect as if each Party had signed the same document.

- 8.8 Each Party shall (at its own expense) promptly execute and deliver all such documents, and take all such actions, or procure the execution and delivery of all documents and taking of all such actions as are required to give full effect to this Agreement.”

9. On 3 February 2017 the Respondent sent to the Appellant a pdf version of the guarantee as executed by the Respondent.
10. On 10 March 2017 Warby J gave judgment in Mr Hourani’s favour for damages and costs.
11. On 24 August 2017 the Respondent paid £381,720.48 to the Appellant. The Respondent has not paid any further sums to the Appellant since then.
12. On 6 June 2018 the Appellant sent the Respondent an invoice for a further £477,666.04 which was said to be the total amount outstanding, although an email the same day suggested that a further \$89,176.06 was owed to the Appellant’s New York office.
13. On 14 August 2018 the Appellant made a formal demand of the Respondent for payment under the Guarantee of £477,190.04 (attaching invoices). On 28 August 2018 the Respondent replied that its General Counsel and Chief Finance Officer had reviewed the matter and would “make good on the payment of £477,190.04 and \$89,748.90.” On 29 September 2018 the Respondent again said “we will make good on the full payment of the invoices.”
14. The Appellant issued proceedings in the High Court on 14 November 2018, purporting to effect service at an address in London. The documents were returned with a note suggesting that the Respondent did not have a presence at that address. On

21 December 2018 Master Eastman declared that the Claim Form and Particulars of Claim had been validly served on 16 November 2018. By this point, the time for service of an Acknowledgement of Service had expired.

15. The Appellant did not apply for judgment in default of an acknowledgement of service. It says that this was because it believed (it now says wrongly) that such a judgment would not be recognised in the United Arab Emirates. Instead, it secured permission, pursuant to CPR 24.4(1)(i), to apply for summary judgment before service of an Acknowledgement of Service or Defence. It did not, at that stage, make an application for summary judgment.
16. The Respondent filed an Acknowledgement of Service on 21 January 2019 indicating that it intended to defend “all of this claim.”
17. On 15 February 2019 the Appellant sent an email to the Central London County Court asking for default judgment (but without attaching the necessary Court Form N255: “Request for judgment and reply to admission (specified amount)”). On the same day the Respondent applied for an extension of time for service of its Defence.
18. On 18 February 2019 the Respondent applied for summary judgment on the entire claim, on the grounds that it had paid a total of £631,720.48 (see paragraphs 8 and 11 above) which extinguished its liability under the guarantee, because clause 2.1 of the guarantee imposed a limit of £550,000. In a witness statement in support of the application the Respondent’s solicitor said:

“The Claimant, in reliance on the Agreement has brought this claim against the Defendant. I expressly make no admission that the Agreement is valid or effective in any way. The rest of this statement is drafted, assuming in the Claimant’s favour, on the assumption that it is valid and effective but if this case continues my client’s position in this respect is entirely reserved.”
19. On 1 April 2019 the Respondent served its Defence. This admitted that the Respondent had granted a guarantee to the Appellant (see paragraph 47 below). However, it said that it had paid more than £550,000 and that it therefore had no further liability to the Appellant.
20. On 4 July 2019 the Respondent applied for relief from sanctions in respect of the late service of the Defence. In support of that application the Respondent filed a statement of Hasham Sadruddin which, in an introductory paragraph, said that the statement was made “without prejudice to any arguments as to the validity of the guarantee.”
21. On 16 July 2019 the Appellant made a request for default judgment (this time providing form N255), incorrectly certifying that no Defence had been filed.
22. On 19 July 2019 the Appellant made an application for summary judgment.
23. The different applications that had been made were all listed before HHJ Freeland QC on 26 July 2019. There was insufficient time to deal with the applications (and the Appellant’s application for summary judgment had been made just a week before the

hearing). Directions were given for the management of the applications with a hearing listed before HHJ Monty QC on 7 October 2019.

24. On 20 August 2019 Masudul Wahid, a director of the Respondent, made a statement in response to the Appellant's application for summary judgment. In the course of that statement he said:

“...as was made clear in the statements of Mr Turtle and Mr Sadruddin, the Defendant's own summary judgment application was advanced on the assumption that the guarantee was valid. No such assumption should be made if, contrary to the Defendant's position, the Court were otherwise minded to grant summary judgment to the *Claimant*.

By way of example, the guarantee on which the Claimant relies is signed only by the Defendant and not by the Claimant. I am yet to see a version signed contemporaneously by the Claimant. If no such version is now provided, legal submissions will address the impact of a failure to execute in the context of a guarantee which anticipates that it will [be] executed by both guarantor and creditor.”

#### **The hearing before HHJ Monty QC**

25. The extensive arguments before HHJ Monty QC focussed on the requests for default judgment, the application for relief from sanctions and the Respondent's application for summary judgment. There was little discrete argument on the Appellant's application for summary judgment.
26. There was mutual exchange of written arguments. The Appellant's written argument proceeded on the basis that if the Respondent's application for summary judgment failed, the Appellant's application would, correspondingly, succeed. There was no argument at all on the question of enforceability of the guarantee. The Respondent's written argument proceeded on the basis that if the Respondent's application for summary judgment succeeded, then the Appellant's application “must fail”. However, its written argument included this paragraph:

“...whereas D's SJ Application involves a simple matter of construction which is appropriate for summary judgment, the same cannot be said of C's SJ Application. In particular:

(a) C's SJ Application cannot succeed unless the Guarantee is enforceable. In that regard, the Defendant is yet to see a version of the Guarantee signed contemporaneously by the Claimant. If the Guarantee was not signed, its enforceability in the absence of mutual execution and delivery would be a matter of construction. Clauses 8.7 and 8.8 indicate that execution and delivery was required by both parties and hence that enforceability is contingent upon mutual execution and delivery.”

27. I have been provided with a full transcript of the hearing before HHJ Monty QC, which lasted a day. In opening oral submissions on behalf of the Appellant, Ms Barton did not deal with the question of enforceability. Mr Blake, in his submissions for the Respondent, argued that if the Respondent's application for summary judgment succeeded then the Appellant's application must fail, and that if the Respondent's application failed on the grounds that it was not suitable for summary determination then the same must be true of the Appellant's application. At that point HHJ Monty asked what the position would be if he were to conclude (as he ultimately did) that the Respondent's application for summary judgment should succeed in part, but not to the full extent of the claim: "why should I not give summary judgment against you for the difference?" Mr Blake replied:

"In those circumstances, ...the single submission... is that we have not seen a version which has been executed by Mishcon. We do not know if one has been executed by Mishcon, but it is a matter of construction as to whether, in the absence of execution and delivery by both parties, the deed takes effect. We say that [when one reads clause 8.7 and 8.8] it would have been incumbent upon Mishcon to sign the deed."

28. Mr Blake agreed with the Judge that the "simple point" was "To be enforceable by Mishcons, it must be executed by them as a deed."

29. In the course of her submissions in reply Ms Barton said:

"A question about the enforceability of the guarantee was raised. A short point, I suppose, on that is that it is not the way in which it is put in the defence and the way in which it is now put orally. The way in which it is put in the defence is limited, by the looks of things, to matters of foreign law, in respect of which there is no evidence adduced one way or the other."

30. The Judge asked "If it has not been executed and it is not enforceable, then why should you have summary judgment?" Ms Barton submitted (on that footing) a conditional order would be appropriate, namely that summary judgment be entered unless the Appellant failed to produce a copy of the executed counterpart within a prescribed period of time. The Judge pointed out that this would give rise to "yet more satellite litigation about when it was and was not executed."

31. That is the extent of the argument on this issue that was advanced before HHJ Monty QC prior to judgment.

32. In a detailed written judgment the Judge:

(1) Dismissed the Appellant's first request for default judgment on the grounds that it had not been validly made – the Court had not been provided with the information necessary to enter default judgment.

(2) Dismissed the Appellant's second request for default judgment because a Defence had been filed before the application for default judgment. He held (by reference to *Cunico Resources NV v Konstantinis Daskalakis and another* [2018] EWHC

3382 (Comm) and *Clements Smith v Berryman Lace Mawer* [2019] EWHC 1904 (QB)) that there was no entitlement to default judgment where the Defence had been filed late, so long as it had been filed before the request for default judgment.

- (3) Granted the Respondent's application for an extension of time for the Defence and made no order on its application for relief from sanctions.
  - (4) Awarded the Respondent summary judgment as to about two thirds of the claim, relating to the payment of £381,720.48 on 24 August 2017 which, he held, fell to be taken as having been made under the guarantee.
  - (5) Dismissed the balance of the Respondent's application for summary judgment which had been based on the contention that it had paid more than the £550,000 limit of the guarantee. That was because of the total amount paid, £250,000 had been paid before the date of the guarantee, and therefore that payment did not fall to be taken into account when applying the limit of the guarantee.
  - (6) Dismissed the Appellant's application for summary judgment, for the reasons I have quoted (see paragraph 1 above). This is the only aspect of the Judge's decision which is subject to appeal.
33. In seeking permission to appeal the Appellant argued that it had not been open to the Judge to refuse summary judgment on a point that had not been pleaded by the Respondent. The Judge refused permission to appeal, saying:
- “Although D has succeeded on an unpleaded point, it would be wrong for the court to assist a party which does not in law have an enforceable guarantee by giving that party summary judgment on its claim under that Deed.”
34. A renewed application for permission to appeal was granted by Tipples J, who made observations as to the pleaded issues and the effect of taking the benefit of a deed without executing it. Those observations informed, and framed, much of the argument on the appeal.

### **The appeal**

35. I only have to deal with one of the six applications that were before HHJ Monty QC. I have heard much more extensive argument on that application than was advanced at first instance. A summary of the parties' respective arguments is at paragraphs 2 and 3 above.

#### *Is the complaint about the pleadings a new argument raised on appeal?*

36. In the light of the transcript of the argument it is clear (and Mr Blake accepts) that Ms Barton QC did draw attention to the pleaded Defence, and submitted that the argument that was being advanced by the Respondent was “not the way in which it is put in the Defence”, which was “limited, by the looks of things, to matters of foreign law.”
37. Ms Barton QC did not, in terms, argue at the hearing that the pleaded Defence precluded reliance on an argument that the guarantee was not enforceable. Moreover,



Mr Blake points out that when the judge asked why he should not enter summary judgment if he considered the guarantee was unenforceable, Ms Barton did not, at that point, say “because the enforceability of the guarantee is not in issue on the pleadings” and instead raised the prospect of a conditional order. He argues that the argument advanced by the Appellant on appeal takes issue with the Defence in a more direct and focussed way than the argument before the Judge.

38. However, in my judgment, if there was scope for any doubt as to whether the Appellant was seeking to hold the Respondent to its pleaded case, that doubt was removed when permission to appeal was sought. Ms Barton made a clear submission that summary judgment should not be entered on an unpleaded issue. It would, at that point, have been open to the Judge to reconsider, even reverse, his judgment – see *Re L-B (Children) (Care Proceedings: Power to revise judgment)* [2013] UKSC 8 [2013] 1 WLR 634.

*Should the Claimant be permitted to advance the pleading argument?*

39. It would have been better all round if the pleading issue had been squarely confronted at the hearing before the Judge. It may be that both parties had forensic reasons for not doing so. From the Respondent’s point of view there may have been potential costs consequences if it had sought to amend its claim. From the Appellant’s point of view it may have seemed unattractive to focus its application on a complaint about a pleading that could be cured by amendment. The result is that the need to amend the pleadings was not put before the Judge as a discrete matter requiring resolution. It is therefore hardly surprising that it was not addressed in the judgment.
40. The matter was, however, touched on in the argument, and was directly raised on the permission to appeal application. The Judge engaged with the issue when refusing permission to appeal and gave reasons why he considered that summary judgment should be refused “on an unpleaded point.”
41. In these circumstances, this is not a clear case of an appellant seeking to raise a new point on appeal which had not been raised in the court below. Even if it were such a case, I consider that the Appellant should be entitled to raise the point, having regard to the principles identified by the Court of Appeal in *Singh v Dass* [2019] EWCA Civ 360 *per* Haddon-Cave LJ at [15]-[18]. It would not necessitate any new evidence. I do not think that if it had been raised below it would have resulted in the hearing being conducted differently with regard to the evidence deployed (the practical difference is that it would likely have precipitated an application to amend). The Respondent has had adequate time to deal with the point. It has not acted to its detriment in reliance on the failure to raise the point at first instance, and the Respondent can be adequately protected in costs.
42. Moreover, the result of the point not having been squarely confronted by the parties is unsatisfactory if it is not now addressed. The case will otherwise proceed to trial where the only basis for defending the claim is not in issue on the pleadings, there is no extant application to amend the pleadings (nor any commitment to make such an application), and it is clear that any application to amend, if and when it is made, will be contested.

43. Further, the parties disagree as to the effect of the Judge's judgment on the construction issue. The Respondent contends that it amounts to a final decision as to the meaning of the guarantee, and that this decision will bind the trial judge. The Appellant contends that it was merely a summary determination that the Respondent's case had a real prospect of success, and does not preclude an argument at trial in support of a different construction.
44. If this case is otherwise to continue, it is important to resolve these matters now. Otherwise, there is scope for further unnecessary litigation and cost.
45. For all these reasons I consider that the Appellant is entitled to challenge the Judge's order on the ground that the issue on which he refused summary judgment had not been pleaded.

*What is the relevant pleaded issue between the parties?*

46. Paragraph 13 of the Particulars of Claim states "...on 2 February 2017 the Defendant granted a guarantee... to the Claimant."
47. Paragraph 14 of the Defence states:

"Paragraph 13 [of the Particulars of Claim] is admitted save it is not admitted that in accordance with the laws of Dubai, the guarantee was executed in a way which makes it binding on the Defendant and the Claimant is put to strict proof as to the same."
48. If paragraph 14 of the Defence had been limited to an admission of paragraph 13 of the Particulars of Claim, there may have been scope for argument as to whether the admission of the guarantee (without more) encompassed not just the fact of the guarantee but also that it was binding on the Defendant. But paragraph 14 of the Defence went further than a simple admission. It addressed the effect of the guarantee as a caveat to the general admission of the grant of the guarantee. In that context, the general admission can fairly be taken as applying both to the grant of the guarantee and its binding effect (subject, of course, to the express, but narrow, caveat as to whether it would be binding under the laws of Dubai). Read in that way the Defence can be taken as an admission of the enforceability of the guarantee, subject to a caveat which here has no application.
49. Even if paragraph 14 of the Defence is not an admission that the guarantee is binding on the Respondent (and I accept Mr Blake's submission that it is not a "clear" admission), the Defence does not, on any view, put the enforceability of the guarantee in issue. On the pleaded Defence there is no issue between the parties as to the enforceability of the guarantee under the law of England and Wales.

*Was the Judge wrong to grant summary judgment on an unpleaded issue?*

50. This is the Appellant's first ground of appeal.
51. The power to grant summary judgment against a defendant arises where the defendant "has no real prospect of successfully defending the claim or issue" and "there is no

other compelling reason why the case or issue should be disposed of at a trial” – see CPR 24.2(a).

52. Ms Barton QC draws attention to the decision of the Court of Appeal in *Korso Finance Establishment Anstalt v Wedge & others* [1994] Lexis Citation 3261. There, in the context of an application for summary determination under Order 14A of the Rules of the Supreme Court (permitting summary determination where it will finally determine “the entire cause or matter of any claim or issue therein”), Leggatt LJ said:

“In my judgment the question of construction is well capable of constituting an issue in the cause or matter. An issue may be said to be a disputed point of fact or law relied on by way of claim or defence.”

53. Ms Barton’s argument was that this definition of “issue” (“a disputed point... relied on by... defence”) applies to CPR 24 such that the Judge was only entitled to consider disputed points which had been raised in the defence.
54. I disagree. *Korso* was concerned with RSC Ord 14A. The Civil Procedure Rules replaced the Rules of the Supreme Court with a “new procedural code” (see CPR 1.1(1)). Lord Woolf MR, who was instrumental in their introduction, made it clear, in one of the first cases in which the Court of Appeal addressed their effect, that “[e]arlier authorities are no longer generally of any relevance once the CPR applies” – see *Biguzzi v Rank Leisure PLC* [1999] 1 WLR 1926 at 1934G. The word “issue” in CPR 24 does not, in context, naturally signify a matter that is put in issue by the defence. Rather, it relates to the “claim or issue” in respect of which summary judgment is being sought. Here, summary judgment was being sought in respect of the entire claim. Further, summary judgment is (with permission) available even before a defence has been filed (see CPR 24.4(1)). I was not shown any authority, since the introduction of the Civil Procedure Rules, that a Judge may not consider matters that fall beyond the parameters of the statements of case when assessing if a defendant has a real prospect of successfully defending the claim.
55. For all these reasons I do not accept that there is any firm and hard edged rule that a Judge, when considering an application for summary judgment against a defendant, may only have regard to matters that are put in issue by the pleaded defence.
56. That said, the Judge must form an assessment as to whether the defendant has any real prospect of successfully defending the claim. That involves a forecast of the outcome at trial. The judge at trial will rule on the matters that are in issue between the parties, as framed by the statements of case – see *Prudential Assurance Company Ltd v Commissioners for Her Majesty’s Revenue and Customs* [2016] EWCA Civ 376 per Lewison LJ at [20]-[21]:

“20. ...Our procedural system is and remains an adversarial one. It is for the parties (subject to the control of the court) to define the issues on which the court is invited to adjudicate. This function is the purpose of statements of case. The setting out of a party’s case in a statement of case enables the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial. It is

inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning. If a party wishes to raise a new point, he should do so by amending a statement of case....

21. Although in days gone by the court would routinely allow late amendments to statements of case, in more recent time attitudes have changed. It is now the case that the court requires strong justification for a late amendment. This is not only in the interest of the opposing party but also consonant with the interests of other litigants in other cases before the court and the court's duty to allocate a proportionate share of the court's resources to any particular case. Where a new issue arises which is not foreshadowed in a statement of case, a party needs the court's permission to advance it. The court is then faced with a discretionary case management decision, to be exercised in accordance with the overriding objective."

57. Accordingly, when a judge entertains a summary judgment application the statements of case are relevant and important documents. That is because they identify the matters that – as matters stand – will be in issue at trial. There are, however, cases where the defined issues may foreseeably change (for example as a result of disclosure and a consequential application to amend a statement of case). In those cases, a judge considering an application for summary judgment may need to take account of the possibility of an amendment to the statements of case when assessing whether a defendant has a real prospect of success at trial.
58. In some cases an application to strike out a statement of case, or for summary judgment, will provoke an application to amend. The determination of the amendment application will then help inform the resolution of the summary judgment application. That is what ought to have happened here: once the Respondent appreciated that there was a potential issue as to the existence of a counterpart signed by the Appellant (as it certainly had done by the date of the hearing) it ought to have applied to amend its Defence. More generally, where there is an issue between the parties as to the adequacy of a statement of case there is an obligation to seek a ruling from the judge – see the observations of Lawton LJ in *Rolled Steel Products Holdings Limited v British Steel Corporation & Others* [1986] 1 Ch 246 at 309-310, quoted by Tomlinson LJ in *Skrzynski v Commissioner of Police of the Metropolis* [2014] EWCA Civ 9 at [4].
59. As it was, the Judge in this case was left to determine the issue without an application to amend having been made by the Respondent. It would have been open to the Judge to put the Respondent to an election – either to proceed on the basis of its pleaded Defence or to apply to amend. However, given that the matter was not confronted by the parties, the Judge cannot be criticised for not raising it of his own motion, and for determining the application without reference to the defence.
60. In any event, there are two routes by which the judge could have refused summary judgment even though the issue had not been raised in the Defence. He could have concluded that the Respondent had a real prospect of successfully amending its Defence and then resisting the claim (CPR 24.2(a)(i)). Or, he could have concluded

that there was a compelling reason why the case should proceed to trial, namely that it would be wrong summarily to determine the case in the Appellant's favour if the guarantee was unenforceable (which fits with one of the reasons he gave for refusing permission to appeal – see paragraph 33 above).

61. If (as the Judge found) the guarantee was not enforceable (the subject of the second ground of appeal) I do not think a conclusion that the Respondent had a real prospect of amending its Defence and then successfully resisting the claim can be impugned. The case was still at a relatively early stage. There would be no prejudice that could not be compensated in costs. The additional evidence that would be required to deal with the enforceability issue was very limited. Even if an amendment of the defence would require permission to withdraw an admission (see paragraph 48 above, and paragraph 7.2 of CPR Practice Direction 14) the Judge was (in those circumstances) entitled to conclude that the Respondent had a real prospect of successfully defending the claim.
62. Accordingly, subject to resolution of the second ground of appeal, I would dismiss this ground of appeal.

*Construction of clauses 8.7 and 8.8 of the guarantee*

63. By its second ground of appeal the Appellant challenges the Judge's conclusion that the guarantee is only enforceable "upon mutual execution and delivery."
64. The meaning of clauses 8.7 and 8.8 is a short point of construction. All of the evidence that is relevant to the question is available. Its resolution does not depend on disputed evidence. The point is amenable to summary determination. I did not understand either Mr Blake or Ms Barton QC to suggest otherwise. By pursuing the appeal the Appellant necessarily contends that the point is capable of being dealt with summarily. By seeking to uphold the Judge's judgment, so too does the Respondent.
65. The language of clause 8.8 required each party to execute the guarantee. It did not state that the guarantee shall only come into effect once it has been executed by both parties. Nothing in the language of clause 8.8 suggests that this is its intended effect. The natural language of the clause therefore strongly suggests that it does not amount to a condition. Simple and conventional language could have imposed a condition of execution – eg "[This guarantee] shall not become effective until each party has executed a counterpart and exchanged it with the other" (cf the clause in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] 1 WLR 753 at [12]).
66. For the reasons given below, I do not consider that there is any reason to interpret clauses 8.7 and 8.8 as imposing a condition when that is not the natural meaning of the words.
67. The guarantee makes business and commercial sense without interpreting clauses 8.7 and 8.8 as imposing a condition of execution. At the time it was executed by the Respondent it had already agreed to underwrite the fees charged by the Appellant. The guarantee (without any obligation of execution by the Appellant) simply puts that agreement into effect. Although, in form, the guarantee amounts to a mutual agreement, with covenants on the part of the Appellant as well as the Respondent, in substance it was, for all practical purposes, a unilateral guarantee on the part of the

Respondent: the principal obligation on the part of the Appellant was simply the provision of invoices to the Respondent and the application of receipts against the balance of outstanding invoices. Moreover, as soon as the Appellant sought to rely on, and secure the benefit of, the guarantee it was bound in equity to comply with the obligations that were imposed on it under the guarantee – see *Lady Nass and another v Westminster Bank Limited* [1940] AC 366 *per* Lord Russell of Killowen at 391 (“by his action he is affirming and adopting the deed and every provision of it, and is bound by it as effectively as if he had executed it”), and see *Webb v Spicer* 13 QB 886 *per* Lord Denman CJ at 1505 (“a man may be bound by the covenants of a deed in which he is described as a party, though he does not execute it, if he assent to it, and take a benefit under it”).

68. Mr Blake argued that the stipulation in clause 8.7 that the counterparts will “together have the same effect as if each Party had signed the same document” contemplated that the provision of two signatures would have some “effect” beyond that achieved by the provision of one signature. That effect could only be the legal consequences of a binding agreement. Otherwise, clause 8.7 would have no purpose.
69. I do not agree. I accept Ms Barton’s submission that clause 8.7 has the effect that each counterpart is to be treated as an original, and that together they should have the same effect as if each party had signed the same (rather than separate) documents. In other words, the effect of clause 8.7 is to avoid any potential argument arising out of the fact that the parties did not sign the same document.
70. In any event, although the document was professionally drafted by lawyers, this appears to have been undertaken in haste in the context of the commencement of a major trial. The internal evidence of the document itself shows errors and lack of precision in the drafting. A number of apparent boilerplate clauses were used. In that context, even if clauses 8.7 and 8.8 are, strictly, legal surplusage or verbiage, that would not justify an alternative interpretation from that compelled by their natural language.
71. For these reasons, and with the benefit of much fuller argument than that advanced at first instance, I have respectfully departed from the interpretation adopted by the Judge. I do not consider that clauses 8.7 and 8.8 impose a condition precedent to the guarantee’s enforceability. It follows that the Respondent’s unpleaded defence that the guarantee is unenforceable has no real prospect of success. There is no other compelling reason why the case should be disposed of at trial. I therefore allow the appeal and grant summary judgment in the Appellant’s favour.

### **Outcome**

72. The guarantee is enforceable against the Respondent even if it was not executed by the Appellant. The Respondent has no real prospect of successfully defending the claim. I allow the appeal and enter summary judgment for the Appellant in the principal sum of £168,279.52.