



Neutral Citation Number: [2022] EWHC 3031 (Comm)

Case No: CL-2021-000535

**IN THE HIGH COURT OF JUSTICE**  
**KING’S BENCH DIVISION**  
**COMMERCIAL COURT**

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

Date: 29 November 2022

**Before :**

**Mr Stephen Houseman KC**  
**Sitting as a Judge of High Court**

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**Between :**

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|-------------------------------|-------------------------|
| <b>Angeliki Frangou</b>       | <b><u>Claimant</u></b>  |
| <b>- and -</b>                |                         |
| <b>Ioannis (John) Frangos</b> | <b><u>Defendant</u></b> |

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**Timothy Hill KC & Andrew Feld (instructed by Wikborg Rein LLP) for the Claimant**  
**Oliver Caplin (instructed by Waterson Hicks) for the Second Defendant**

Hearing dates: **28 November 2022**

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**Approved Judgment**

**I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.**

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MR STEPHEN HOUSEMAN KC

This judgment was handed down by the judge remotely by circulation to the parties’ representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 29 November 2022 at 10:30am.

**MR STEPHEN HOUSEMAN KC:**

**Relevant Context**

1. The trial of this action is listed before me for four sitting days, Monday 28 November to Thursday 1 December; plus one day of pre-reading on Friday 25 November 2022. This judgment concerns issues of admissibility and amendment arising at the outset of trial. Nothing said below indicates a view on any substantive matter for determination at trial.
2. The claim was commenced in September 2021. The claimant seeks payment of US\$11,866,844 plus interest from her brother, the defendant, pursuant to clause 5 of a written agreement stated to be concluded on 1 September 2011 between the two of them and their (since deceased) father. The agreement relates to the financing and ownership of a vessel known as *m/v Taurus Two*. For convenience I refer to the agreement as the “TTA” and the parties to this action as C and D, respectively.
3. Clause 5 of the TTA provides that D “*irrevocably and unconditionally guarantees payment to*” C of two identified categories of loss in so far arising upon her (i.e. C’s beneficially-owned company, Brandon’s) permitted sale of the vessel in accordance with the terms of the TTA. C sold the vessel in May-July 2020 and seeks payment of relevant shortfalls or losses pursuant to clause 5. I say as little as possible in this judgment about the contractual analysis in play at trial, save to observe that the precise meaning and effect of clause 5 and the potential legal impact of later events upon D’s payment obligation are hotly disputed.
4. An Agreed List of Issues (“LOI”) was settled and endorsed by the Court at a CMC in February 2022. The LOI broadly reflects the pleaded bases of D’s denial of liability under clause 5 of the TTA, including (C’s burden of proof as to) the components of the claim made pursuant to the language of that clause. D’s original defence ran points of construction as to the scope and effect of clause 5 as well as estoppel(s) and waiver. D also denied enforceability on the basis of non-execution by all three named contracting parties.
5. Both sides changed their counsel ahead of trial. Nothing turns on the precise date of that happening on either side, still less the circumstances. By prior agreement based on consent given to draft versions, D served an Amended Defence and C served an Amended Reply - in each case settled by new counsel - on Friday 18 November 2022. That was one week before the trial fixture. C also served Amended Particulars of Claim at the same time, but not so as to require consequential amendments by D. By his Amended Defence, D dropped the enforceability/non-execution point but introduced new bases for his denial of liability under clause 5, including implied rescission through inconsistent subsequent agreement(s) or extra-contractual circumstances. The LOI was not updated.
6. C’s written opening submissions (50 pages plus addendum) were lodged on Monday 21 November. D’s written opening submissions (50 pages) were lodged on Tuesday 22

November. C's counsel then lodged a supplementary skeleton argument (12 pages) objecting to two new lines of analysis or argument contained in D's written opening but not pleaded. These are: (a) characterisation of the clause 5 covenant as a 'see to it' contract of suretyship with certain legal consequences said to flow from that characterisation ("Guarantee Analysis") and (b) non-applicability of such payment covenant beyond the four year term of the financing in place for the vessel at the time of the TTA - referred to in argument as the 'use it or lose it' construction ("Duration Analysis").

7. The Guarantee Analysis seeks to invoke the so-called 'purview doctrine' expounded by the House of Lords in *Trade Indemnity Company Limited v. Workington Harbour and Dock Board* [1937] AC 1 at 20-21 and/or the rule in *Holme v. Brunskill* (1878) LR 3 QBD 495 to the effect that a surety/guarantor is relieved from liability where the principal debt or obligation is materially altered unless he validly consents to such alteration or variation. The Statute of Frauds applies to variations of guarantees. More broadly, D appears to wish to use the characterisation of the clause 5 payment covenant as a 'see to it' contract of suretyship so as to invoke stricter principles of contractual construction, such as *contra proferentem*, than might otherwise apply.
8. The parties raised house-keeping issues for my attention concerning the admissibility of additional witness evidence and extraneous material in the trial bundle. I determined those admissibility issues by email on Friday 25 November. I also indicated that any amendment application would need to be made by D that day. Such application was duly made on a contingent basis attaching a draft Re-Amended Defence. D's counsel also lodged a supplementary skeleton argument (12 pages) at 2.42pm that day.
9. I directed that C's objections based on the scope of the pleaded case and D's contingent amendment application would be dealt with during oral opening submissions on the first day of trial. I requested a revised/marked version of the LOI in the meantime without prejudice to the determination of such matters. C's counsel provided me with a written speaking note (8 pages) and draft non-agreed revised LOI at 6.59pm on Sunday 27 November 2022. D's counsel provided some comments on the latter document by email at 8.14am on the first morning of trial.
10. C objects to the admissibility of both the Guarantee Analysis and the Duration Analysis by reference to D's pleaded case - even, or perhaps especially - as amended one week before trial. Further, in so far as D requires permission to amend to introduce such contentions, C objects to such permission being given at this late stage in respect of the Guarantee Analysis. As to this latter objection, C identifies various matters on which she says she would have wished to seek disclosure in order to fairly interrogate D at trial as regards his state of mind in connection with key post-contractual circumstances. Criticism is also made of the draft Re-Amended Defence in terms of its purported identification of the principal debt or obligation which is said or assumed to be owed to C qua principal creditor from the relevant corporate borrower, Brandon, a company she beneficially owned and

effectively controlled at the relevant time; and how such principal liability was said to be altered by relevant events post-dating the TTA.

11. The proposed amendments are undoubtedly late. They arise, albeit contingently, on the eve of trial in a literal sense: the application was issued (over) halfway through the allocated reading day. The suggested reading included written opening submissions, since augmented to total some 132 pages plus attachments, and materials identified in an agreed reading list. Both sides plead estoppels arising out of events spanning a period of 8-9 years involving successive financing and cross-collateralisation of various vessels.
12. I heard argument on these issues as part of both side's oral opening submissions on the first day of trial yesterday. This judgment was provided to the parties' legal teams overnight in as good as final form for approval and issuance by me after court today.

### **Late Amendments: Test**

13. The principles governing late amendments are not controversial. They are summarised in the White Book 2022 at 17.3.8 (pp.637-639).
14. Paragraph C5.4 of the Commercial Court Guide (11<sup>th</sup> ed. published January 2022) states as follows:

*“Late amendments should be avoided and may be disallowed, even if they do not imperil a trial date.”*

15. I was taken to a helpful distillation of the relevant factors given by HHJ Pelling QC (sitting as a judge of the High Court) in a judgment in proceedings related to the present action: *Ferand Business Corporation & others v. Maritime Investments Holdings Limited & another* [2020] EWHC 2665 (Comm) at [6]. The factors listed at (a)-(h) represent what I regard as codified common sense with an emphasis on pragmatic procedural fairness and responsibility. Relevant authority is cited in support of each proposition. I note the following:
  - (i) Factor (b) concerns the strength of the proposed new case or allegation.
  - (ii) Factor (d) concerns the quality or sufficiency of the explanation for the relevant delay.
  - (iii) Factors (e) & (f) show that prejudice is only a consideration and that it can take the form of disruption to an opposing legal team's preparation for trial.
  - (iv) Factor (g) concerns the need for a proper pleading on the new allegations.
  - (v) Factor (h) dovetails with (d): a party's instruction of new counsel is not a good explanation for making a (very) late amendment.

16. As the judge emphasised in taking stock on such factors at the end of [6]:

*“A critical issue, therefore, will be the reasons given as to why a very late application is being made. If a very late amendment is made without any or a weak or bad reason being offered, then that is likely to justify a refusal of the application particularly if there is prejudice to the other side if the amendment is permitted.”*

17. I deal with the contingent amendment application in so far as necessitated in light of my threshold conclusions on admissibility by reference to the existing pleaded case. I use the term ‘admissibility’ in this context in the forensic rather than evidential sense to denote the exercise of a judge’s power to manage and control the issues which may fairly be pursued at trial in light of the pleaded and procedural context.

### **Admissibility: Guarantee Analysis**

18. The Guarantee Analysis is not advanced by D in his Amended Defence, notwithstanding the express language of clause 5 as quoted above. It would need to be so advanced given the potential significance of such a legal characterisation of the key provision.

19. D’s basic procedural obligation in this context is to “*state his reasons*” for any allegation which “*he denies*” in accordance with CPR 16.5(1)(a) & (2)(a).

20. A defendant who denies liability to pay sums claimed under a contractual provision on the basis that (i) such provision constitutes or forms part of a contract of suretyship and (ii) as such he was not liable or ceased to be liable by reason of certain circumstances is obliged, in my judgment, to plead that legal characterisation and its consequences. As to this and as applicable in the present case:

(i) A legal characterisation of this kind is a positive case with distinct contractual or doctrinal implications that a counterparty is entitled to see formulated under the discipline of a statement of case and reflected in a list of issues ahead of preparation for trial. The existence of pleading precedents in *Bullen & Leake* and *Atkin’s Court Forms* corroborates this, albeit directed at a claim rather than defence.

(ii) A legal characterisation of this nature is a matter of substantive law. The characterisation of a contract as belonging to a recognised genus (e.g. sale, loan, tenancy, swap or repo, etc.) is a significant feature of a dispute. It is no less a positive case, in terms of its potential impact upon the focus or shape of trial, than one relating to “*causation, mitigation or quantification of damages*” in respect of which a pleaded position is required “*at the outset or, if not then available, as early as possible thereafter*” in accordance with paragraph C1.3(g) of the Commercial Court Guide.

(iii) Such a legal characterisation potentially engages the legislative regime as to formalities governing not just the creation of a guarantee but also its subsequent

variation, namely the Statute of Frauds. Paragraph C1.3(d) of the Commercial Court Guide requires clear identification in a statement of case of any “*legislative provision upon which an allegation is based*” and an explanation as to “*the basis of its application*”. The features of the Guarantee Analysis summarised in paragraph 7 above illustrate how this potentiality is a practical reality or indeed probability in the present case, i.e. absence of (valid) consent or variation on the part of D qua surety to any alleged material alteration to the principal debt or obligation owed to C qua principal creditor. Paragraph 32.b.iii. of the Re-Amended Defence says this in terms.

- (iv) The fact that clause 5 itself says “*guarantees*” does not obviate the need to plead its legal characterisation as such and any consequences said to flow from that characterisation. The basis of the claim as pleaded is that D’s liability under clause 5 is primary in nature, i.e. an indemnity. If D wished to contend that any liability was only secondary or accessory and hence parasitic on (and further hence co-existent with) an underlying primary/principal debt owed to C by another (i.e. her own) corporate entity as borrower under existing financing, that contrary characterisation requires articulation as a key feature of the dispute. It involves a challenge to the nature and basis of contractual liability as asserted or assumed in the pleaded claim. It is, on any view, a “*reason*” for the denial of liability.
- (v) A denial of liability based on the characterisation of a payment covenant as an obligation or contract of suretyship is not the same as a pure point of construction for pleading purposes. As noted above, such characterisation engages distinct jurisprudence under English law; this is reflected in the long-standing publication of well-known specialist practitioner texts (e.g. *Andrews & Millett: Law of Guarantees* (8<sup>th</sup> ed. pending)) and a separate chapter dedicated to guarantees in Volume 2 of *Chitty on Contracts* dealing with specialist contracts, to take two examples. The fact that the characterisation of a contract as one of suretyship, and the identification of the ‘type’ of guarantee within that genus, involves an exercise of ascertaining the relevant parties’ objective common intentions does not mean it need not be pleaded. The creation or variation of contractual relations involves a similar exercise. So do extra-contractual doctrines such as rescission, estoppel and waiver.
- (vi) The Amended Defence does not contain the ingredients of a pleaded defence based upon clause 5 imposing a secondary liability. It does not, for example, identify the relevant principal debt or obligation with any specificity or legal resonance. The reference to “*Brandon’s liabilities had in any event been re-financed beyond the terms of the [TTA]*” in paragraph 32.b. is not an adequate identification of a principal debt or obligation. It forms part of a pleaded defence as to the absence of a “*sale*” to trigger liability (i.e. primary liability) under clause 5. Further:

- (a) Paragraph 36 of the LOI references paragraph 32.b. of the original Defence for the broad dispute as to whether “*the sums claimed at paragraph 24.2 of the POC fall within the terms of Clause 5 of the [TTA]*”.
  - (b) Paragraphs 33 and 35 of the LOI both reference paragraph 32.d. of the original Defence on quantum-related defences to the claim albeit under the section headed, “*The operation and sale of the Taurus Two*”.
21. I conclude, therefore, that D requires permission to amend to introduce the Guarantee Analysis. The suggested additions to the LOI to reflect the Guarantee Analysis are substantial. D has not disagreed with such contingent formulations. This confirms my conclusion as to the current pleaded position.

### **Admissibility: Duration Analysis**

22. I am satisfied that it is open to D to advance the Duration Analysis at trial without the need to amend his pleaded case. This argument is one of pure construction of the words appearing in clause 5 construed in their contractual and commercial matrix. The entirety of that matrix is in play in support of the various pleaded analyses as to why D says he is not liable to pay (any of) the sums claimed pursuant to clause 5.
23. This construction argument does not expand the parameters of D’s denial of liability. It falls within the ambit of the pleaded denial in paragraph 32.b. of the Amended Defence that “*in all the circumstances the sale was not one envisioned by the terms of clause 5 or falling with it*”. The Duration Analysis involves less legwork than D’s implied rescission or estoppel-based defences as pleaded. On proper analysis it may be or involve another way of circumscribing the concept (i.e. timing) of “*sale*” in clause 5 itself.
24. As regards the implied rescission defence, introduced by amendment a week before trial, I observe in passing that paragraph 26 of the Amended Defence is sufficient to carry such a case by reference to the Annual Reconciliation to 31 December 2018 as signed by C and D, i.e. even if the primary case of implied rescission (paragraph 25.a.) is not made out by reference to the “*arrangements*” during the period December 2012 to September 2017 pleaded at paragraphs 20 to 24 of the Amended Defence. The second sentence of paragraph 26 appears to have been an attempt to plead this independent factual or contractual basis for all of the defences advanced in paragraph 25, even though the phrase “*her assumption that the [TTA] had been rescinded*” elided two distinct defences. Such elision was the unintended by-product of concision.
25. D does not, therefore, need permission to amend in respect of the Duration Analysis or, so far as may have been suggested in oral submissions, paragraph 26 of the Amended Defence. The scope and nature of D’s pleaded defences to both liability and quantum are not without significance when it comes to determining the next issue.

### **Amendment: Guarantee Analysis**

26. In light of my conclusion as to the non-admissibility of the Guarantee Analysis on D's current pleaded case, it becomes necessary to determine this limb of his amendment application issued last Friday.
27. I conclude that it would be contrary to the interests of justice and/or the overriding objective of the CPR to permit D to introduce the Guarantee Analysis by way of amendment at this late stage.
28. I say nothing about the merits of such analysis given the potential overlap with pleaded defences. As regards threshold characterisation, I have assumed that it is possible for a contract or covenant of suretyship to be undertaken by a party (here, D) to a counterparty (here, C) in respect of a principal debt or obligation owed to the latter by a non-contracting party (B) which happens to be a company beneficially owned and controlled by C. But such structure is unorthodox, putting it mildly. The alignment of commercial or corporate interests is usually found as between principal debtor (B) and surety (D), rather than between B and C in this triangular model.
29. Not only does the posited principal debt or obligation arise by way of (presumed) (implied) indemnity on the part of B arising out of C's own personal guarantee to the relevant finance parties to whom B is primarily liable for the underlying debt; by the same logic and legal impetus an equivalent implied indemnity would arise on the part of B qua principal debtor in favour of D qua surety to the extent that the latter paid out on the guarantee to C qua principal creditor. This would create a situation in which C's benefit under the guarantee is offset (at least on paper) by her own company's (i.e. B's) corresponding and consequent implied liability to indemnify D in the ordinary way of things. That feels distinctly uncommercial and circuitous.
30. As it happens, I need form no view as to the substantive merits of the Guarantee Analysis. This is because I am amply satisfied that D has been unable to justify such a late amendment with potential implications for the focus and shape of this trial.
31. Crucially in this context, I am not satisfied that any good or sufficient explanation has been provided by D for the timing of this proposed amendment:
  - (i) I reject the audacious attempt to pin the procedural blame on C for her pleaded claim under clause 5 as an indemnity: see paragraphs 7.3 and 20.2.7 of the Amended Reply. If anything, that pleaded characterisation of a primary liability laid down the challenge to D to articulate any contrary analysis by reference to a secondary liability, i.e. guarantee: see paragraph 20(iv) above. The original pleaded claim is for reimbursement alternatively damages: see paragraphs 24.2 and 25 of the (Amended) Particulars of Claim. C did not thereby invite D to raise, or assume the risk of D



raising, such a counter-analysis at trial through opening submissions. As I have already concluded, the Guarantee Analysis required pleading.

- (ii) In so far as C's pleaded characterisation of clause 5 as an indemnity was raised in her original Reply (served in November 2021) that put the onus on D to seek amendments to his case to challenge such characterisation prior to the CMC held in February 2022. The words of clause 5 themselves provide the obvious pointer to running such a rebuttal case, after all.
- (iii) The fact that C's witness evidence served pursuant to the CMC Order referred to clause 5 as a "*guarantee/indemnity*" does not alter the allocation of procedural responsibility. This is descriptive language in factual witness evidence. If anything, this would put D's legal team on notice of the need to plead the Guarantee Analysis.
- (iv) The further attempt to shift responsibility onto C for not having interrogated paragraph 32.b. of the original Defence is without merit. That paragraph, since amended to accommodate the implied rescission analysis added in at paragraph 25.a., runs a defence based upon the proper meaning of "*sale*" within the meaning of clause 5 (see paragraphs 20(vi) & 23 above). There was nothing in that which put the onus on C to interrogate it to resolve patent ambiguity or uncover an implicit case based upon secondary liability.
- (v) The fact that D changed counsel at some point prior to trial does not provide an explanation for this delay: see Factor (h) in *Ferand* (above). On the contrary, new counsel obviously reviewed the pleaded case and concluded that it required augmentation (implied rescission / declaration of trust as to co-ownership of Brandon) as well as streamlining (removing the enforceability/non-execution point) in the run up to trial. This prompted service of the Amended Defence, as described. No explanation is given as to why the Guarantee Analysis was not (sought to be) introduced as part of those amendments a week before trial.

32. Furthermore and so far as relevant in light of the above conclusion:

- (i) There has been genuine prejudice to C caused by the unjustified timing of such proposed amendments. The Guarantee Analysis was advanced for the first time in D's written opening submissions filed three clear business days before the first sitting day of trial. The application itself was made on the allotted reading day. This caused disruption to C's legal team in preparing for trial; it has at the very least diverted attention onto tangential or procedural matters at a time when they were entitled to be fully focussed on the substance of the claim and defences. It has also consumed time provisionally allocated for cross-examination on the first day of trial which may in turn reduce C's own time allocation for cross-examining D.

- (ii) Moreover, I am satisfied that if the amendments were now permitted C would be prejudiced substantively. Absent an adjournment of trial, C would have missed the opportunity to seek disclosure from D as to matters relevant to his (inevitable) case based on co-extensivity to the effect that he had not consented to or validly varied the guarantee in clause 5 in light of (alleged) material alterations to the principal debt or obligation owed to C in the period between conclusion of the TTA (September 2011 for present purposes) and sale of the vessel by C in May-July 2020 (see paragraph 7 above). The precise nature or scope of the issues or disclosure that may have been sought going to such issues cannot be known at this stage. C has been unable to plead back to D's proposed negative plea (vis. "*to which [D] had not consented*" in paragraph 32.b.); and, therefore, a commercial judge has been denied the opportunity to determine the scope of D's disclosure obligations by reference to a properly pleaded dispute. Due process has been short-circuited or compromised.
- (iii) On the other hand, there is no or insufficient material prejudice to D in refusing this amendment in circumstances where his pleaded defences engage legal mechanisms and doctrines by reference to the same overall factual narrative. D can and will contend at trial that the sale of the vessel in May-July 2020 fell outside the contemplation of the parties evaluated objectively at the time of the TTA such that his payment obligation (if surviving at all) was not triggered. D will contend that such obligation should be construed strictly and *contra proferentem* even as a primary obligation of indemnity. An issue arises as to the purview of the 'purview doctrine' itself, i.e. irrespective of whether the payment obligation is primary or secondary.
- (iv) I raised in oral submissions whether D was willing to pay the costs thrown away by an adjournment of trial at this stage on (at least) the indemnity basis. I received no confirmation to such effect on behalf of D.

33. In all the circumstances, I am thoroughly satisfied that it would be unjust to accede to D's amendment application in respect of the Guarantee Analysis. I dismiss it.

### **Next Steps**

34. I will deal with the costs of these discrete procedural issues at an appropriate stage during or after trial. The parties have agreed at my request a list of disputed areas/issues of fact and identified the pleaded matters to which they relate. Cross-examination will take place by reference to that rubric and will be controlled to ensure it concludes in time for oral closing submissions. The trial will finish on Thursday.