Case No: A3/2011/2146

Neutral Citation Number: [2012] EWCA Civ 640
**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE CHANCERY DIVISION**
**Mr Justice Vos**
**HC10C01527**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 May 2012

**Before :**

**LORD JUSTICE RIMER**
**LORD JUSTICE MCFARLANE**
and
**LORD JUSTICE LEWISON**

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**Between :**

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| **IBRAHIM** | **Appellant** |
| **- and -** | |
| **BARCLAYS BANK PLC & ANR** | **Respondent** |

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**MR ROMIE TAGER QC & MR JACKSON** (instructed by **Winckworth Sherwood LLP**) for the **Appellant**
**MR PATRICK GOODALL & MR RUPERT ALLEN** (instructed by **Addleshaw Goddard LLP**) for the **Respondent**

Hearing dates : 9 and 10 May 2012

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# Judgment

**Lord Justice Lewison:**

## Introduction and background

1. The only remaining issue in this appeal is whether a debtor's liability to his creditor is discharged when the creditor recovers an equivalent amount to the debt from a bank that has provided a standby letter of credit.

2. The factual background is as follows. LDV Group ("LDV") was at the relevant time a well-known van manufacturer in the Midlands. It was an important regional employer. Since 2005 it had been owned by GAZ International Ltd ("GAZ"). However, it had run into chronic cash-flow difficulties and had suspended production in about December 2008. Although its cash-flow position was poor, it had assets; and it was thought that their value exceeded its liabilities. It was also hoped that if it could raise working capital it would shortly be able to restart production. GAZ was looking to sell LDV. But it was unwilling to put more money into the business. The demands of LDV's numerous creditors, and its outgoings, meant that it had an immediate cash need of the order of £1 million per week to "keep afloat" pending some form of disposal and refinancing of the business.

3. Barclays Bank plc ("Barclays") was the principal lender to LDV. It had provided both overdraft facilities and equipment finance loans. As at May 2009 the overdraft was of the order of £8.5 million and the finance loans were of the order of £1.6 million. Barclays had the benefit of various securities for their loans, in the shape of a charge over land and a debenture over LDV's assets, together with a guarantee from GAZ for the overdraft up to £8.5 million. But it was also unwilling to put more money into the business.

4. Weststar LDV Sdn Bhd ("Weststar") was a Malaysian company. It was already familiar with LDV's vehicles, having enjoyed arrangements with LDV since 2006 for the purchase of vehicles for import to, or manufacture in, Malaysia, as well as distribution rights in South East Asia, Australia and New Zealand. Mr Ibrahim, who was himself a successful businessman, was the controller of Weststar. He was interested in arranging for Weststar to buy LDV's business. The British government were also keen to see LDV survive. However the government were unwilling at the time to finance LDV pending its sale.

5. Ultimately the directors of LDV decided that they had no choice but to petition for the administration of LDV. That petition was to be heard on 6 May 2009. The imminent petition prompted a flurry of activity. The British government in the shape of the Department of Business, Enterprise and Regulatory Reform ("BERR") modified its position. If GAZ were out of the way it might be prepared to assist with the interim financing of LDV. Discussions followed between BERR, Weststar and LDV, with the consequence that, over the May Bank holiday weekend in 2009, Weststar agreed to purchase all of GAZ's shares in LDV under the terms of a Share Sale and Purchase Agreement (the "SPA"). A due diligence period was allowed for with completion to be on 30 June 2009. The SPA included a provision requiring Weststar to use its "best efforts" to secure interim funding of £5 million. Weststar understood that BERR would assist with the interim funding. BERR approached Barclays, and asked it to

provide short term finance of £5 million, against the security of a Government guarantee. However, in return for that guarantee, BERR demanded super priority over Barclays' existing security. That was unacceptable to Barclays; but Barclays did agree to share some of its realisations with BERR. Nor were Barclays willing to provide as much as £5 million in interim finance.

6. There was a further problem. BERR were unwilling (or perhaps in the light of EU rules prohibiting state aid unable) to provide a non-recourse guarantee. They were unwilling to accept an indemnity from Weststar. Eventually what was agreed was that Mr Ibrahim would arrange for UBS Singapore to provide a letter of credit in favour of BERR. UBS in turn required an indemnity from Mr Ibrahim personally.

7. Thus the outlines of the ultimate arrangements were:

   i) Barclays agreed to provide further finance up to £2.5 million (although in the event only £1.4 million was drawn down);

   ii) BERR agreed to guarantee LDV's liability to Barclays for that further finance limited to £2.5 million;

   iii) LDV agreed by way of counter-indemnity to pay BERR on demand all sums paid by BERR or demanded by Barclays under the BERR guarantee;

   iv) Mr Ibrahim arranged for the letter of credit to be issued by UBS in favour of BERR as the beneficiary;

   v) Mr Ibrahim agreed to indemnify UBS;

   vi) Barclays and BERR agreed that the first £3.2 million of recoveries in LDV's insolvency would be shared equally between them; and any surplus over £3.2 million would go to BERR until such time as it had been repaid in full for any liability incurred under the BERR guarantee.

8. I will need to return to some of the details in due course.

9. In the course of conducting its due diligence Weststar decided not to proceed with the acquisition of LDV. This had the result of pushing LDV over the edge into administration, which was itself an event of default under the Barclays facility. By that time just over £1.4 million had been drawn down. So, on 8 June 2009, Barclays made formal demand on BERR under the BERR guarantee for repayment of the sums outstanding under the new facility and was paid. On the following day, 9 June 2009, BERR demanded payment from LDV under the counter indemnity. The sums that BERR demanded consisted not only of the sum that it was required to pay Barclays, but also an additional sum of £6,900 for costs and expenses which it had incurred, and which LDV was liable to pay under the terms of the counter indemnity. On the same day BERR also demanded payment from UBS under the letter of credit, and was paid. Mr Ibrahim ultimately repaid UBS under his indemnity to UBS. Economically, therefore, the buck has stopped with Mr Ibrahim.

10. Mr Romie Tager QC and Mr Hugh Jackson, appearing on Mr Ibrahim's behalf, say that he is entitled to share in the recoveries made by Barclays in the same way as BERR would have been entitled to share in them. Mr Patrick Goodall appearing with Mr Rupert

Allen on behalf of Barclays, says that once UBS had paid BERR, BERR had no further right to share in Barclays' recoveries. Vos J agreed with Barclays that Mr Ibrahim's claim failed. With the permission of Rimer LJ, Mr Ibrahim appeals.

**The relevant documents**

*The Berlin term sheet*

11. "Berlin" was the code name given to LDV. A term sheet was prepared on or about 11 May 2009, and circulated on 12 May. The recipients included LDV, Barclays, BERR and Weststar, all of whom were asked to confirm agreement to it. We were told that they did. The term sheet contained non-binding indicative terms, although it did form the genesis of the eventual suite of documents. The amount of the facility was to be £5 million. £2.5 million was to be made available initially, with further availability subject to a maximum of £5 million "subject to the provision of covering Standby Letter of Credit from UBS Singapore on behalf of Weststar in favour of HMG." Next to the side note "HMG Letter of Credit/Bank Guarantee" it provided:

> "Guarantee from a bank satisfactory to HMG (in its sole discretion) sufficient to cover the guarantee provided by HMG, to be arranged by Weststar in favour of HMG, to reimburse any payments under its Guarantee to Barclays plus accrued interest, fees and third party costs of documenting and, if necessary, enforcing the agreement."

12. Subject to the provision of the HMG Guarantee Barclays were to provide the loan facility to "Berlin" secured by Barclays' existing security (apart from a guarantee by GAZ). There was then provision for sharing of the proceeds of security as between HMG and Barclays in a manner that was eventually embodied in the Realisation Agreement (the "RA"). The term sheet also provided that "all drawdown requests made by Berlin are to be agreed by Weststar prior to drawdown…".

*The new facility*

13. On 13 May 2009 Barclays wrote to LDV with the terms of the new facility. The initial amount was to be £2.5 million and the maximum was to be £5 million. Paragraph 1.2 said that drawdown would only be available upon Barclays receiving a written request together with written authority to the drawing from Weststar, copied to BERR. The purpose of the facility was to provide working capital. Paragraph 7 said that the loan was to be secured by "any security and/or guarantee(s) which are now or subsequently held by the Bank." It also stated that the facility was to be secured by "an executed guarantee" for £2.5 million from the Secretary of State.

*The BERR facility*

14. BERR wrote to LDV to offer a facility. The facility was for the issue of guarantees relating to the Barclays loan. The first guarantee was to be for an amount not exceeding £2.5 million. Paragraph 5 stated that the facility would not be available for drawing until BERR had received (among other things) a counter-indemnity executed by LDV and a standby letter of credit issued by UBS in favour of BERR for an amount of not less than £2.5 million in a form and substance satisfactory to BERR.

*The LDV counter-indemnity*

15. The document in the case papers is not dated, but the judge found that it was entered into on 14 May 2009. It recited that the Secretary of State had agreed to provide a guarantee for loans to be made available to LDV by Barclays. Clause 1 required LDV to "pay [the Secretary of State] on demand all sums paid by [the Secretary of State] under or in connection with any Guarantee and indemnify [the Secretary of State] on demand against all actions, charges, claims, costs, damages, demands, expenses, liabilities, losses and proceedings which may be brought or preferred against [the Secretary of State]…". Clause 2 empowered the Secretary of State to make payments and comply with demands without requiring proof that the amounts demanded were due; and to pay even though LDV might dispute its own liability. Clause 6 provided that it should not be necessary for the Secretary of State before demanding payment to endeavour to enforce any other guarantee or security whether from LDV or any other person; and that the Secretary of State "shall have the right and power to claim all amounts due and payable in respect of the liabilities hereunder from [LDV Group] or any other person in such order and at such times as [the Secretary of State] may in its absolute discretion consider appropriate".

*The BERR guarantee*

16. The BERR guarantee in favour of Barclays was executed on 18 May 2009. By clause 2.1 the Secretary of State guaranteed the payment by LDV of its liabilities to Barclays up to an aggregate limit of £2.5 million. Clause 6.1 provided for the guarantee to terminate at midnight on 12 June 2009 (except in relation to amounts falling due before that time).

*The realisation agreement*

17. The RA was made on 14 May 2009. It recited, among other things that:

> "In consideration of the issue of the Guarantees by [the Secretary of State][Barclays] has agreed that any Distribution Moneys received by [Barclays] in respect of the Bank Liabilities will be shared between them in accordance with the terms of this Agreement."

18. The relevant terms of the RA provided as follows:

> "1.1 In this Agreement:
>
> …
>
> "Counter Indemnity": means the counter indemnity entered into by [LDV Group] on or about the date of this Agreement in favour of [the Secretary of State] in respect of its liabilities under the Guarantees.
>
> "Creditors": means each of [Barclays] and [the Secretary of State].

"Distribution Moneys": means any moneys received by [Barclays] or any person acting on behalf of or on the instructions of [Barclays] in respect of the Bank Liabilities or the Guarantor Liabilities, as the case may be, including but not limited to those received from:

(a) the enforcement of the Bank Security or any part thereof;

(b) the proceeds of dissolution and liquidation of [LDV Group] and/or any Related Party or distribution of its assets among its creditors (however such liquidation or distribution may occur)…;

…

"Guarantor Liabilities": means the aggregate of the amounts in various currencies at any time and from time to time owing by [LDV Group] or any Related Party to [the Secretary of State] and unpaid in respect of principal, interest, default interest, commissions, charges, fees, expenses and indemnities.

"Realisation Sharing Amount": means an amount equal to the lesser of:

(a) £3,200,000; and …

…

**2. Sharing Arrangements**

***Turnover of Distribution Moneys***

2.1 Unless and until the Guarantor Liabilities have been paid and discharged in full and [the Secretary of State] has no further actual or contingent liability under or in respect of the Guarantee, to the extent that [Barclays] receives any Distribution Moneys for application against the Bank Liabilities or the Guarantor Liabilities as applicable, it shall;

2.1.1 as soon as reasonably practicable following receipt pay to [the Secretary of State] (and pending such payment, hold on trust for the [the Secretary of State]) for application to the Guaranteed Liabilities (or to be held by [the Secretary of State] pending such application) an amount equal to 50% of the Distribution Moneys, to the extent the aggregate Distribution Moneys received do not exceed the Realisation Sharing Amount; and

2.1.2 as soon as reasonably practicable following receipt pay to [the Secretary of State] (and pending such payment, hold on trust for [the Secretary of State]) for application to the Guaranteed Liabilities (or to be held by [the Secretary of State]

> pending such application) an amount equal to the total amount of the Distribution Moneys, to the extent the aggregate Distribution Moneys received exceed the Realisation Sharing Amount. …
>
> …
>
> **4. Term of Agreement**
>
> 4.1 This Agreement shall continue in force until the date that [the Secretary of State] has no further actual or contingent liability under or in respect of the Guarantee, and the Guarantor Liabilities have been irrevocably discharged in full.
>
> …
>
> **9. Successors and Assigns**
>
> 9.1 This Agreement shall bind and inure to the benefit of the respective successors and assigns of the Creditors, provided, however, that no Creditors shall assign or transfer any interest it has under this Agreement unless the assignee or transferee undertakes to be bound by the provisions of this Agreement.
>
> 9.2 Notwithstanding Clause 9.1 above, the rights and obligations of [the Secretary of State] under this Agreement shall be binding on, and enforceable by, any successor in title to [the Secretary of State]."

*The standby letter of credit*

19. UBS issued its standby letter of credit on 14 May 2009. It said that it was issued in favour of the Secretary of State "covering credit facilities provided by yourselves to [LDV] up to an aggregate amount of GBP 2,500,000". It continued:

> "A claim under this Standby Letter of Credit must cite this SBLC No. SBLC09032 and must be accompanied by the Beneficiaries' duly signed request for payment certifying that the amount demanded represents and covers the unpaid sums due to yourselves by [LDV]."

20. The standby letter of credit stated in terms that it was subject to the Uniform Customs and Practice for Documentary Credits ICC Publication No. 600 ("UCP 600").

**The case below**

21. Mr Ibrahim began proceedings against Barclays and the Secretary of State. He had thought about joining UBS, but in the end decided not to. The Particulars of Claim pleaded the various agreements and the sequence of events I have summarised, culminating in the payment by Mr Ibrahim to UBS. The Particulars of Claim went on to allege in paragraph 19:

> "In the premises, in the events which have occurred, [Mr Ibrahim] became subrogated to the rights of BERR in the following:
>
> (a) The Realisation Agreement.
>
> (b) The Counter Indemnity."

22. The Particulars of Claim went on to allege that in about November 2009 LDV's assets were sold and that Barclays received part of the proceeds of sale. They then said that Barclays had failed to account to BERR or to Mr Ibrahim for what was due under the RA; and that Barclays had declined to acknowledge that it held its recoveries on the terms of the RA. Thus the Particulars of Claim claimed the following relief:

> "(i) A declaration that [Mr Ibrahim] is entitled to be subrogated to:
>
> (a) the rights enjoyed by BERR in relation to the Counter Indemnity;
>
> (b) the rights enjoyed by BERR pursuant to the Realisation Agreement.
>
> (ii) A declaration that [Barclays] holds all such monies as it may have received, and as it may receive from LDV pursuant to the terms of the Realisation Agreement.
>
> (iv) An account by [Barclays] of all such sums as it may have received from LDV.
>
> (v) An order upon taking such account for payment to [Mr Ibrahim] of such sums as may be due to him pursuant to the Realisation Agreement…"

23. Although the Secretary of State was joined as a party to the proceedings, no relief was sought against him. The Secretary of State filed a Defence. In that Defence he pointed out that the Particulars of Claim made no claim to relief against him and revealed no cause of action against him. He was, however, prepared to continue as a party to the proceedings "for the purpose of assisting the Court, [Mr Ibrahim] and [Barclays] if and to the extent required in the resolution of these proceedings." He made no positive case and no claim for relief of his own.

24. The precise legal basis on which Mr Ibrahim puts his case was not immediately apparent from the pleadings; and the judge recorded that the way in which Mr Tager had put his case changed somewhat during the course of the trial. But ultimately Mr Tager relied on two types of subrogation, namely:

    i) Subrogation to extinguished rights (which the judge called type 1 subrogation) and

    ii) Subrogation to subsisting rights (which the judge called type 2 subrogation).

25. Underpinning both ways of putting the case was the contention that the payment by UBS to the Secretary of State did not discharge the debt due under the counter indemnity from LDV to the Secretary of State (judgment § 6). The judge described Mr Ibrahim's case thus (§ 8):

> "Mr Tager submits that Mr Ibrahim is entitled to engage type 1 subrogation (on the basis that the arrangements with UBS were simply a mechanism to ensure that Mr Ibrahim paid the Secretary of State, so that one should look at the substance rather than the form), because the debt due from LDV to the Secretary of State was not discharged by the payment by UBS. He submits that Mr Ibrahim can also engage type 2 subrogation because the agreement or understanding between all the relevant parties was that Mr Ibrahim (again regarding the arrangements with UBS as purely mechanistic) would be entitled to stand in the shoes of the Secretary of State to share in Barclays' recoveries from an administration of LDV if UBS paid up."

26. The judge then considered the basic contention that the payment by UBS to the Secretary of State did not discharge LDV's obligations to the Secretary of State under the counter indemnity, and rejected it. He continued (§ 130):

> "130. Since the answer to the first issue is that UBS's payment did discharge LDV's liability to the Secretary of State, this issue does not arise. This is because, despite some prevarication in submissions, it was ultimately common ground between the parties that, that if LDV Group's debt to the Secretary of State was discharged by UBS's payment, Mr Ibrahim could not make either a type 1 or a type 2 subrogation claim against Barclays.
>
> 131. The reason for that concession was simply the unambiguous wording of the distribution provision in clause 2.1 of the RA, which is prefaced by the following condition, namely that distributions are permitted to the Secretary of State: "*[u]nless and until the Guarantor Liabilities have been paid and discharged in full and [the Secretary of State] has no further actual or contingent liability under or in respect of the Guarantee*". This condition was undoubtedly fulfilled when UBS made its payment to the Secretary of State because by that time:-
>
> i) The Guarantor Liabilities (meaning the aggregate of the amounts owing by LDV Group to the Secretary of State and unpaid in respect of principal, interest, default interest, commissions, charges, fees, expenses and indemnities) had been discharged for the reasons I have given; and
>
> ii) The Secretary of State had no further actual or contingent liability under or in respect of the Guarantee.

> 132. Accordingly, when UBS paid the Secretary of State, the Secretary of State's right to "*Distribution Monies*" as defined in the RA ceased. It was at no time suggested that, when this right ceased, any other right of the Secretary of State against Barclays, whether at common law or in equity, could survive. Nor was it suggested that any right of subrogation could survive the termination of the Secretary of State's contractual right to Distribution Monies."

27. Thus Mr Ibrahim's claim failed.

**Events since trial**

28. On 29 February 2012 the Secretary of State executed an assignment of his rights arising out of or in relation to the RA and the counter indemnity to Mr Ibrahim. Notice of the assignment was given to Barclays on 12 March 2012. Mr Ibrahim asked for permission to introduce the assignment into evidence on this appeal.

29. The argument in support of the application asserted that if Mr Ibrahim had taken an assignment before trial then the only issue that Vos J would have had to determine was whether the payment by UBS to the Secretary of State discharged LDV's obligations under the counter indemnity. Thus there would have been no need to determine any of the subrogation issues. The argument went on to assert that if Mr Ibrahim succeeded in persuading this court that the payment by UBS did not discharge LDV's debt, then "it would follow that [Mr Ibrahim] is entitled to judgment against Barclays in the sum of [£1.4 million], Barclays having recovered [£3.8 million] from LDV." Mr Tager recognised that the assignment would have to be pleaded; and proposed an amendment to the Particulars of Claim to plead it. After some discussion Mr Tager agreed that the amendments would include not only the positive averment of the assignment, but also the deletion of reliance on subrogation previously contained in the Particulars of Claim. Thus paragraphs 19 and 22(i) of the Particulars of Claim (which had been the foundation of the claim at trial) would be deleted.

30. The first point that Mr Goodall took in opposition to the application was indeed the pleading point. As he rightly said unless the assignment was pleaded, it went to no issue in the case. He also pointed out that an appellate court is always very reluctant to allow an appellant to pursue a case that was not raised below. Second, he said that the delay in achieving the assignment had not been satisfactorily explained and for that reason too the new evidence should not be admitted.

31. Under the old rules an amendment to a pleading related back to the issue of the writ. Amendments were commonly refused if they would have allowed a plaintiff to assert a cause of action that he did not have at the date when the writ was issued. Although it is not entirely clear whether the doctrine of relation back has been abolished for all purposes (e.g. amendment to plead a cause of action that would be statute barred at the date of the amendment but not at the date of the claim form), there have been cases in which amendments have been allowed to permit a claimant to rely on events post-dating the issue of the claim form. Moreover, if, for example, a party has died during the course of proceedings, it would be routine to allow his personal representatives to carry on the proceedings. The assignment of a cause of action from

the Secretary of State to Mr Ibrahim is akin to such a case. Although we recognised the force of Mr Goodall's point about the paucity of evidence, we decided that the interests of justice came down firmly in favour of allowing the amendment to be made and the new evidence adduced. We gave a ruling to that effect during the course of the appeal. It follows that all issues about subrogation fell away.

**Did payment by UBS to the Secretary of State discharge LDV's obligation?**

32. As I have recorded it was common ground below that if the payment by UBS to the Secretary of State did discharge LDV's obligations under the counter indemnity, then Mr Ibrahim's claim must fail. That is still the position on this appeal. The question of discharge is thus the only issue we need to decide.

33. We were referred to some of the correspondence passing between the parties both before and after the finalisation of the contractual documents. We were also referred to parts of the evidence in which certain of the witnesses expressed their subjective views about what they thought had been agreed. In my judgment all this material and evidence was entirely irrelevant to the bare legal question we have to decide. I do not therefore propose to set it out or discuss it. Mr Tager placed some reliance on the Berlin term sheet (parts of which I have set out). He accepted that it was not relevant to questions of interpretation of the suite of contractual documents, but said that it was relevant to what the parties intended. I did not follow the suggested distinction.

34. The judge reasoned as follows:

    i) Whether a payment discharges a debt depends primarily on the intention of the creditor and the debtor; in this case LDV and the Secretary of State. Their intention must be derived primarily from the documents they entered into, but it is permissible to look at other evidence to consider what their understandings were: (§ 113);

    ii) There was no direct evidence of the intention of LDV beyond clause 6 of the counter indemnity: (§ 114);

    iii) UBS was party to an autonomous instrument, namely the letter of credit. Its intentions may not be strictly relevant but it was undoubtedly bound by the terms of the letter of credit: (§ 115);

    iv) As a matter of interpretation of the letter of credit UBS would only be bound to make a payment that the Secretary of State had certified "represents and covers the unpaid sums" due to the Secretary of State by LDV. The word "cover" in context means "discharge": (§ 128);

    v) The Secretary of State secured the payment from UBS on the basis of a representation that it would discharge the LDV debt; and by clause 6 of the counter indemnity LDV had given him the authority to demand the amount of its debt from any other person. Both of them must be taken to have intended that such a payment would discharge LDV's liability to the Secretary of State under the counter indemnity: (§ 128);

vi) Therefore UBS' payment to the Secretary of State did discharge LDV's liability to the Secretary of State under the counter indemnity.

35. In their skeleton argument Mr Tager and Mr Jackson said that the judge decided that UBS made its payment as agent for LDV. I do not think he did. Nowhere does he mention the question of agency. As I read the judgment he approached the question on the basis of the intention of the relevant parties, objectively ascertained. However that may be, in opening the appeal Mr Tager submitted that UBS was a "stranger" so far as the debt owed by LDV to the Secretary of State was concerned; and that, in those circumstances a payment by UBS could not have discharged LDV's debt unless it was made by UBS as agent for LDV. Agency, he said, was essential if LDV's debt was to be discharged by UBS' payment. If there were no agency there could be no discharge. He submitted that:

i) LDV did not see the letter of credit and had no involvement in its drafting. They did not procure its issue. They cannot be treated as the principal in a relationship of agency with UBS;

ii) The letter of credit was an autonomous transaction. In making payment under the letter of credit UBS was doing no more than complying with its own free-standing obligation to make a payment on presentation of compliant documents. It cannot be regarded as having been in any sense the agent of LDV;

iii) The evidence adduced on behalf of the Secretary of State made it clear that no one within BERR ever thought that payment by UBS would deprive Mr Ibrahim of what they believed were his rights to subrogation under the general law.

36. In support of the submission that a payment made by a third party will only discharge a debtor's debt if made as agent for the debtor, Mr Tager relied on *Simpson v Eggington* (1855) 10 Exch. 845. The treasurer of the corporation of Lichfield paid Mr Eggington, the corporation's former clerk, a year's salary thinking that he had the corporation's authority to do so. In fact he did not; and the corporation repudiated the payment and sacked Mr Eggington. The new clerk sued for the money; and Mr Eggington said that he could set off his entitlement to a year's salary. Parke B gave the judgment of the court. He said:

> "The general rule as to payment or satisfaction by a third person, *not himself liable as a co-contractor or otherwise*, has been fully considered in the cases of *Jones* v *Broadhurst* (9 C B 193), *Belshaw* v *Bush* (11 C B 191), and *James* v *Isaacs* (22 L J C P 73); and the result appears to be, that it is not sufficient to discharge a debtor unless it is made by the third person, as agent, for and on account of the debtor and with his prior authority or subsequent ratification." (Emphasis added)

37. The first critical question, then, is whether the third party is himself liable "as a co-contractor or otherwise". If he is, then the general principle stated by Parke B will not apply. The quotation from this judgment in Mr Ibrahim's skeleton argument omitted this crucial part of the principle.

38. In *Re Rowe* [1904] 2 KB 483 Mr Rowe owed money to Dehrenburg & Co. Rowe's firm made a voluntary payment of the amount of the debt. Dehrenburg & Co subsequently claimed to be entitled to prove in Mr Rowe's bankruptcy for the whole of the debt; and their claim was upheld by this court. Vaughan Williams LJ said:

> "The words in which Buckley J finds the facts are these: "This is not a case in which a stranger comes and offers to the creditor a portion of the debt due, and the creditor accepts it towards satisfaction of the amount due, there being no communication with the debtor in the matter. It was not tendered or accepted in reference to any part of the debt at all, but it was offered and accepted as a voluntary payment made in consideration of the fact that the creditor had incurred losses through the act of a person for whom Bewick, Moreing & Co held themselves to be on some moral ground, at any rate not upon any legal ground, responsible." I think that that conclusion of fact was perfectly right. This, as Buckley J points out, was a payment with which Rowe, the debtor, had nothing to do and of which he was quite ignorant. It did not purport to be made on his behalf. It did not purport to be made on account of either the debt or the debtor. *It was a voluntary gift made by Bewick, Moreing & Co for the purpose of mitigating a loss for which they were not liable.* I do not think that the parties to this transaction intended, the one the payment to be made, the other the payment to be accepted, for or on account of the debtor or of the debt." (Emphasis added)

39. In my judgment the crucial fact here is that the payment was a voluntary payment; that is to say one for which the payer had no legal liability. Once again, the quotation from this judgment in Mr Ibrahim's skeleton argument omitted this crucial part of the principle. In addition the payment was not made "in reference to … the debt". Even where a payment *does* discharge another's debts the law may still decline to recognise that any rights have accrued to the payer as a result of the payment. *Owen v Tate* [1976] QB 402 is one example.

40. Where the payer has been compelled to pay the legal position is quite different. Many of the cases concern a case where A has paid a sum of money equivalent to an amount that B was liable to pay, and subsequently claims to be recouped by B. A's claim to recoupment could only succeed if his payment had discharged B's liability. Even where the question of discharge is not explicitly discussed in the cases, it is the fundamental premise upon which recoupment rests.

41. In *Exall v Partridge* (1799) 8 Term Rep 308 Mr Exall left his carriage with Mr Partridge, a coach-maker. Mr Partridge was the tenant by assignment of his coach building works. His landlord distrained for rent and seized Mr Exall's carriage. In order to get his carriage back Mr Exall paid the landlord, and then claimed recoupment not only from Mr Partridge, but also from the original tenants. His claim succeeded. Of the four judges who heard the case Lawrence J was the clearest on the question of discharge. He said:

> "…here was a distress for rent, due from the three defendants; the notice of distress expressed the rent to be due from them all; the money was paid by the plaintiff in satisfaction of a demand on all, and it was paid by compulsion; therefore I am of opinion that this action may be maintained against the three defendants. The justice of the case indeed is, that the one who must ultimately pay this money, should alone be answerable here: but as all the three defendants were liable to the landlord for the rent in the first instance, and as by this payment made by the plaintiff, all the three were released from the demand of the rent, I think that this action may be supported against all of them."

42. This, it should be noted, was a case in which Mr Exall had no contractual liability to pay. He himself was not liable to pay the rent. Moreover his action in leaving his carriage with Mr Partridge was itself a voluntary act. In addition the fact that Mr Exall left his carriage with Mr Partridge was unknown to the other defendants who were nevertheless held liable to pay.

43. In *Moule v Garrett* (1872) LR 7 Exch 101 an original tenant was compelled to pay damages for dilapidations. He successfully claimed recoupment against the ultimate assignee in possession. Cockburn CJ approved a statement in Leake on Contracts as follows:

> "Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, *so that the latter obtains the benefit of the payment by the discharge of his liability*; under such circumstances the defendant is held indebted to the plaintiff in the amount." (Emphasis added)

44. The words "so that" in the quotation are to some extent ambiguous. They could mean "in consequence of which" (i.e. that *would* be the result) or they could mean "in circumstances in which" (i.e. that *could* be the result). In context, I think that the former meaning is the correct one.

45. In *Brook's Wharf and Bull Wharf Ltd v Goodman Brothers* [1937] 1 KB 534 Goodman Brothers deposited imported furs in Brook's bonded warehouse. A number of them were stolen, without negligence on the part of the warehousemen. As bonded warehousemen Brook's were compelled to pay customs duties on the imported furs. They claimed recoupment from Goodman Brothers. The claim succeeded. Lord Wright MR referred to the principle quoted by Cockburn CJ in *Moule v Garrett* and said that it had been applied in "a great variety of circumstances" and that it did not depend on privity of contract. On the question of discharge he said:

> "The payment relieved the importer of his obligation. The plaintiffs were no doubt liable to pay the Customs, but, as between themselves and the defendants, the primary liability rested on the defendants. The liability of the plaintiffs as warehousemen was analogous to that of a surety. It was imposed in order to facilitate the collection of duties in a case

> like the present, where there might always be a question as to who stood in the position of importer. The defendants as actual importers have obtained the benefit of the payment made by the plaintiffs and they are thus discharged from the duties which otherwise would have been payable by them."

46. In *Electricity Supply Nominees Ltd v Thorn EMI Retail Ltd* (1992) 63 P & CR 143 ESN had let property to Thorn on terms that required payment of a service charge. Thorn had sub-let the property to BT on similar terms. Because of the operation of Part II of the Landlord and Tenant Act 1954 ESN had become simultaneously entitled to enforce both the covenants in the head lease against Thorn and the covenants in the sub-lease against BT. Thorn paid service charges due under its lease. The question was whether it was entitled to recover the amount of the payment from BT. One step in the decision was whether Thorn's payment had discharged BT's liability to ESN. Fox LJ said:

> "If a person makes a voluntary payment intending to discharge another's debt, he will only discharge the debt if he acts with that person's authority or the latter subsequently ratifies the payment. Consequently if the payee makes the payment without authority and does not obtain subsequent ratification he normally has no redress against the debtor.
>
> The position where there is a payment under compulsion, however, is different."

47. He then referred to some of the cases I have mentioned. Fox LJ concluded that Thorn paid under compulsion because it had no answer to ESN's claim. Second (and importantly for present purposes) Thorn's payment discharged BT's debt to ESN:

> "Secondly, it seems to me that the payment discharged BT's liability to ESN. BT could have been sued direct by ESN for the full amount of the charges and would have had no answer to the claim. The claim by ESN, though it would have arisen by virtue of the under-lease and not by virtue of the headlease, would have been for exactly the same amount computed in exactly the same way and in respect of the same services as the amount recoverable by ESN from Thorn."

48. Sir Denys Buckley agreed with Fox LJ. Staughton LJ also agreed.

49. These authorities in my judgment justify the first two of Mr Goodall's propositions, namely:

i) Payment by a third party to a creditor under legal compulsion on account of a debt owed by a debtor will automatically discharge the debtor's debt;

ii) That is the case even if the legal compulsion arises out of a contractual obligation voluntarily assumed by the third party.

50. Where the case is one of payment under compulsion, questions of agency, authority and ratification do not in my judgment arise.

51. Although the authorities on which Mr Tager relied in opening the appeal were cases dealing with voluntary payments, in the course of his reply he accepted that UBS did pay the Secretary of State under compulsion. Accordingly in my judgment the initial criticism of the judge in dealing (or not dealing) with questions of agency were misplaced. But, Mr Tager said, his acceptance that UBS paid under compulsion begged the question: what was it that UBS was compelled to pay? Was it, to use Mr Goodall's language, "on account of [the] debt"?

52. Mr Tager submitted that the obligations of an issuing bank under a letter of credit are autonomous. That is undoubtedly correct. In the first place UCP 600 makes that clear. Article 4 a states:

> "A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under a credit is not subject to claims or defences by the applicant resulting from its relationship with the issuing banks or the beneficiary."

53. Article 5 states:

> "Banks deal with documents and not with goods, services, or performance to which the documents may relate."

54. Article 7 a states:

> "Provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour if the credit is available…"

55. Thus the obligation of an issuing bank under a letter of credit is to honour the credit on presentation of compliant documents. The letter of credit itself will specify what documents comply. Mr Tager referred us to Lord Diplock's description of the autonomy principle in *Commercial Banking Co of Sydney Limited v Jalsard Pty Ltd* [1993] AC 279, 286:

> "The banker is not concerned as to whether the documents for which the buyer has stipulated serve any useful purpose or as to why the customer called for a tender of a document of a particular description."

56. Mr Tager took as his paradigm example a cross-border contract for the sale of goods where the buyer arranges a letter of credit for an amount equivalent to the price of the goods. He submitted that when the issuing bank honours the credit it is not paying the price of the goods. If, for example, the buyer claims to have rescinded the contract on

the ground of misrepresentation by the seller, the bank must still pay. Whether the payment is or is not payment of the price must depend on the terms of the contract for sale. In principle I agree with this. If the buyer has rescinded the contract for misrepresentation, the bank's payment cannot discharge the buyer's debt, because there is no longer a debt to discharge. In the paradigm example the buyer will have arranged the letter of credit. But what is important is not his intention in his capacity as applicant, but his intention in his capacity of buyer.

57. In the paradigm case both seller and buyer will have contracted on the footing that payment by documentary credit will be payment of the price. As Benjamin on *Sale of Goods* explains (§ 23-001):

> "Through the tendering of commercial documents, a seller can provide a significant measure of proof that it has performed its obligations under a contract. By contracting for payment against documents, as through a collection as discussed in the previous chapter, a buyer gains such protection against the risk of default by its seller. Equally, however, a seller may be desirous of protection against default by the buyer. The focus of this chapter is upon the introduction of a trusted party to assume financial obligations to the seller in respect of the price. Most commonly, the parties contract for payment by "documentary credit" (or "letter of credit"): this still affords the buyer the protection of payment against documents but, in addition, provides the seller with protection against buyer default by substituting one or more banks as the party to which the seller looks-indeed, primarily at least, is required to look-for payment."

58. In their article *Subrogation and bankers' autonomous undertakings* (2000) LQR 121, 136 McCormack and Ward state:

> "When the issuer of a standby letter of credit duly pays the beneficiary, it is necessarily discharging (at least in part) its customer's obligation – this is the intention of all the parties and the legal effect – but it is also discharging its own obligation which it owes, personally, to the beneficiary."

59. In other words the general view is that the seller looks to the letter of credit for payment of the price. Thus it is, I think, received wisdom that when an issuing bank honours a letter of credit its payment will discharge the obligation that gave rise to the need for the letter of credit.

60. It is, however, important to be clear about the scope of the autonomy principle. Again Benjamin explains (§ 23-070):

> "The principle of the autonomy of the credit insulates the operation of the credit from any matters *extraneous to the credit's own terms*. In consequence, first, the credit is independent of disputes arising out of the underlying contract between the applicant and the beneficiary. … Secondly, the

> credit is also independent of the relationship between the applicant and the issuing bank. Any rights the issuing bank may have against the applicant do not prejudice the rights of the beneficiary under the credit. Thirdly, and conversely, the beneficiary's rights are *those specified in the credit as communicated to it*: the beneficiary cannot avail itself of the relationships between banks or between the applicant and the issuing bank." (Emphasis added)

61. It is clear, therefore, that the autonomy principle does not preclude looking at the terms of the letter of credit to see what it is that the bank is paying. In the present case the credit said that it was "covering credit facilities provided by yourselves to [LDV]". Thus LDV was the only potential debtor identified in the terms of the letter of credit. The triggering event was certification by the Secretary of State that "the amount demanded represents and covers the unpaid sums due to yourselves by [LDV]". The judge said (§ 128):

> "It seems to me that the common or garden usage of the word "cover" in this context is indeed "discharge", rather than "is sufficient to discharge". If there were any extraneous material to suggest that the wording was required for another reason, that might have been significant. But I can only rely on the evidence that is available. And that shows that the Secretary of State was required, in order to make his claim against UBS, and for reasons that have not been explained in the 7 days of the trial, to certify that the amount demanded represented and covered (meaning discharged) the debt due from LDV Group to the Secretary of State."

62. I agree with this, and do not need to add much more. In addition to certifying that the amount demanded "covers" the amount unpaid by LDV, the certificate also had to say that the amount demanded "represents" that amount. If it "represents" the amount unpaid by LDV it must follow, as I see it, that as between LDV and the Secretary of State it has the legal consequences of a payment by LDV. Moreover, as Mr Goodall submitted, the payment made by UBS was undoubtedly "on account of" LDV's debt in the sense that it was referable to that debt and to nothing else. In my judgment that is sufficient to bring the compulsion principle into play.

63. Mr Tager sought to characterise the credit as an insurance policy or as an indemnity akin to an insurance policy. But that, in my judgment, would offend the very autonomy principle on which he relied. An insurer or indemnifier is entitled to enquire into the real loss that the insured or indemnified has suffered; and is not obliged to pay more than that loss. Under the letter of credit, UBS was not entitled to make any such enquiry. Moreover the letter of credit does not refer to "loss": it refers only to "sums due and unpaid".

64. Mr Goodall's third proposition was that a payment to a creditor made under an indemnity will discharge any liability to indemnify under an equal or co-ordinate indemnity. That proposition is well supported by authority: *Caledonia North Sea Ltd v British Telecommunications plc* [2002] 1 Lloyd's Rep 553 (§ 63 Lord Mackay of Clashfern; § 92 Lord Hoffmann). Accordingly, in my judgment even if the credit were

to be characterised as an indemnity, it could only be (at best from Mr Ibrahim's point of view) an indemnity co-ordinate with LDV's counter indemnity. But that would not help Mr Ibrahim; because of Mr Goodall's third proposition.

65. Another label that Mr Tager sought to attach to the letter of credit was a "sub-guarantee". If it were to be treated in that way, one would first have to ask: what primary liability is being guaranteed? The only answer, in my judgment, is that it is the liability of LDV under the counter indemnity to the Secretary of State, because that is the only liability referred to in the credit itself. It was certainly not a guarantee of the Secretary of State's own guarantee of LDV's liability to Barclays. In that sense the letter of credit was a guarantee (rather than a sub-guarantee) of LDV's liability. But if that were the case, then the Secretary of State would be the creditor, LDV the principal debtor, and UBS the guarantor. In such a case it is clear law that payment by the guarantor discharges the debt of the principal debtor, and gives rise to rights by way of subrogation in the guarantor. But since we are concerned only with discharge, and not with subrogation, that does not assist Mr Ibrahim either. In my judgment these attempts to recharacterise the credit do not carry Mr Ibrahim home.

66. Applying the principle as stated by Fox LJ in *Electricity Supply Nominees Ltd v Thorn EMI Retail Ltd* to the present case:

    i) The Secretary of State could have sued LDV for the amount that he had been required to pay to Barclays plus the other amounts that LDV was liable to pay under the counter indemnity;

    ii) LDV would have had no answer to the claim;

    iii) The claim against UBS was for the same amount computed in the same way, and was in respect of the same action on the part of the Secretary of State (i.e. payment to Barclays plus the other amounts recoverable under the counter indemnity).

67. In those circumstances I conclude, like the judge, that the payment by UBS did discharge LDV's liability to the Secretary of State under the counter indemnity (as well as any liability that LDV might have had to the Secretary of State under principles of subrogation). It follows in my judgment that once UBS had paid the Secretary of State the Guarantor Liabilities (as defined in the RA) had been paid and discharged in full; and the Secretary of State's rights under the RA came to an end. There was, therefore, nothing for him to assign to Mr Ibrahim on 29 February 2012; and no rights to which Mr Ibrahim has become entitled.

68. I would dismiss the appeal.

**Lord Justice McFarlane:**

69. I agree.

**Lord Justice Rimer:**

70. I also agree.