Claim No LM-2018-000037

Neutral Citation Number: [2018] EWHC 2719 (Comm)

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

LONDON CIRCUIT COMMERCIAL COURT (QBD)

Date: 18/10/2018

BEFORE:

DANIEL TOLEDANO Q.C.

(SITTING AS A DEPUTY HIGH COURT JUDGE)

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BETWEEN:

BARCLAYS BANK PLC

Claimant

and

(1) MR FRANKLIN RICHARD PRICE
(2) MR SIMON CHRISTOPHER REES-HOWELL
(3) MR JULIAN MORGAN SKEENS
(4) MR PHILIP GRAHAM COHEN
(5) MR CHARLES ERIC GERADA AZZOPARDI

Defendants

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Mark Warwick Q.C. (instructed by Gordon Dadds LLP) for the **Applicant/Fourth Defendant**
Robert Scrivener (instructed by Dentons UK and Middle East LLP) for the **Respondent/Claimant**

Hearing date: 12th October 2018

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JUDGMENT

1. This is an application by the Fourth Defendant ("Mr Cohen") to strike out the claim of Barclays Bank Plc ("Barclays") against him, alternatively for summary judgment in his favour.

Background

2. Mr Cohen was one of the directors of the law firm Jeffrey Green Russell Limited ("JGR"). JGR went into liquidation owing sums to Barclays. The Bank is therefore seeking to enforce its rights under guarantees that were provided to it by the directors, including by Mr Cohen.

3. In 2012 Barclays had provided to JGR the 2012 Overdraft Facility and the 2012 Term Loan. These arrangements required security to be provided in the form of guarantees. The required security was described in the 2012 Overdraft Facility and in the 2012 Term Loan as including "*A guarantee from Philip Graham Cohen on the Bank's standard form limited to £55,500.00…*"

4. Mr Cohen and the other Defendants executed guarantees in favour of Barclays on, I am told, nearly identical terms on or around 20 August 2012. The guarantees were entered into by way of deed. Mr Cohen's Guarantee provided as follows:

    a. Clause 1.1 – that Mr Cohen would unconditionally guarantee that all Customer Liabilities [any money and liabilities which JGR now owes or may owe in the future in any way] will be paid or be satisfied. Mr Cohen would immediately pay the amount guaranteed when Barclays made demand.

    b. Clause 2.1 – that the Guarantee was for the full amount of all Customer Liabilities. However, the total amount that Mr Cohen had to pay under the Guarantee would not be more than the Specified Amount, plus interest and certain other amounts.

    c. Clause 6 – that Mr Cohen was liable to Barclays as principal debtor for any Customer Liabilities that cannot be recovered from him as guarantor. This was a separate commitment, extra to the guarantee in clause 1.1. The amounts

for which Mr Cohen was liable under this clause had to be paid for as soon as Barclays demanded payment. The total amount Mr Cohen would have to pay would be no more than that mentioned in clause 2.

d. Clause 11 – this concerned serving demands and notices. It provided in clause 11.1 that a demand or notice "*may*" be made or given by a letter addressed to an Authorised Address. Clause 11.2 provided that a demand or notice would be treated as properly served when it is left at an Authorised Address (if delivered by hand) or at noon on the day after it was posted if it was sent by post to an Authorised Address, even if it is not delivered or returned undelivered.

e. The Specified Amount calculated in a Schedule to the Guarantee was an amount equal to the Customer Liabilities at the relevant time in respect of the aggregate of the following – (a) one ninth of the balance outstanding on the 2012 Term Loan plus (b) a maximum of £55,000 of the balance outstanding on the 2012 Overdraft Facility or any other account which may be substituted for it.

5. The 2012 Term Loan was repaid. The 2012 Overdraft Facility was refinanced in August 2013. This was achieved by Barclays entering into a 2013 Facility Agreement with JGR in the amount of £600,000. No new security was required. However, the 2013 Facility Agreement expressly referred to the existing security which was listed in the Schedule to the Commercial Terms. This Schedule set out the existing security and referred, inter alia, to a guarantee from Mr Cohen for £55,500.

6. Barclays' case is that the 2013 Facility Agreement account was substituted for the 2012 Overdraft Facility account. Mr Cohen denies that this substitution took place. The parties have not suggested that this issue can be resolved on this application. Accordingly, the issue of account substitution will be an issue for trial.

7. On or around 16 October 2015 Barclays sent the First Demand to Mr Cohen. This was sent to his correct address. It demanded payment forthwith of Mr Cohen's liability pursuant to the guarantee dated 20 August 2012 of the liabilities of JGR as

specified below. It then listed the "principal sum due" as being £55,500, interest of £0 and therefore the "total outstanding" as £55,500.

8. It will be apparent that the amount demanded was higher by £500 than the maximum specified in (b) of the Specified Amount definition in the Schedule to the Guarantee. The amount demanded was equal to the amount identified as the required security in the 2012 and 2013 arrangements between the Bank and JGR.

9. By letter dated 26 October 2015 Mr Cohen wrote to Barclays. He referred to the letter of 16 October 2015 and to the Guarantee. He then stated that there was no mention of £55,500 in the Guarantee and that the 2012 Overdraft Facility was already repaid such that there was nothing for the Guarantee to bite upon.

10. Barclays responded by letter dated 20 November 2015. As regards the £500 point, the Bank stated that it required Mr Cohen to make payment of the lower sum of £55,000. As regards the repayment of the 2012 Overdraft Facility, the Bank asserted that the 2013 Facility Agreement account had been substituted for the 2012 Overdraft Facility account.

11. On or about 17 March 2016 Barclays sent the Second Demand which was itself dated 8 March 2016. This document demanded a sum of £55,000 only and not £55,500. The Second Demand contained Mr Cohen's correct address at the top of the first page. However, according to the evidence, the Second Demand was sent by first class post under cover of a Letter Before Action sent by Dentons on behalf of Barclays dated 17 March 2016. The Letter Before Action contained an error in the address of Mr Cohen (it referred to the correct street number but omitted the "A" after this number). According to Mr Cohen, he did not therefore receive the Letter Before Action at the time.

12. Barclays does not accept Mr Cohen's case on this point. Barclays points in particular to the fact that, by letter dated 5 May 2016, Mr Cohen wrote to Dentons for the first time in order to make various points about his Defence in the action. Barclays considers that this suggests that Mr Cohen had received the Letter Before Action and the enclosed Second Demand by that date. Mr Cohen says, however, that he had only

found out about Dentons' involvement from his co-defendants and that his 5 May 2016 letter does not refer in terms to the Letter Before Action for that reason. Mr Warwick QC who appeared for Mr Cohen did, however, accept that his client had at some point obtained a copy of the Letter Before Action and the accompanying Second Demand, although he said that this was after commencement of the proceedings.

13. Mr Cohen issued the Application Notice seeking a strike out of the claim and/or summary judgment on 26 March 2018. Mr Cohen has also provided two witness statements. Barclays relies on a witness statement of Mr Roger McCourt.

14. In view of the various issues that I have identified above, Barclays issued an application dated 30 August 2018 for permission to file and serve an Amended Claim Form and Amended Particulars of Claim. This application has not yet been listed and will need to be dealt with following the hand-down of this judgment. The amendments sought by Barclays seek to plead two demands in addition to the two I have described above.

    a. First, Barclays seeks to rely on a letter dated 24 May 2018, which was served on or around 25 May 2018. This demand was correctly addressed and only demanded payment of £55,000.

    b. Secondly, Barclays seeks to rely on the service of the Claim Form and Particulars of Claim as a further, valid demand with the Date of Deemed Service being 23 February 2018.

15. Mr Warwick QC accepted that in due course his client was likely to have to consent to the proposed amendments such that the action would continue as against his client. The real consequence he said therefore of the Application that I have to decide concerned the question of costs. Mr Warwick QC submitted that, if his client succeeded on this Application, he should be entitled to an order for the immediate payment of all of his costs of the action to date, albeit that the claim would then likely be amended and continue. Barclays disputed that this was the correct way for the court to proceed in relation to the amendments. I will come back to the proposed amendments at the end of this judgment.

16. I turn now to the issues that arise. There are essentially three points which arise for determination on this Application. In so far as other points had been raised in the evidence, Mr Warwick QC accepted that he was not pursuing them. The three points are as follows:

    a. Is Barclays required to issue a demand in order to claim under the Guarantee or can it rely on the principal debtor clause i.e. clause 6?

    b. If Barclays is required to issue a demand under the Guarantee, is the First Demand invalid by reason of having demanded an excessive amount?

    c. If Barclays is required to issue a demand under the Guarantee, is Barclays able to rely on the Second Demand even though it was sent under cover of the Letter Before Action which contained an error in Mr Cohen's address?

17. I will deal with each of these three issues in turn.

Is Barclays required to issue a demand in order to claim under the Guarantee?

18. Barclays contends that it does not matter if its First Demand was for an excessive amount or that the Second Demand was sent under cover of a letter that was incorrectly addressed because it did not need to make a demand at all. Barclays relies on clause 6 of the Guarantee which, as described above, contains a principal debtor obligation.

19. The authorities establish that "principal debtor" clauses have the effect of creating a primary liability and such liability is not contingent on demand even where the words "repayable on demand" have been used in the instrument in the context of the surety's liability as surety: see **M.S. Fashions Ltd and Ors v BCCI (In Liquidation) and Ors** [1993] Ch 425, Hoffman LJ at 436D-F; Dillon LJ 447B-F; **TS & S Global Limited v John Fithian-Franks and Ors** [2007] EWHC 1401 (Ch), David Richards J at [26]-[27]. However, as the passages from the judgments of Dillon LJ in **M.S. Fashions** and David Richards J in **TS & S Global** make clear, essentially the question is one of the construction of the contract.

20. In the present case, a demand is referred to both in clause 1.1 and in clause 6 of the Guarantee. Barclays sought to argue that in the context of clause 6 the reference to a demand was designed only to crystallise the date from which payment would need to be made but was not necessary for the liability to arise in the first place. I do not accept that submission. It seems to me that there is no material distinction between the way in which a demand is dealt with in clause 1.1 and the way it is dealt with in clause 6. In each case, a demand is required. Accordingly, the present case is in my judgment distinguishable from the authorities relied on by Barclays. On its true construction, the Guarantee requires a demand to be served on Mr Cohen before an obligation to pay arises, whether an obligation to pay as surety or an obligation to pay as principal debtor. I therefore reject Barclays' case on the first issue.

Is the First Demand invalid by reason of having demanded an excessive amount?

21. Mr Cohen contends that the First Demand is invalid because it sought payment of £55,500 against a maximum specified liability under the Guarantee of £55,000.

22. Mr Warwick QC relies on the test set out in the well-known House of Lords decision in **Mannai Investment Co. Ltd v Eagle Star Life Assurance Co Ltd** [1997] AC 749. In that case, the House of Lords considered whether notices to determine leases were effective. Lord Steyn set out various numbered propositions at p. 767 of his speech. The fourth of these propositions was that notices under break clauses in leases were not in a unique category and belonged to the general class of unilateral notices served under contractual rights reserved. Lord Steyn stated that, even if such notices contained errors, they may be valid if they are "*sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate*": **Delta Vale Properties Ltd v Mills** [1990] 1 WLR 445, at 454E-G, per Slade LJ and adopted by Stocker and Bingham LJJ; see also **Carradine Properties Ltd v Aslam** [1976] 1 WLR 442, 444. Lord Steyn went on to say that the test postulated that the reasonable recipient was left "*in no doubt that the right reserved is being exercised*" (see also Lord Hoffmann at 780G and Lord Clyde at 782A-B). Mr Warwick QC also relied in this context on **Barclays Bank v Bee** [2002] 1 WLR 332, Arden LJ at [43] and [49].

23. Mr Warwick QC said that the reasonable recipient of the First Demand would be in doubt as to whether and if so how liability under the Guarantee was being demanded since the amount claimed was (a) in excess of the maximum stated in the Guarantee and (b) equal to the (different) amount referred to in the various 2012 and 2013 facilities.

24. Mr Scrivener who appeared as counsel for Barclays accepted that the **Mannai** test applied. However, he relied on a number of authorities that make it clear that demands under guarantees for excessive amounts may be valid. The authorities show that, at least in cases of "all moneys due" guarantees, the demand need not specify the amount owing at all: **Bank of Baroda v Panessar** [1987] 1 Ch 335, Walton J at 346-347. Moreover, in such cases, if the wrong amount is specified, that would not invalidate the demand which would be effective for the amount actually owing. See **Arab Banking Corporation v (1) Saad Trading & Financial Services Company (2) Maan A Al-Saneia** [2010] EWHC 509 (Comm), David Steel J at [34]-[36]: "…*I have formed the clear view that a request for more than is due does not invalidate a demand made against a guarantor*". In the **Arab Banking Corporation** case, where the demand was for about $600,000 more than was due, David Steel J relied on the opinion of the learned authors of O'Donovan and Phillips in the Modern Contract of Guarantee at [10-126]-[10-130]. That seems to have been a reference to the First Edition of that work. Mr Scrivener helpfully provided the Court with each of the First, Second and Third Editions all of which reach the same conclusion, namely, that even a request for more than is due should not invalidate a demand. The same conclusion is reached by the learned authors of Law of Guarantees, Seventh Edition, The Honourable Mrs Justice Andrews DBE and Richard Millett QC at page 319.

25. Mr Warwick QC distinguished these authorities on the basis that they were principally dealing with "all moneys due" guarantees whereas he submitted that the position is different in the present case where the Guarantee was for a maximum specified amount. Mr Scrivener said in response that the Guarantee was an "all moneys due" guarantee albeit one that specified that liability could not exceed a specified amount.

26. I accept that each guarantee must be looked at on its own terms and in its proper context. Although the authorities make it clear that a demand for an excessive amount may be valid, the conclusion in any particular case will turn on the guarantee in question. The factors that may be relevant in any given case will include what liabilities were guaranteed. Ultimately, the court has to apply the **Mannai** test in an objective way as regards the reasonable recipient of the demand.

27. Adopting that approach, I have no doubt that the First Demand was not invalid by reason of demanding £500 more than the maximum specified amount. In my judgment, the reasonable recipient could not have been left in any doubt at all that the right reserved was being exercised, bearing in mind that no particular form of demand was stipulated in the Guarantee:

    a. The demand referred expressly to the Guarantee dated 20 August 2012.

    b. The demand required payment of Mr Cohen's liability pursuant to that Guarantee of the liabilities of JGR.

    c. The reasonable recipient would have known of the terms of the Guarantee including that they contained a clearly expressed specified maximum.

    d. The reasonable recipient would have known that the additional £500 was above the maximum, and it would have been open to the reasonable recipient therefore to have paid the maximum amount and disputed the balance.

    e. I accept that the sum demanded was the same as the sum referred to in the 2012 and 2013 documentation between the Bank and JGR but I do not accept that this alone would have left the reasonable recipient confused as to whether the Bank was purporting to make a demand under the Guarantee subject to the terms of that Guarantee including as to amount.

    f. I do not accept Mr Warwick QC's submission that the reasonable recipient might well have thought that the Bank had deliberately demanded the wrong sum. No basis for this submission was suggested and no evidence was prayed

in aid, beyond the point about the 2012 and 2013 documentation between the Bank and JGR which I have addressed immediately above.

28. Although this issue arises as part of Mr Cohen's strike out and/or summary judgment application, both parties invited me to decide the point finally on this application since all relevant facts and matters are before the Court. I therefore conclude that the First Demand was valid. It follows from this conclusion that I reject Mr Cohen's applications to strike out the claim against him and/or to grant him summary judgment on it.

29. I should add that Barclays raised a further argument to the effect that I should not strike out the claim or give summary judgment on it because Barclays wishes to advance a fall-back argument at trial if needed, namely that it was entitled to demand the additional £500 as a result of various allegations of rectification, variation and estoppel. In view of my conclusion above, I do not need to express a view about these matters.

Is Barclays able to rely on the Second Demand even though it was sent under cover of the Letter Before Action which contained an error in Mr Cohen's address?

30. Mr Cohen contends that Barclays cannot rely on the Second Demand because of the error in his address in the Letter Before Action. He says that Barclays has no basis to challenge his evidence that he did not receive the Second Demand at the time. As I have indicated above, Barclays does not agree. It wishes to explore this issue at trial and to investigate further when and how Mr Cohen first obtained the Second Demand.

31. In my judgment, this issue is not a matter that can be determined summarily on an application such as the present. It is a matter that raises a triable issue of fact that can only be determined at trial when the relevant witnesses can be cross examined following disclosure in the usual way.

32. Mr Warwick QC relied on **Easyair Limited v Opal Telecom Limited** [2009] EWHC 339 (Ch) Lewison J at [15] so as to contend that it is not enough if Barclays has a fanciful prospect of success on the point. It must have a realistic prospect meaning one that carries some degree of conviction and is more than merely arguable.

However, in my judgment, Barclays does have a realistic prospect of success within the meaning of this test.

33. I am not therefore willing to strike out the claim or to give summary judgment on it in so far as it is based on the Second Demand. The Second Demand issue will need to be resolved at trial (unless Barclays choose not to pursue it in light of my conclusion on the First Demand).

34. A further point about the Second Demand is that, as I have said above, Mr Warwick QC accepts that Mr Cohen obtained the Second Demand at some point, albeit he says that this was after the commencement of the proceedings. The date that Mr Cohen received it would obviously be relevant to the interest that Barclays could recover. Subject to that, I do not see any reason why Barclays could not rely as against Mr Cohen on the fact that that the Second Demand came into his possession at some point. In **Maridive and Oil Services (SAE) & Anor v CNA Insurance Co (Europe) Ltd** [2002] EWCA Civ 369 Chadwick LJ stated at [54] that there is "*no absolute rule of law or practice which precludes an amendment to rely on a cause of action which has arisen after the commencement of the proceedings in circumstances where (but for the amendment) the claim would fail. The court has a discretion whether or not to allow the amendment in such a case; a discretion which is to be exercised as justice requires*." (see also Mance LJ at [23]). It would therefore be open to Barclays to seek to amend to rely on the Second Demand even from such later date as Mr Cohen received it subject as I have said to the consequences of this as regards interest.

Application to amend

35. In light of my judgment, the parties should liaise as to how to take forward Barclays' Application to Amend. Barclays accepts that, in the usual way, it must pay the costs of and occasioned by the amendments. Directions will then need to be given for the disposal of that Application and for the further conduct of this case thereafter.

Conclusion

36. For the reasons set out above, I dismiss the Fourth Defendant's application for the claim to be struck out as against him and/or for summary judgment.