Case No: BR-2018-001374

Neutral Citation Number: [2019] EWHC 1811 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
INSOLVENCY AND COMPANIES COURT

7 Rolls Building
Fetter Lane
London EC4A 1NL
Tuesday, 18 June 2019

BEFORE INSOLVENCY AND COMPANIES COURT JUDGE JONES

BETWEEN:

AMARPREET SINGH RANDHAWA

Applicant

- and -

BRIDGECO LIMITED

Respondent

MR A SHAW (instructed by Fox Williams LLP) appeared for the Applicant
MS L KUEHL appeared for the Respondent

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

I.C.C. Judge Jones:

I. I have before me an application notice issued pursuant to section 375 of the Insolvency Act and/or rule 3.3 of the Civil Procedure Rules 1998 to set aside a statutory demand dated 5 April 2018, served on the Applicant on 8 May 2018. The original application was dismissed pursuant to the order dated 1 August 2018 made by MacKenzie DDJ. The order granted the Respondent, Bridgeco Limited, permission to present a bankruptcy petition. The Respondent served the bankruptcy petition on the Applicant on 28 September 2018. At that stage, it was listed to be heard on 23 October 2018. The application asks for the order dated 1 August 2018 to be set aside and for the petition to be dismissed. It also seeks directions and costs.

2. The matter came before this court as a result of a transfer order from the County Court at Central London of 23 October 2018. There followed an order of ICC Judge Barber on 15 January. The dismissal order was set aside pursuant to section 375 and the petition was dismissed. Directions were then given for the application to set aside the statutory demand, which is how it has ended up before me. The basis and the circumstances in which that order was made are unexplained before me but they do not need to be. The result is that I must decide whether the statutory demand should be set aside.

3. The statutory demand requires Mr Randhawa to pay a sum of, in round terms, just under £4,498,000. Its particulars refer to a facility agreement between Halamar (Birchlands) Limited ("HBL") and Mr Randhawa, Halamar (Eaton House) Limited and Bridgeco Limited originally executed on 4 December 2013 and revised on 22 March 2017. The demand refers to a condition precedent for the facility agreement, namely that Mr Randhawa should enter into a guarantee and indemnity in favour of Bridgeco, which he did on 4 December 2013. The demand relies upon the liability under that guarantee, that sum having been requested to be paid by a letter of demand of 26 September 2017. The demand is, in effect, for £1 million plus interest, fees and expenses.

4. The application relies upon Insolvency Rules, 2016, 10.5(5)(a), (b) and/or (d) and I will treat those as being read into this judgment rather than read them out. The legal tests are familiar to this court and they are identified in the skeleton arguments. Subject to an issue concerning the application of sub-paragraph (d), they are not in dispute.

5. The scene to be set before identifying the defences relied upon can be summarised as follows: Mr Randhawa. established HBL for the purposes of a specific property development project. He became a director. He sought finance from Bridgeco Limited, Trooper Limited and Coatdean Limited. The finance was in place by the end of 2013, he having signed the 4 December guarantee. The development property was purchased and the development process began. Construction started in around April 2014. It took about a year for the basement of the new house to be completed and then the shell of the house took a further 12 months, so the work was completed around about July 2016. On 22 March 2017 a facility amendment and restatement deed were entered into. As I have previously mentioned, repayment of the principal loan together with interest and expenses was demanded by letter of 26 September 2017. On the same day administrators were appointed. The guarantee was called upon by letter of 2 February 2018.

6. The grounds of defence for the application involve Mr Randhawa stating that during negotiations for the financing it was represented to him that Bridgeco Limited would accept a personal guarantee limited to £1 million. That is referred to in a variety of places in the evidence. I mention for convenience paragraphs 4 to 5 of the witness statement of 2 April 2019 of Mr Randhawa. Applying the substantial dispute test, his oral evidence is to be accepted for the purposes of this hearing subject to it being contradicted by contemporaneous written evidence and/or it being incredible.

7. Subject to overcoming a representation within the terms of the guarantee that its meaning had been explained to Mr Randhawa by lawyers, it is not that difficult to see how the evidence of those oral statements might raise a defence based on rectification to reflect his assertion that he agreed to a £1 million guarantee but no more. His evidence plainly is that he was willing to provide a £1 million guarantee and the only

problem for him with regards to the deed of guarantee that he signed is the part of the wording of clause 3.2 of the guarantee that reads:

> *"Plus any interest, fee or expenses due and payable pursuant to the loan agreement."*

The statute of frauds would not be a problem for rectification. The words which do not reflect the agreement, as he says, could be struck out.

8. However, there is no reference to rectification within the evidence in support. Such relief has not been proposed during submissions despite the topic having been raised within the context of identifying the difficulties which exist for his primary defence. Instead, the primary defence is that the guarantee is void and/or should be rescinded for misrepresentation or mistake.

9. Subject to two additional defences the alternative case, if the defences relying on misrepresentation and/or mistake fail, relies upon an argument of construction. Namely, that the interest, fees and expenses, the "plus" part of the clause, are to be applied to the £1 million only and, indeed, only if payment is not made when the guarantee liability is demanded.

10. The two additional defences are that the principal debtor's liability as extended during 2017 falls outside the purview of the guarantee. Alternatively, that the guarantee should be set aside because it would be unjust to permit the petition to proceed when Bridgeco Limited had subsequently prevented third parties from purchasing the debt of the principal debtor which would have prevented the guarantee liability from existing.

11. Turning to the guarantee itself, the following points are to be noted: There is no doubt, and it is not disputed, that this is a continuing guarantee which expressly provides that it will apply to any renegotiated facility in connection with the loan agreement. I refer in particular to clauses 4.3.5, 5.4 and 5.9. This is obviously relevant to the applicability of the guarantee to the amendment and restatement deed.

12. Second, Mr Randhawa represented within the guarantee that he received legal advice as to the nature and extent of his obligations, I refer to clause 4.3.2. Third, should partial invalidity be established the remaining valid parts of the guarantee will be enforceable, clause 12. Fourth, clause 3.2, the most important clause, reads:

> *"The maximum aggregate amount which may be recovered from the personal guarantor under this deed in respect of the guarantee and indemnity contained in clause 3.1 shall be limited to £1 million sterling (£1,000,000) plus any interest, fees or expenses due and payable pursuant to the loan agreement."*

The loan agreement being, in essence, the facility agreement which I have mentioned.

13. I will deal first, in the light of that and the facts which I have summarised, with the first ground relied upon by the application for the statutory demand to be set aside, namely misrepresentation.

14. The first point is that the statement that a guarantee limited to £1 million will be accepted is a statement of one of the terms then being proposed for the offer of finance. As a term of the offer it may be varied or withdrawn at any time until the offer with that term has been accepted. There is no dispute that this term, as expressed in the evidence, was not accepted. Instead nothing was said to connote binding, contractual acceptance, a written guarantee was offered for signature containing a different term for the facility package and that offer was accepted by execution.

15. Terms offered in negotiation in that way cannot be treated as representations binding upon the representor if the term is not accepted and the offer changes. If the guarantee when drafted and presented as the offer document contains a different term, a decision must be made whether to contract on that new term. If agreed, there is no misrepresentation, if refused, there is no contract.

16. That means that there is no need, in fact, and it would be wrong in principle, to consider inducement or reliance. However, for completeness and bearing in mind the very detailed submissions that I have had, it can be added that this guarantee is clear in

its wording at clause 3.2, at least to the extent that the liability is limited to £1 million "plus … [etcetera]". Mr Randhawa had legal advice as to its meaning, as he represented within the guarantee. It is inconceivable that the legal advice would not have referred to the, "plus …" Any evidence to the contrary would be incredible. No lawyer would look at that clause and say it is purely £1 million when its express wording clearly says, "£1 million plus." It is clear that the representation of legal advice received would have prevented any claim of reliance or inducement as made by Mr Randhawa.

17. Moving to the alternative approach of mistake, there is no suggestion that Mr Randhawa did not read clause 3.2 or explanation as to why he thought that clause 3.2 did not mean £1 million, "Plus …" except to the extent that he refers to the independent legal advice which I mentioned. As to that, in his witness statement of 2 April, paragraph 6 he says:

> *"I was told by Mr Davies of CBS on 27 November 2013 that the guarantee would be limited to £1 million. On 21 March 2017 when I was advised by Simpson Millar LLP the process was very rushed as Simpson Millar LLP seemed to be under pressure to get all the documents for the amended agreements completed urgently. Consequently the process of giving me legal advice only took approximately five minutes and consisted of the solicitor informing me that my liabilities were the same as they were when I signed the personal guarantee in 2013. Therefore, at that point I understood that my liability would continue to be limited to £1 million as that was the legal advice I had received previously and that was consistent with the representations that the respondent had made to me."*

18. As I have said that is incredible, for the reasons already stated. Even if it was credible, his mistake only refers to the words, "Plus any interest et cetera" and unless he did not read this guarantee, and there is no suggestion that he did not, he himself would know that the words, "Plus …" must have meant something additional.

19. Furthermore, even if he had a basis for this claim of mistake , which I do not consider that he has applying the tests that I need to do with regard to a statutory demand, the £1 million guarantee cannot be rescinded on the basis of that mistake. The best that he

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would do would be to seek rectification concerning the words, "Plus [etcetera]". However, to the extent that he might seek rectification, whether by a common or unilateral mistake, the basic point is that he does not do so. He does not do so in his evidence and he did not do so in argument before me. Therefore, the ground of mistake is unsustainable.

20. That leads to the question of construction. My approach to the substantial grounds test is slightly wider in this context by analogy with the approach to be taken in regard to summary judgment. I refer to the note in the White Book at 24.2.3 which reads by reference to the case of *ICI Chemicals & Polymers Limited v TTE Training Limited* [2007] EWCA Civ 725 and the earlier decision to which it refers:

> *"Where a summary judgment application gives rise to a short point of law or construction the court should decide that point if it has before all of the evidence necessary for a proper determination and it is satisfied the parties have an adequate opportunity to address the point in argument. The court should not allow a case to go forward to trial simply because there is a possibility of some further evidence arising."*

21. I have already referred to clause 3.2. It limits recourse under the guarantee as provided for in clause 3.1. Clause 3.1 is an obligation not simply as guarantor but also as a principal obligor, although nothing really turns on that for these purposes.

22. Mr Randhawa's construction is advanced without suggesting that oral evidence is required. It starts from the premise that the basic figure that is due is £1 million. However, that leads immediately to the "Plus et cetera" wording. Its construction is apparent. The guaranteed liability is for £1 million plus any interest, fees or expenses due and payable pursuant to, which means in accordance with, the loan agreement. It is then necessary to look at the loan agreement to identify the interest, fees and/or expenses. Neither side has considered it necessary to take me to the loan agreement to support their case.

23. Whether the sum calculated in the statutory demand correctly applies the terms of the loan agreement is not something I have been asked to decide and indeed I cannot

decide on the basis of what I have been shown. I do not need to do so. The reason being because if the other defences addressed have failed, there is in any event a liquidated sum of £1 million due and owing. The statutory demand does not have to be for the precise sum due and owing to be valid. It is sufficient to enable a petition to be presented for it to cover the sum due and owing in excess of the statutory minimum.

24. This demand is plainly "good" for the £1 million without me needing to be referred to the "Plus et cetera" calculations and the terms of the loan agreement to decide whether the precise sum demanded is accurately calculated.

25. I move to the next submission, which raises the question whether there is a substantial dispute that the liability under the guarantee has been discharged because amendments to the guaranteed obligations have removed the liabilities from the purview of the guarantee.

26. The basis for this defence is set out in paragraph 35(4) of Mr Shaw's skeleton argument. A problem, in my judgment, for this submission is that it does not present or rely upon an "outwith purview" ground. An "outwith purview" ground challenges the application of a clause which provides that the guarantee shall not be discharged if there is a material variation to the principal contract without the guarantor's consent. It does so on the basis that there has not been a variation but instead there is a new different agreement which does not relate back or should not be connected to the original liability guaranteed.

27. As mentioned, the guarantee contains no discharge provisions and includes an obligation as principal debtor but it is not being suggested that there was a new, different agreement. Here, the defence is being relied upon in respect of variations to the original loan between the same parties for the same project. Those variations concern some additional finance, some rolling up of interest and some extensions of time but that does not introduce an "outwith purview" defence based upon a new, different agreement. This is not a case where the clause will cover a different subject matter and/or more than the scope of what was, in fact, previously agreed. In reaching

that decision I note the decision of Sir Bernard Rix in *CIMC Raffles Offshore (Singapore) Limited v Schahin Holding SA* [2013] EWCA Civ 644 at 51.

28. I also bear in mind within this context and generally the fact that the subsequent 2017 documentation consistently referred to the guarantee as a guarantee limited to £1 million. But that appears within the recitals and cannot possibly be said to be setting out the full terms of the liability under the guarantee, to exclude the "plus etcetera", in particular in circumstances when the parties were aware of those full terms and it is not suggested that any different agreement has been reached.

29. The next submission that would have been turned to is that there is a cross-claim arising from the misrepresentation but obviously that falls away in the light of the judgment I have reached for misrepresentation and indeed mistake.

30. I therefore turn to the final submission which is whether the demand should be set aside because it would be unjust to allow Bridgeco Limited to rely upon its own breach of contract against third parties.

31. As I have previously mentioned, sub-paragraph (d) of Insolvency Rule 10.5(5) is relied upon. It is based upon the submission that there is a genuine and substantial dispute that Bridgeco Limited breached its obligations to permit the other parties, Trooper Limited and Coatdean Limited, to purchase the principal debtor's debt. A purchase which, it is said, would have prevented bankruptcy proceedings against Mr Randhawa. More detail is set out in paragraphs 39 to 41 of Mr Shaw's skeleton argument.

32. It is accepted that such a dispute will not establish a defence or a cause of action for the purposes of set off. That is why Mr Shaw relies upon sub-paragraph (d). In my judgment an answer to this can be found by addressing the practical position and in that regard, I bear in mind the decision of the Court of Appeal in *Budge v A H Budge* [1997] BPIR 366, in particular the passages appearing on page 371.

33. The practical position, if this application was to be successful, would be that there will be a claim form seeking judgment for the sum of £1 million plus. There being no defence or set off, judgment will be obtained. That will enable Bridgeco Limited to apply for execution of the judgment debt. It can be assumed for these purposes that execution would be returned unsatisfied in whole or in part. That will be sufficient to enable Bridgeco Limited to present a bankruptcy petition. It will not need to rely upon a statutory demand and subject to nothing else occurring the bankruptcy order would be made on that petition. That is a good reason why sub-paragraph (d) should and will not apply.

34. That answer derived from the practical is also mirrored by the law to be found within the same case. This is set out on Ms Kuehl's skeleton argument at paragraph 36. In essence, this defence does not present a substantive reason comparable to the sort of reasons set out in sub-paragraphs (a), (b) and (c) of the Rule as to why the demand ought to be set aside.

35. Finally, insofar as one needs to go any further, and really, I only do so to pay tribute to the detail that Ms Kuehl has covered for the purposes of her skeleton argument and submissions, there are fundamental matters of fact which can be referred to and relied upon to counter this submission. She sets them out in paragraphs 31 through to 33 of her skeleton argument. I am not going to go into those matters any further because it is unnecessary to do so other than to say that I am convinced by those submissions.

36. For all those reasons this application seeking to set aside the statutory demand as it now does must fail and in that circumstance I will permit service of the petition within a time period to be considered.

Order Accordingly

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge