Neutral Citation Number: [2019] EWCA Civ 2175

Case No: A4/2019/0512

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
LONDON CIRCUIT COMMERCIAL COURT (QBD)
HHJ RUSSEN QC (Sitting as a Deputy High Court Judge)
LM-2017-000132

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2019

Before:

LADY JUSTICE KING
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE FLAUX

- -

Between:

DEEPAK ABBHI	**Appellant/ (Defendant)**
- and -	
RICHARD JOHN SLADE (trading as Richard Slade and Company)	**Respondent (Claimant)**

- -
- -

Stephen Robins (instructed by **Birketts Llp**) for the **Appellant**
Brian Doctor QC and Sebastian Kokelaar (instructed by **Richard Slade and Company Limited**) for the **Respondent**

Hearing date: 20 November 2019

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Approved Judgment

Lord Justice Flaux:

Introduction

1. The appellant (to whom I will refer as "Mr Abbhi") appeals against the Order dated 1 March 2019 of HH Judge Russen QC in the London Circuit Commercial Court giving judgment for the respondent (to whom I will refer as "Mr Slade") with damages to be assessed. The Order was made following a three day trial in July 2018 in respect of which the judge gave a judgment dated 24 September 2018 finding, so far as relevant to this appeal, that Mr Slade had established the oral agreement with Mr Abbhi for which he contended and that that oral agreement was not a guarantee to which section 4 of the Statute of Frauds 1677 applied. There was a further hearing on February 2019, following which the judge gave a second judgment dated 1 March 2019 rejecting Mr Abbhi's argument that the claim had been issued in contravention of section 69 of the Solicitors Act 1974.

2. On 12 June 2019, Longmore LJ granted permission to appeal on one ground: namely, the question of whether the oral agreement comes within Section 4 of the Statute of Frauds 1677. He also stayed the assessment of damages and payments on account. He refused permission to appeal on a second ground concerning the judge's decision on section 69 of the Solicitors Act 1974.

Factual background

3. In 2012 and 2013, Mr Abbhi's father-in-law Mr Balmohinder Singh (to whom I will refer as "Mr Singh") was engaged in extensive litigation in the Chancery Division against his son Jasminder Singh, in which he contended that certain property was subject to a common intention constructive trust under the Hindu custom of *mitakshara*, by which Mr Singh as the patriarch of the family was entitled to partition the property. The property in question consisted of Tetworth Hall, a substantial house on the edge of Ascot racecourse, and shares in a very successful hotel group, Edwardian Group Limited. Mr Abbhi is married to Mr Singh's daughter Suninder, known as "Seema". They are resident in the United States.

4. The proceedings were brought with funding provided by Mr Abbhi, as Mr Singh was unable to fund it himself. The funding was initially on an informal basis, but on 16 June 2012 Mr Singh and Mr Abbhi entered a Loan Agreement in writing, the terms of which applied to loans already made (about US$530,000 at that date) and any future advances, which were to be entirely at the discretion of Mr Abbhi.

5. Although Mr Abbhi denied at trial that he and Seema had any personal interest at stake in the litigation, the judge found that Seema had an expectation of deriving some personal financial benefit in the form of a legacy from her father out of his share of the family property if his claim were successful.

6. Mr Singh was initially represented by a firm of solicitors called Pillai & Jones, but only a few months before the trial, the principal solicitor there was taken ill. Mr Singh's leading counsel, Mr John McDonnell QC, recommended that Mr Slade, who is a solicitor and the principal of Richard Slade & Co, be instructed.

7. A meeting was arranged between Mr Slade and Mr Abbhi and Seema at the Capital Hotel in Knightsbridge on 11 July 2013, before they went to the airport to return to the United States. Mr Slade did not meet Mr Singh at that time. The meeting, and what was agreed at it, was predicated upon Mr Singh not being able to pay Mr Slade's bills if he agreed to take on the case and the liability for disbursements such as counsel's and experts' fees it would entail. Mr Slade's pleaded case in [7] of the Particulars of Claim was that an oral agreement was made at the meeting in these terms:

> "On or around 11 July 2013 the Defendant:
>
> (a) Informed the Claimant that Mr Singh himself would be unable to pay the Claimant's fees and disbursements to be incurred in connection with the Action";
>
> (b) Agreed with the Claimant, in consideration of the Claimant agreeing to act for Mr Singh in the Action, that he would pay such fees and disbursements on Mr Singh's behalf, alternatively, lend Mr Singh sufficient funds to pay such fees and disbursements and ensure that those funds would be applied for that purpose, pursuant to the 2012 Loan Agreement (a copy of which was provided by the Defendant to the Claimant by email on 16 July 2013)"

8. Mr Abbhi's first line of defence was that no such oral agreement was made at all. Both he and Mr Slade gave evidence at trial and the judge preferred the evidence of Mr Slade. At [92] of the first judgment the judge recorded Mr Slade's evidence in cross-examination about the oral agreement:

> "The agreement that was made was this: Mr Singh, Mr Abbhi and Seema wanted me to act as Mr Singh's solicitor for the purposes of the forthcoming trial. I am reducing this to a series of propositions if you like. That is proposition number one. Number two: Mr Singh couldn't pay. Number three: Mr Abbhi said he would pay. Number four: Mr Abbhi said that there was a slight complication in that he did not want to pay me directly because he considered, on the basis of previous advice, that that might expose him more than necessarily [sic] to an application under section 51 [of the Senior Courts Act 1981] by Jasminder, and so the precise way in which he would pay me would be by providing his funds so that Mr Singh could write a cheque and deliver it to me."

9. At [93] of the first judgment, the judge said: "I accept Mr Slade's evidence and that his four propositions neatly encapsulate the nature of the agreement reached between Mr Slade and Mr Abbhi." At [115] he went on to conclude that Mr Slade had established the oral agreement alleged at [7] of the Particulars of Claim.

10. On the strength of the oral agreement, Mr Slade agreed to act for Mr Singh in the forthcoming litigation. Mr Singh subsequently signed Mr Slade's retainer letter on 1 October 2013. The trial took place before Sir William Blackburne over 16 days in

November and December 2013. He handed down judgment dismissing the claim on 8 April 2014 (*Singh v Singh* [2014] EWHC 1060 (Ch)). Permission to appeal was refused by the Court of Appeal.

11. All Mr Slade's bills were delivered to Mr Singh as the "party chargeable with the bill" within the meaning of section 70 of the Solicitors Act 1974. However, Mr Slade did not expect Mr Singh personally to pay the bills. Rather, prior to Sir William Blackburne's judgment, Mr Abbhi paid Mr Slade via Mr Singh some £185,000, pursuant to the oral agreement. The payments were made by putting Mr Singh in funds which he then paid on to Mr Slade by cheque because, as identified in Mr Slade's fourth proposition accepted by the judge, Mr Abbhi was concerned that, if he paid Mr Slade direct, Jasminder Singh would make an application against him under section 51 of the Senior Courts Act 1981 on the basis that he had funded the litigation. Hence payments being routed through Mr Singh.

12. However, after judgment was handed down by Sir William Blackburne, Mr Abbhi did not make any further payments, although in April 2014, Mr Slade received £250,000 being Mr Singh's share of monies held in an offshore bank account first disclosed in February 2014 and £138,492.25 being the balance of the proceeds of the sale of Mr Singh's minority shareholding in Edwardian Group to Seema (after repayment of the monies due from Mr Singh to Mr Abbhi under the Loan Agreement). This left an outstanding balance of £317,823.63, of which £251,743 represents unpaid counsel's fees, £5,700 other disbursements and £69,226 Mr Slade's own unpaid fees.

13. Mr Singh died on 9 February 2015 and his estate is insolvent.

Section 4 of the Statute of Frauds 1677

14. Section 4 of the Statute of Frauds provides:

> "**No Action against Executors, upon a special Promise, or upon any Agreement, or Contract for Sale of Lands, unless Agreement, be in Writing and signed.**
>
> No Action shall be brought… whereby to charge the Defendant upon any special promise to answer for the debt default or miscarriages of another person... unless the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

15. As Lord Diplock said in *Moschi v Lep Air Services* [1973] AC 331 at 347H-348A:

> "Translated into modern legal terminology "to answer for" is "to accept liability for" and "debt, default or miscarriage" is descriptive of failure to perform legal obligations, existing and future, arising from any source, not only from contractual promises but in any other factual situations capable of giving rise to legal obligations such as those resulting from bailment, tort, or unsatisfied judgments."

The ground of appeal

16. The single ground of appeal for which permission to appeal was given is that the judge erred in law in holding that the oral agreement fell outside section 4 of the Statute of Frauds 1677 and was enforceable notwithstanding the lack of writing. He should have held that the oral agreement fell within section 4 because the liability of Mr Abbhi to Mr Slade under it was defined by reference to the liability of Mr Singh to Mr Slade under the Retainer Letter. Accordingly the judge should have held the oral agreement was unenforceable under section 4.

The judgments below

17. Given that the appeal is limited to that single ground, it is only necessary to refer to those parts of the judgments which address the issue whether, as is contended on behalf of Mr Abbhi, the oral agreement was an unenforceable guarantee. Having accepted the evidence of Mr Slade about the making of the oral agreement and its nature as set out at [9] above, the judge rejected the argument that the oral agreement was a guarantee in these terms at [94] to [96] of the first judgment:

> "94 Moreover, [Mr Slade's] propositions one and two make it clear that this was not an agreement in the nature of a guarantee but, as pleaded, a funding agreement. There was no question of Mr Abbhi's obligation to pay being contingent upon prior default by Mr Singh. The whole agreement was premised upon Mr Singh not being able to pay from the outset. Compliance with the agreement by Mr Abbhi would have forestalled any question of default by Mr Singh (about whose inability to pay there was no sense of contingency) and that shows that Mr Abbhi's obligation was a primary one and not that of a surety. The monies that were to be paid by Mr Slade's client, Mr Singh, in accordance with the firm's retainer were always intended to come from Mr Abbhi *because* Mr Singh did not have them.
>
> 95 It is noteworthy that the oral agreement between Mr Slade and Mr Abbhi was reached in circumstances where the Loan Agreement was already in place, no further contractual input was required from Mr Singh and Mr Slade had yet either to meet or speak to Mr Singh or obtain his formal signature to the Retainer Agreement. These are also clear indications that the agreement between Mr Slade and Mr Abbhi, only, did not involve a collateral liability on Mr Abbhi's part but a primary one.
>
> 96 On the face of the contractual documentation Mr Slade could have sued Mr Singh for his fees and Mr Singh had a liability to Mr Abbhi (under the Loan Agreement) even if they were paid. But I do not regard these matters as impediments to the existence of a separate, oral funding agreement between Mr Slade and Mr Abbhi which, if complied with, would have averted the first scenario. Nor do I consider that, by entering

> into that agreement in July 2013 in circumstances where Mr Abbhi and Mr Singh had already made their own bilateral Loan Agreement the previous year, the contractual analysis necessarily becomes one of a tri-partite arrangement of creditor, debtor and surety. That analysis would probably see the surety (Mr Abbhi) resisting liability to pay by reference to the discretionary language of the Loan Agreement or, if Mr Abbhi did pay Mr Slade, Mr Singh (the principal debtor) then arguing that no right of indemnity arose against him until six months after the Action had been determined. But the earlier, two party Loan Agreement cannot be shoehorned into a later suggested creditor, principal debtor and surety relationship so that it might in either of those ways regulate Mr Abbhi's right to be indemnified by Mr Singh in the event that Mr Abbhi paid his fees. Its terms had no impact upon the agreement between Mr Slade and Mr Abbhi beyond prescribing the conduit for (but not any fixed cap upon) the latter's funding."

18. At [97] the judge referred to the point relied upon heavily by Mr Stephen Robins on behalf of Mr Abbhi, that under the terms of the retainer, it was Mr Singh, not Mr Abbhi, who was the client and who was therefore the contractual debtor in respect of fees and disbursements falling due for payment. The judge noted that under the terms of the retainer and the enclosed standard terms, payment was due upon delivery of the bill, with a provision for interest in the event of non-payment. At [100] of the first judgment, the judge noted that there was in fact a 30 day grace period before interest was due. He recorded that Mr Slade did not allege that funding by Mr Abbhi would be up-front as opposed to responsive to those monthly bills delivered to the client.

19. At [99] the judge noted that because Mr Abbhi did not keep to the oral agreement, there was default by Mr Singh in the payment of the bills and that, in cross-examination, Mr Slade had recognised that the effect of the agreement with Mr Abbhi was that he was taking on the credit risk of one month's worth of work and disbursements and that, in the event, significantly greater credit was extended to Mr Singh.

20. Nevertheless, the judge rejected the "forceful submission" by Mr Robins that, in these circumstances, the oral agreement had to be one of guarantee. At [100] the judge said:

> "…in my judgment the terms of the retainer, and the one month credit to the client for which they provided, do not detract from the analysis that this was a funding arrangement rather than a guarantee. Whether or not Mr Abbhi assumed primary liability to fund the Action does not hinge upon the difference between the funding being up-front and on account or, as here, in response to quantification by client bills. In the present case, the concern that had been raised about potential section 51 exposure to Jasminder, even before Mr Slade was introduced to the case, meant that the latter (with the arrangement between Mr Abbhi and Mr Singh being one of loan) was the way to proceed."

21. The judge then referred to the decision of the Court of Appeal in *Guild & Co v Conrad* [1894] 2 QB 885 upon which Mr Kokelaar for Mr Slade had relied. The judge said of that case at [101]:

> "…the plaintiff sued on oral undertakings given by the defendant that he would provide funds to meet bills drawn on his son's overdrawn account which the plaintiff was otherwise unwilling to accept. The undertaking had in fact been given in circumstances where a formal guarantee had previously been given by the defendant in respect of credit previously extended by the plaintiff up to the overdraft limit. The trial judge held that the oral undertakings were not within section 4 of the Statute of Frauds and the Court of Appeal agreed. Lindley LJ said (at p. 892) that the nature of the promise is all important and that 'if it was a promise to put the plaintiff in funds in any event, then it is not such a promise as is within the Statute of Frauds.'"

22. The judge held that the position was the same in the present case:

> "Here Mr Abbhi agreed to put Mr Slade in funds in any event, in circumstances in which both of them knew that Mr Singh could not pay (and, as I find and whether or not Mr Abbhi knew otherwise, Mr Slade was unaware of the £250,000 at the date of their agreement)."

23. On this issue, he concluded at [102]-[103]:

> "102 For all these reasons I conclude that Mr Abbhi's obligation under his agreement with Mr Slade to provide the funds was a primary one and not in any sense secondary and dependent upon Mr Singh's failure to pay. The agreement was therefore not in the nature of a guarantee: see *Vossloh Aktiengesellschaft v Alpha Trains (UK) Limited* [2010] EWHC 2443 (Ch), [23]-[26] per Sir William Blackburne.
>
> 103 It follows that, in my judgment, section 4 of the Statute of Frauds has no application to this case."

24. The judge went on to find that if he had concluded that the oral agreement was within section 4, the emails relied upon by Mr Slade were not a sufficient memorandum or note in writing to satisfy the requirements of the section. There is no cross-appeal against that finding.

25. The judge returned to the nature of the oral agreement in his second judgment and reiterated that it was not a guarantee, as part of his analysis as to why Mr Abbhi was not the party chargeable with the bill for the purposes of the Solicitors Act 1974. At [30] to [32] of the second judgment, he pointed out that the effect of the agreement made as reflected in Mr Slade's third and fourth propositions was that Mr Abbhi's promise was to provide the funding in the second of the ways described in [7(b)] of the Particulars of Claim.

26. In refusing Mr Abbhi permission to appeal, the judge reiterated his analysis at [94] of the second judgment in these terms:

> "[The oral agreement] did not involve a "secondary" liability on the part of Mr Abbhi. As I have sought to explain in the Judgment (and again in paragraphs 31 to 33 above) Mr Abbhi's liability was a primary one, existing independently of Mr Singh's in the sense that his discharge of it would have pre-empted the need for Mr Slade to give any consideration to the liability of the supposed "principal debtor". If Mr Abbhi had performed his promise to Mr Slade (by lending to Mr Singh so that Mr Singh could pass on the monies to Mr Slade) then there would have been no unsatisfied debt, default or miscarriage by Mr Singh. If anything, the context shows that it is Mr Singh (who had signed up to the terms of the Retainer Agreement which Mr Slade was happy to agree with his client in the light of and only because of his prior oral agreement with Mr Abbhi) who became potentially answerable for the default of Mr Abbhi."

Summary of the parties' submissions

27. The principal submission by Mr Robins on behalf of Mr Abbhi was that the defining feature of a contract of guarantee is that the liability of the guarantor to the claimant is defined by reference to the liability of some other person. He noted that it was contended on behalf of Mr Slade that this was too wide a definition, as it would mean that contracts of indemnity, which are recognised to be outside section 4 of the Statute of Frauds, would be caught by the section. He submitted that this was incorrect. Whereas contracts caught by the section were ones where the liability of the promisor to the promisee was defined by reference to the liability of some other person to the promisee, contracts of indemnity outside the section were ones where the promisor agreed to indemnify the promisee against a liability the promisee assumed to a third party.

28. He submitted that this distinction was made by Vaughan Williams LJ in his judgment in *Harburg India Rubber Comb Company v Martin* [1902] 1 KB 778 at 784-5:

> "Before leaving these instances I wish to mention one other class, which I do not treat as an exception from s. 4, but which, I think, does not come within the section at all. I mean the cases which have been spoken of as "indemnity cases." Of course in one sense all guarantees, whether they come within s. 4 or not, are contracts of indemnity. But the difference between those indemnities which come within the section and those which do not is very shortly thus expressed in the notes to *Forth* v. *Stanton*: "These cases establish that the statute applies only to promises made to the person to whom another is already or is to become answerable."
>
> That, to my mind, is an accurate definition of a guarantee or indemnity which comes within s. 4 of the statute, as

> distinguished from an original liability which is not within the section, and which has no reference to the debt of another, but creates a new liability which is undertaken by the promisor, and has been called in the course of the argument of a contract of indemnity. I will not go through these case as length, but it seems to me that *Guild & Co. v Conrad* [1894] 2 QB 885 entirely confirms this as being the true view of the distinction between an indemnity and a guarantee which comes within s. 4."

29. Mr Robins submitted that, on a proper analysis, *Guild & Co v Conrad* was a case of an agreement to indemnify the plaintiff against a liability he had assumed to third parties, which was why it fell outside section 4. Accordingly, it was of no relevance to the present case, which concerned a liability of Mr Abbhi which was defined by reference to the liability of Mr Singh to Mr Slade and was therefore within section 4 of the Statute of Frauds.

30. Mr Robins drew the attention of the Court to the two types of guarantee identified by Lord Reid in his speech in *Moschi v Lep Air Services* at 344G-345C. The first type is a conditional agreement whereby the guarantor undertakes that if the principal debtor fails to pay, he will pay. The second type is an undertaking by the guarantor that the principal debtor will carry out his contract. Lord Reid described this second type in these terms:

> "On the other hand, the guarantor's obligation might be of a different kind. He might undertake that the principal debtor will carry out his contract. Then if at any time and for any reason the principal debtor acts or fails to act as required by his contract, he not only breaks his own contract but he also puts the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid instalment but for damages. His contract being that the principal debtor would carry out the principal contract, the damages payable by the guarantor must then be the loss suffered by the creditor due to the principal debtor having failed to do what the guarantor undertook that he would do."

31. This second type of guarantee is described in other cases as a "see to it" guarantee. Mr Robins submitted that the oral agreement as found by the judge was on a proper analysis a "see to it" guarantee. He relied in particular in this context upon the decision of Field J and the Court of Appeal in *Associated British Ports v Ferryways NV* [2008] EWHC 1265 (Comm); [2008] 2 Lloyd's Rep 353 and [2009] EWCA Civ 189; [2009] 1 CLC 350. That case concerned an agreement made between the claimant and the parent company of Ferryways, MSCB and whether that agreement was a guarantee, not for the purposes of section 4 of the Statute of Frauds since the agreement was in writing, but in order to determine whether the liability under it was discharged by a variation to the principal contract.

32. The relevant provision in the agreement between the claimant and MSCB was as follows:

> "In consideration of Associated British Ports ("ABP") entering into an agreement relating to the Port of Ipswich of even date with this letter (the "Agreement"), we assume full responsibility for ensuring (and shall so ensure) that, for seven years from the date of this letter, the Company (i) has and will at all times have sufficient funds and other resources to fulfil and meet all duties, commitments and liabilities entered into and/or incurred by reason of the Agreement as and when they fall due and (ii) promptly fulfils and meets all such duties commitments and liabilities."

33. It was contended on behalf of the claimant that this was a contract of indemnity imposing a primary liability on MSCB. That contention was rejected by Field J who said at [60] of his judgment:

> "As [counsel for MSCB] contended, the obligations provided for in both limbs are defined by reference to the duties, commitments and liabilities of Ferryways under the SA and will only become concrete and of practical significance on such duties, commitments and liabilities accruing and if Ferryways is in default thereof. The substance of both limbs is therefore an obligation to see to it that Ferryways performs its obligations under the SA and accordingly both are properly to be characterised in my judgement as giving rise to a secondary liability, rather than a primary liability. This conclusion is more readily reached in respect of limb (ii). My view that limb (i) is a guarantee is reinforced by the holding of the majority in *Motemtronic v Autocar* (1996) (unreported) that an undertaking to make sure that a company would have the money to meet a contractual obligation was a promise to answer for the debt of another within s.4 of the Statute of Frauds, assuming that the undertaking was an enforceable contractual warranty."

34. He went on to conclude that liability under the contract of guarantee had been discharged by the subsequent variation of the principal contract. His reasoning was upheld by the Court of Appeal. Giving the main judgment, Maurice Kay LJ said at [11]:

> "The real issue relates to limb (i). Mr Millett stops short of submitting that the language of limb (ii) imposes a primary rather than a secondary liability. However, he says that the crucial words in limb (i) are "at all times" and that they point to a primary liability to ensure that, from the execution of the Letter Agreement and throughout its duration, Ferryways would have sufficient funds to meet its liabilities under the Second Agreement, whether or not they had yet fallen due. It was an immediate and continuing obligation that was not contingent upon or secondary to any default by Ferryways. In my judgment, it is simply not possible to reach Mr Millett's destination by focusing on the words "at all times". Far more significant is the way in which limb (i) defines the obligation of

> MSCB by reference to Ferryways meeting all *its* "duties, commitments and liabilities entered into and/or incurred by reason of the Agreement as and when they fall due". It is, in the hallowed words used by the judge, a "see to it" obligation: MSCB would see to it that Ferryways performed its obligations under the Second Agreement. If Ferryways could not meet its liabilities to ABP "as and when they fall due" (the primary liability), then the secondary liability of MSCB would accrue by way of guarantee."

35. Mr Robins submitted that, on a proper analysis, the present case was no different from *Ferryways*. In particular the provision of the oral agreement that Mr Abbhi would put Mr Singh in funds so that Mr Singh could write a cheque to Mr Slade paying his fees was a "see to it" guarantee of precisely the type described in *Ferryways*. The promise by Mr Abbhi was not actionable until Mr Singh was in default under the retainer and, accordingly, the secondary or collateral liability of Mr Abbhi was coterminous with the primary or original liability of Mr Singh.

36. Furthermore, the liability of the two was co-extensive in relation to quantum, in the sense that Mr Abbhi could not be liable to pay Mr Slade's fees to a greater extent than Mr Singh was liable under the retainer. If Mr Singh's liability to pay the fees was reduced on an assessment of costs, Mr Abbhi's liability would be reduced to the same extent. Likewise, Mr Robins submitted that there was a co-extensive liability upon both Mr Singh and Mr Abbhi to pay VAT on the bills, a further indication that the liability of Mr Abbhi was secondary to the primary liability of Mr Singh.

37. Mr Robins made a number of criticisms of the judge's reasoning, for example the point he made at [95] and [96] about the pre-existing Loan Agreement between Mr Singh and Mr Abbhi and not shoehorning that into a later suggested creditor, principal debtor and surety relationship. He submitted that the Loan Agreement was simply the means by which Mr Abbhi would comply with his obligations under the oral agreement. It was irrelevant to the question whether those obligations amounted to a guarantee.

38. He also criticised the judge's focus on Mr Abbhi and his wife having a personal interest in the successful outcome of the litigation for Mr Singh as somehow indicating that their liability was primary not secondary. He pointed out that a guarantor will often have a personal interest in the transaction to which the guarantee relates, the obvious example being a shareholder or director who guarantees his company's debt, who has an interest in the company remaining solvent.

39. Mr Robins submitted that the judge's conclusion that Mr Abbhi was under a primary liability under the oral agreement was inconsistent with his subsequent conclusion in [45] of the second judgment that Mr Abbhi was not the person chargeable with Mr Slade's bill within the meaning of sections 69 and 70 of the Solicitors Act 1974.

40. On behalf of Mr Slade, Mr Brian Doctor QC submitted that the circumstances in which the oral agreement came to be made were of considerable importance. Mr Slade was being asked to act as solicitor and assume liabilities to counsel and experts when the client could not pay. Mr Abbhi said he would pay Mr Slade's bills which meant he would pay Mr Slade on behalf of a man who could not pay. The

complication was to do with Mr Abbhi's desire to avoid a liability under section 51 of the Senior Courts Act 1981 so he would pay Mr Slade by putting Mr Singh in funds enabling Mr Singh to then write Mr Slade a cheque. This meant that Mr Abbhi had to provide Mr Singh with funds before the end of the grace period, so as to enable Mr Singh to write a cheque lawfully.

41. Mr Doctor QC also submitted that the question whether the liability of Mr Abbhi was primary or secondary was a question of fact so that this Court should be extremely reluctant to interfere with the finding of the trial judge on that issue. He relied upon *Simpson v Penton* (1834) 2 C & M 430 where the issue whether the defendant had assumed a primary or collateral liability had been left to the jury. He also referred to passages in the judgment of Lindley LJ in *Guild & Co v Conrad* at 891-2 in support of the proposition that whether or not the contract in that case was one of guarantee was a question of fact. On that basis, he submitted that the judge's conclusion that the oral agreement was not a guarantee was a finding of fact with which this Court should not interfere, since it was a finding which was supported by the evidence.

42. Mr Doctor QC submitted that the ground of appeal that any liability defined by reference to the liability of the debtor (here Mr Singh) to the creditor (here Mr Slade) was far too wide a proposition. Not every promise to pay the debt of another is within section 4 of the Statute of Frauds. He submitted that the criticisms levelled by Mr Robins against the judgment proceeded on the assumption that the oral agreement was a guarantee, which begs the question.

Analysis and conclusions

43. The initial question which needs to be addressed is whether Mr Doctor QC is correct in his submission that the finding of the judge that the oral agreement was not a guarantee was a finding of fact supported by the evidence with which this Court should not interfere. There is certainly some support for that submission in *Simpson v Penton*. *Andrews & Millett: Law of Guarantees 7th edition,* citing that case at [3-006], say:

> "It is a question of fact in each case whether the arrangement is one under which the surety's liability is original or collateral, and this means that the court will consider each case on its particular circumstances, and the language which was used by the parties at the time, though indicative of the nature of the bargain, will not necessarily be conclusive."

44. What are the particular circumstances of the case and the terms of the relevant contract will undoubtedly be questions of fact, but I agree with Mr Robins that the correct analysis is that whether or not a contract on those terms is or is not a contract of guarantee is an issue of legal classification and thus a question of law. There is nothing in *Guild & Co v Conrad* which militates against that analysis. In my judgment, what Lindley LJ was really discussing in the passage relied upon by Mr Doctor QC is whether the evidence in that case supported the judge's conclusions as to the terms of the contract. Furthermore, one cannot read too much into an old case like *Simpson v Penton* heard on appeal from a jury trial.

45. So far as the present case is concerned, the circumstances in which the oral agreement was made emerge clearly from the judge's findings of fact at [92]-[93] of the first judgment. In particular, the oral agreement was predicated upon Mr Singh being unable to pay the legal fees to fund the litigation and indeed that was a term of the oral agreement, under which Mr Abbhi agreed that, in consideration for Mr Slade agreeing to act as solicitor, Mr Abbhi would pay the legal fees. In other words he was agreeing to fund the litigation (as indeed he had to date) and this was what the judge meant when he described this as a funding agreement. In my judgment this was a promise to put Mr Slade in funds in any event of the kind described by Lindley LJ in *Guild & Co v Conrad* at 892:

> "The nature of the promise is all-important: because, if it was a promise to pay if the Demerara firm did not pay, then it is void under the Statute of Frauds as not being in writing. But if, on the other hand, it was a promise to put the plaintiff in funds in any event, then it is not such a promise as is within the Statute of Frauds."

46. Although that was a case of an agreement by the defendant to indemnify the plaintiff against a liability to the holders of the bills he had accepted, contrary to Mr Robins' submission, it does not follow that the legal principle enunciated by the Court of Appeal in that case would not be equally applicable to an agreement such as in the present case, where Mr Abbhi agreed to pay Mr Slade in any event for the legal services he provided. As is clear from the passage in the judgment I have just quoted, it is the nature of the promise made by the defendant which is important. Lindley LJ repeats this point slightly later on the same page where he says:

> "If this is the real contract, and if the learned judge is right in saying that the contract was not a contract to pay if the Demerara firm did not pay, but was a contract to pay in any event, then, in my opinion, the authorities shew that the Statute of Frauds does not apply."

47. A similar formulation of the same principle can be found in the judgment of Lopes LJ at 895:

> "A promise to be liable for a debt conditionally on the principal debtor making default is a guarantee, and is a promise to make good the default of another within the statute. On the other hand, a promise to become liable for a debt whenever the person to whom the promise is made should become liable, is not a promise within the Statute of Frauds and need not be in writing. The question was one which, no doubt, it was difficult to decide. It appears to me that the evidence given at the trial as to the character of the promise is capable of either interpretation; and the question we have to determine is, was the learned judge wrong in putting upon it the interpretation which he did, namely, that it was not a contract to pay if the Demerara firm did not pay, but that it was a contract to find funds to enable the plaintiff to meet the acceptances? I am not prepared to say that he was. On the contrary, I am inclined to

> think he was right. The evidence amounts to this: the defendant says to the plaintiff, "I promise that if you accept these bills for which my son's firm will become liable I will indemnify you."

48. To like effect is the judgment of Davey LJ at 896:

> "In my opinion there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not. In my opinion this was a promise to indemnify, and therefore not within the statute; and the authorities entirely bear that out."

49. The critical aspect of the promise in *Guild & Co v Conrad* which all three members of the Court focus on is that the promise to pay is not contingent upon prior default by the third party, there the Demerara firm, but is a promise to pay independently of such default, an "original" or "new" liability undertaken by the promisor, as Vaughan Williams LJ described it in *Harburg India Rubber Comb* at 785. In my judgment, the promise of Mr Abbhi here was equally a promise to pay in any event, independently of any default by Mr Singh, *a fortiori* because it was a term of the oral agreement as found by the judge that Mr Singh could not pay. The promise did not somehow become qualified because the consideration for it was the legal services Mr Slade was to provide, as opposed to the assumption of liability to a third party, like the holders of the bonds in *Guild & Co v Conrad*. Accordingly, the liability of Mr Abbhi was a primary not a secondary liability.

50. This analysis is not altered by the fact that, for the convenience of Mr Abbhi and in order to minimise his potential exposure to an application under Section 51 of the Senior Courts Act 1981, it was agreed that the method by which payment by Mr Abbhi of Mr Slade's bills would be effected was by his putting Mr Singh in funds and Mr Singh then paying a cheque to Mr Slade. Again, contrary to Mr Robins' submission, the obligation of Mr Abbhi under the oral agreement arose before there could be any default on the part of Mr Singh. His obligation was to put Mr Singh in funds for any particular bill before the due date when the grace period expired. Accordingly, contrary to Mr Robins' submission, the obligation of Mr Abbhi was not coterminous with the obligation of Mr Singh. If Mr Abbhi did not put Mr Singh in funds before the due date (which in practical terms would mean doing so about seven days before the grace period expired, allowing time for any cheque subsequently written to clear) then he would be in breach of the oral agreement. That breach would occur prior to and independently of any default by Mr Singh.

51. Mr Abbhi's obligation under the oral agreement was thus not simply a "see to it" guarantee, but an independent and primary obligation assumed by Mr Abbhi, an absolute obligation to put Mr Singh in funds in sufficient time before the expiry of the grace period in respect of any particular bill. This is the crucial point of distinction between the present case and *Ferryways*, where the Court of Appeal was not prepared to construe the words "at all times" as imposing an independent obligation on MSCB to pay the claimant in any event.

52. Furthermore, I agree with Mr Doctor QC that the mere fact that the liability of Mr Abbhi can be said to be defined by reference to the liability of Mr Singh to Mr Slade under the retainer does not mean without more that the oral agreement is a guarantee. Mr Robins' submissions and ground of appeal are founded upon far too wide a proposition. Before this Court (although not before the judge), Mr Robins relied upon a decision of Lord Ellenborough at first instance in *Barber v Fox* (1816) 1 Starkie 270. That case concerned an oral promise by William Bailey Fox to pay the fees of an attorney relating to litigation conducted by him on behalf of Samuel Fox. The judge held that the promise was within the Statute of Frauds and thus unenforceable. Mr Robins submitted that that case bore marked similarities to the present.

53. I consider that, whilst that case may have been correctly decided on its own facts, it cannot be relied upon as stating some general principle. In the briefly reported law report, Lord Ellenborough is recorded as saying: "But the statute says that a person shall not be bound by a promise to pay the debt of another without some note of writing". As Mr Doctor QC correctly submitted, that is too broad to be an accurate statement of the law. As Lopes LJ put it in *Guild & Co v Conrad:* "a promise to become liable for a debt whenever the person to whom the promise is made should become liable, is not a promise within the Statute of Frauds and need not be in writing." The critical question which determines whether a contract is one of guarantee within section 4 of the Statute of Frauds is not that the promise is to pay another's debt but, in the words of Lindley LJ in *Guild & Co v Conrad*, whether that promise is to pay if the other does not pay, in which case it is within the Statute of Frauds or whether it is a promise to put the claimant in funds in any event, in which case it is outside the Statute of Frauds. For the reasons I have given, the promise here was of the latter kind.

54. It follows that, despite Mr Robins' well-argued submissions, I am entirely satisfied that the oral agreement was one under which Mr Abbhi assumed a primary or original liability to pay Mr Slade's bills. That conclusion is not affected by Mr Robins' submissions about the judge's conclusions in the second judgment, even if those submissions were open to him given Longmore LJ's refusal of permission to appeal on the second ground, which I rather doubt. As both the judge and Longmore LJ concluded, the argument in relation to the Solicitors Act was not open to Mr Abbhi at the stage of the quantum hearing. If it were to have been run at all, it should have been raised at the first, liability, trial. It cannot now be used to impugn the judge's conclusion that the liability under the oral agreement was primary, not secondary.

55. In any event, I consider this part of Mr Robins' argument to be misplaced. The question for this Court is whether the judge's conclusion that the oral agreement was not a guarantee is correct. The answer to that question cannot be affected by whether he was correct in his answer to the separate question whether Mr Abbhi was the party chargeable with the bill within the meaning of the Solicitors Act, *a fortiori* where it is not open to Mr Abbhi to challenge the second judgment on this appeal.

56. The criticism which Mr Robins levelled against the judge's treatment of the Loan Agreement is also misplaced. The point the judge was making at [96] of the first judgment was that the pre-existing Loan Agreement, under which Mr Abbhi was funding the litigation, with him as creditor and Mr Singh as debtor, was inconsistent with the oral agreement being a guarantee, so that Mr Singh was now principal debtor to Mr Slade as creditor, with Mr Abbhi now as guarantor. This was a perfectly valid

point. It was not determinative, nor did the judge treat it as such, but it is an indication that under the oral agreement Mr Abbhi was assuming a primary, not a secondary liability.

57. There is some force in Mr Robins' point that the existence of a personal interest in the transaction to which the guarantee relates should not preclude the contract from being a guarantee. Nonetheless, the fact that someone who is a surety has a direct interest in the underlying transaction will often be an indication that his liability is intended to be original: see *Andrews & Millett: Law of Guarantees 7th edition* [3-006]. As with the pre-existing Loan Agreement, the existence of the personal interest in the outcome of the litigation is an indication that the oral agreement created an original liability, but not determinative.

58. As *Guild & Co v Conrad* makes clear, the fundamental question concerns the nature of the promise made in the oral agreement. For the reasons I have given, I am clearly of the view that the promise of Mr Abbhi was a promise to pay Mr Slade's bills in any event, independently of any default by Mr Singh. Accordingly Mr Abbhi's liability was primary not secondary. In view of that clear conclusion, it is not necessary to refer to any of the other authorities upon which the parties relied. Whether or not a given contract gives rise to a collateral or secondary liability or to an original or primary liability will depend upon all circumstances of the particular case. The cases are essentially illustrations which fall one side of the line or the other. In my judgment, this case clearly falls outside section 4 of the Statute of Frauds and the judge was right in the conclusion he reached. The appeal must be dismissed.

Lord Justice David Richards

59. I agree.

Lady Justice King

60. I also agree.