Case No: D40MA073

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CIRCUIT COMMERCIAL COURT (QBD)
(Sitting at Manchester)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: Thursday, 23 July 2020

Page Count: 10
Word Count: 5363
Number of Folios: 75

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
(Sitting as a Judge of the High Court)

- -

Between:

PROMONTORIA (CHESTNUT) LIMITED	**Claimant**
- and -	
(1) SCOTT SIMPSON	**Defendants**
(2) TRACY SIMPSON	

- -
- -

MR JAMIE RILEY QC (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
MR JOHN PUGH (instructed by **Trinity Law**) for the **Defendants**

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Approved Judgment

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JUDGE DAVIES:

1. This is my judgment given on day 4 of the trial on the claimant's claim. I have already yesterday, on day 3, given judgment on the defendants' application to amend the defence and to stay, which I rejected for the reasons given in that judgment. It is common ground between the parties that this is a claim against the defendants under two guarantees which they gave to the Clydesdale Bank in the cumulative amount of £300,000, together with interest, and it is common ground on the evidence that subject to the defences raised, the amount due under those guarantees in terms of arithmetic is, indeed, £300,000, together with interest, which as at today's date amounts to £415,075.12.

2. It is also common ground that as a result of the defendants' unsuccessful application to amend to plead further positive defences and as a result of the defendants' deletion of existing parts of their defence, there is only one substantive issue left over for determination and that is the non-admissions pleaded in paragraphs 15.4 and 15.5 of the existing defence in its amended form.

3. In paragraph 15.4, it is not admitted that loan asset ID 12874066 was the overdraft facility that was offered to PFSOL (the customer) by the bank by way of the bank's letter of 20 March 2013, nor is it admitted that the overdraft facility was transferred to the claimant by the bank under any other loan ID reference. Then, in paragraph 15.5, it is not admitted that the deed of assignment assigned the overdraft facility and/or the personal guarantees without restrictions, limitations, or impediments.

4. To understand those non-admissions and to address a further point which has arisen in argument today, it is necessary for me to refer to the particulars of claim. Paragraphs 1, 2, and 3 refer to the parties, paragraph 1 making it clear that the claimant, Promontoria (Chestnut) Limited, claims to be the assignee of various rights of Clydesdale Bank PLC trading as Yorkshire Bank. Paragraph 2 confirms, as is not disputed, that the first and second defendants, Mr and Mrs Simpson, are husband and wife and were respectively the director and company secretary of Property For Sale or Let Limited (PFSOL) which is a company which was a customer of the bank and was placed into administration on 24 February 2016. Paragraph 4 goes on to plead that an overdraft facility was made available by the bank to the customer in the amount of £2.365 million pursuant to the terms of a facility letter dated 20 March 2013. That is defined as "the facility letter" and the facility is described as "the overdraft facility".

5. Having pleaded in paragraph 5 various express terms of that facility, and paragraph 6 that there was a director's resolution to enter into the facility, in paragraph 7 it is pleaded, and again this is not in dispute, that the defendants both executed personal guarantees in respect of the liabilities of the customer to the bank in the global amount of £300,000. Paragraph 8 pleads various terms of the guarantees to which I shall refer and paragraph 9 pleads that by a deed of assignment dated 5 June 2015, the claimant acquired the bank's rights under the facility letter and the guarantees and that the customer and the defendants were each given notice of the aforesaid assignment by letters dated 8 June 2015 and 1 March 2016 respectively. I pause there to note that this is an express pleading that the deed of assignment was effective to assign the bank's rights under the facility letter and the guarantees. Paragraph 10 pleads that on or around 5 February 2016, the claimant made a demand of the customer for the sums then due and owing under the overdraft facility in the amount of £2.7 million odd and that the customer did not comply with the demand. Paragraph 11 pleads accordingly, on or around 1 March 2016, the claimant made demands

of each of the defendants under the guarantees in the total sum of £300,000, together with interest and cost, which it is pleaded wrongfully and in breach of contract the defendants failed to pay. Then finally, the claim is pleaded on the basis of the amount then outstanding under the guarantees. There is no doubt, therefore, that it is a claim pleaded under the guarantees and that there is no separate or other claim pleaded either against the customer or against the defendants on any other basis than the guarantees.

6. Mr Pugh has taken a point about the proper construction of the deed of assignment which, at first blush it appears, might be a good point because what he has pointed to is the fact that in the schedule to the deed of assignment the relevant details relating to this particular lending and liability are set out by reference to the connection identity, the borrower identity, the borrower name, and the loan asset identity. The borrower name is Property For Sale or Let Limited and the loan asset identification is simply a number. There are then set out a number of individual documents, or contracts, or securities. The first one under the heading "Facility agreement" reads:

> "English law facility agreement dated 18 July 2013 between Clydesdale Bank PLC and the borrower [the customer]."

Then below that, under the heading "Guarantee", the two guarantees to which I have referred are also separately set out. Then below that is a list under the heading "Security" of the various legal mortgages and other security provided by the customer to the bank and a legal charge provided by the defendants to the bank.

7. Mr Pugh submits that on that basis, if it is right, as he says it is, that the only relevant applicable and enforceable facility agreement is that of March 2013, how could that have been assigned, he asks rhetorically, under this deed of assignment?

8. Mr Riley has four answers to that point. The first answer is to say that on a true construction of the deed of assignment, the reference to the facility agreement of 18 July 2013 is not exclusive or exhaustive and that, on a proper analysis, what was assigned includes the rights under the March 2013 facility agreement insofar as there is a difference. Secondly, he submits that, in any event, if one looks at the relevant documentation from March and July 2013, it is clear that the July 2013 facility agreement is simply a renewal or extension of the March 2013 facility agreement anyway. So there is no difference between them on a proper analysis. Thirdly, that even if that is not right as between the claimant and the defendants, the effect of section 136 of the Law of Property Act 1925 means that this is not a defence open to the defendants in circumstances where there is no suggestion that the bank has ever contended that any further separate or other liability under the March 2013 facility agreement was not assigned. Fourthly and finally, in any event, all of this is completely irrelevant because what, on any view, was assigned was the benefit of the two guarantees as to which there can be no dispute and nor can there be any dispute that the liability under those guarantees, whether it arises under the March 2013 facility or the July 2013 facility, or any other facility, is covered by the guarantee and is properly claimed as pleaded.

9. Having had the benefit of extremely impressive submissions from both counsel on this point, I can say straightaway that I have no doubt that I prefer and accept the claimant's submissions. That is essentially for the following reasons. Firstly, and foremost, the point about the guarantee. For the reasons I have given, it is absolutely clear that the claimant's pleaded case always has been that the claim was under the guarantee and that the guarantee

covered the liabilities of the customer to the bank, specifically the March 2013 facility agreement. If Mr Pugh is right in his analysis then, in my judgment, it follows as night follows day that the liability under the guarantee is covered. It relates to that March 2013 facility agreement and it is pleaded as such.

10. In the circumstances, whatever the force of the point about the disconnect between the March 2013 facility agreement and the July 2013 agreement, it is completely irrelevant to this case. If the bank had been suing the customer in this litigation, that might have been a point which might have been available to be taken by the customer, but it is not. It is a claim under the guarantees where the only relevant question is whether or not the amount claimed by the bank is covered by the guarantees and, having been taken to the terms of the guarantee, it is clear that they are, unsurprisingly. That is because if one goes to the guarantee, one sees that, in terms, it says that the defendants enter into this guarantee in return for the bank making available, or continuing to make available, banking facilities to Property For Sale or Let Limited which is defined as the customer. It is said in terms that:

> "The customer obligations which are guaranteed are any sum of money or any liability which the customer may now, or at any time in the future owe to us."

11. On the face of it, therefore, it is not limited to a specific facility letter or any specific liability. It is an all monies guarantee limited only by amount and that really is the end of the point and indeed the case.

12. However, for completeness and because they were fully argued, I should deal with the further arguments.

13. The second argument turns on the proper construction of the deed of assignment. As I said in the course of argument I respectfully endorse the observation made by Henderson LJ in the case of *Hancock v Promontoria (Chestnut) Ltd* [2020] EWCA Civ 907, to which I shall refer in a moment, that this document is one of some drafting complexity which might not have needed (if I may paraphrase) to have been quite so complex. However, nonetheless, it is a document which I need to deal with.

14. In clause 2.1 headed "Assignment", it says, and I summarise, the bank assigns absolutely to the claimant the following in relation to each such specified loan asset, where "specified loan asset" is a defined term:

> "(1) All of its right, title, benefits, and interests under, in, or to each relevant document [where again 'relevant document' is a defined term] including, without limitation, with respect to each relevant Pool A loan asset [where again that is a defined term], those documents listed in part 1 of schedule 1, relevant loan assets to this deed."

15. So the effect of that, on its face, is that the 18 July 2013 facility letter referred to in the schedule is one of the relevant documents but only one of those relevant documents. It is not stated to be an exhaustive or exclusive definition. If one goes to the definition sections, one sees that a relevant document means in respect of:

> "...a specified loan asset, each facility loan or credit letter or agreement, including all schedules and appendices to that facility or credit agreement..."

Then it goes on and continues by adding this:

> "...and relating to that specified loan asset (including any written amendments, supplements, consents, accessions, waivers, or variations to each document)..."

16. So again, as one perhaps is not surprised to see, an extremely wide definition. If one then looks at the other definitions, the relevant loan asset means a relevant Pool A loan asset which, in turn, means a loan asset or debt claim described in part 1 of schedule 1. Finally, "specified loan asset" means a relevant loan asset.

17. The effect of all of that, in my judgment, as Mr Riley submitted, is that the schedule describes the loan assets, which is a phrase with a very wide definition. It follows that on the facts of this case, if Mr Pugh is right and that there was a disconnect between the March 2013 facility letter and the July 2013 facility letter, nonetheless they are all part of the same bundle of relevant documents in relation to the transactions between the bank and the customer and, thus, they all pass under the deed of assignment. Although, as I have said, the construction is complex, in the end it seems to me to be clear and to be full and exhaustive.

18. The third point, which is connected with the second point, is that in any event, the notices of assignment which were given at around the time of that deed of assignment were express in their terms that what was being or what had been assigned, and what notice was being given of, was the liability of the customer, whether it was under the March 2013 facility agreement or the July 2013 facility agreement, and the specific bank account number referred to in the March 2013 facility letter was specified in those notices. Thus, what the defendants cannot deny is that the notices that were given related to the March 2013 facility letter liability. Nor can they suggest, as I indicated in my judgment yesterday, that there has ever been any indication by the bank or anyone else that the assignment was not effective to assign all relevant liabilities so far as the bank and the customer were concerned.

19. As Henderson LJ explained in the case of *Hancock*, to which I have referred, in such circumstances where a debtor receives notice of assignment from the assignor and/or the assignee, as it does in this case, which are clear as to what is being assigned, then all that the debtor needs to know is that there has been a legally effective absolute assignment falling within section 136 of the Law of Property Act 1925 so that the debtor can safely pay the assignee or, assuming there is any doubt, commence a stakeholder claim for a declaration. However, what the debtor cannot do in normal circumstances is to say, "There is some doubt as to whether the assignment does convey the asset which it says it does and until or unless that is resolved in the assignee's favour, I am under no liability to the assignee." That is another reason for holding the defendants liable under the guarantee in this case.

20. The fourth and final reason for agreeing with Mr Riley is the proper construction of the facility letters in question set in their chronological context and their commercial context. The starting point is the March 2013 overdraft facility. That is to be found in a letter from

Yorkshire Bank dated 20 March 2013 to the customer which is headed "Banking facilities", where the customer also described or defined as "the borrower". It is an offer of overdraft and other banking facilities defined as a facility, or cumulatively "the facilities", on the terms and conditions sent out in this letter, its schedule, and the business current account terms and conditions. The overdraft facility is specified in the sum of £2.365 million made available through current account number 49245878.

21. Clause 2 makes provision for the borrower to pay to the bank a number of sums including in paragraph 2.2, on any extension or renewal of any of the facilities, a fee requested by the bank at that time. There are two points which are relevant there. The first is that the possibility of extension or renewal is expressly contemplated and the second that there is no automatic standard fee. It is a fee payable only if requested. I should have said that the overdraft facility offered also specified that its expiry date was 30 June 2013 and that is relevant when one comes on to paragraph 3, repayment and cancellation. However, before I go to that, I should also explain that in paragraphs 2.3 and 2.4, provision is made for interest payable under the overdraft facility at 4 percent per annum above base whereas interest on any sums over that amount or which are not paid when due is 7 percent above base.

22. Clause 3, as I have said, is headed "Repayment and cancellation". It provides for all amounts outstanding to be repayable on demand and it also states in clause 3.2 each facility will be available until the expiry date for such facility specified in clause 1 when it will be cancelled in full unless the bank has agreed in writing to extend or renew the facility, in which case it will be available until the date in such letter when it will be cancelled in full. That is important because as Mr Pugh submits, there is a provision for an automatic cancellation on the expiry date unless the bank has agreed in writing to extend or renew it. Then in 3.3, if the facility is cancelled, all amounts outstanding will be immediately due and payable.

23. There are then some further provisions to which I need not refer other than clause 8, which provides for interest to accrue and to be debited to the relevant current account. Also, clause 9 which requires the letter to be signed by the customer to accept it by signing and returning it. In the schedule, there is a provision in paragraph 7 for notices, consents, and other communications in respect of this letter to be in writing.

24. It is clear that what happened was that this facility was accepted in the prescribed ways and there is no issue about that. It is also clear that the expiry date of 30 June 2013 came and went without either the sums being repaid or any agreement being reached for a renewal or extension. However, on 18 July 2013, the bank wrote again to the customer referring to the trading account currently being in excess and then saying this:

> "In order to regularise the position, the bank has applied a temporary overdraft facility (limit £2.365 million) to your account. This facility will be applied immediately and will continue on a daily basis at the bank's discretion. It is repayable on demand. Interest will be charged up to the limit at 4 percent above base. On amounts outstanding above that will be charged at 7 percent above base."

Then it went on to state other matters and concluded:

> "Please note that except as expressly provided in this letter, this offer to apply an overdraft facility does not constitute a waiver of any existing breach of your obligations to the bank."

25. It is common ground that there is no evidence of any express discussions before that letter which might be relevant and it is also common ground that there is no evidence of any express discussions immediately on receipt of that letter which might be relevant. Equally, there is no suggestion that the customer did not continue to use the facility and did not either offer or seek to repay, nor did it repay the overdraft facility thereafter. Instead, there were communications between the bank and the customer in September 2013 which indicate that there were negotiations between them as to how the outstanding borrowing could be dealt with in a way that was satisfactory to both in the course of which the bank said on a number of occasions that it reminded the customer that the temporary overdraft facility was still in place and that was not contested by the customer. I should say that the correspondence was being written by Mr Simpson, the first defendant.

26. There was an email sent by Mr Simpson on 25 September 2013 where he wrote:

> "Your comments regarding the excess on the customer temporary facility are also noted and as explained, the excess has been exacerbated recently... [by various which he described]."

27. So the issue between the parties is as to the status of that facility or the letter of July 2013 and its relationship, if any, between or with the March 2013 facility letter. Mr Pugh submitted that the July 2013 letter was effectively of no legal consequence because it was simply a letter written by the bank at its own volition which indicated that no action would be taken in relation to what was then a cancelled facility but did not either waive any existing breach nor offer anything new or different, and nor was it ever accepted by the customer, either in the ways prescribed by the March 2013 facility letter, or in writing as required by the conditions, or otherwise.

28. In contrast, Mr Riley submitted that if one looked at it commercially, it clearly was offering something which was the extension or renewal of the existing facility and that it included two fundamentally valuable promises. One was that so long as it was in place, the interest charged on the facility would only be 4 percent above base, not 7 percent above base, and secondly, so long as it was not cancelled, there would be no calling in, or demand, or suing on the outstanding facility.

29. In my judgment, as a matter of plain common sense as well as commercial reading of that letter, it clearly did provide those two valuable benefits. Any suggestion that it did not have a commercial rationale or benefit to the customer seems to me, with respect to Mr Pugh, to be fanciful. What about its contractual effect? It is true, as a matter of general contract law, that an offer which is not accepted has no legal effect but, in my judgment, it plainly was accepted, as Mr Riley says, firstly by conduct in the sense that the facility was used thereafter without protest, and, secondly, by September 2013 at the very latest when Mr Simpson was writing on behalf of the customer referring to the temporary overdraft limit without any suggestion that that was something which had not been agreed and accepted by him. That is sufficient evidence of acceptance by words or conduct, in my judgment, to be clear that, in fact, there was an acceptance and there is no requirement as a matter of law why the customer could only be bound if it accepted in writing; that was something which the bank was entitled to waive. It also seems to me, by reference to the clear terms of that

letter, that in those circumstances, the bank was making it clear that for the future, it was waiving any prior breach which otherwise might have led to the consequences specified in the terms of the March 2013 letter.

30. So the end result, in my judgment, is that it was an extension or a renewal of the March 2013 letter. The relevance of all that is that if one construes the reference to the July 2013 facility letter in the deed of assignment then, in my judgment, it can only be construed as a variation, or extension, or amendment, or renewal of the March 2013 facility. Therefore, that facility was also assigned as a matter of proper construction of the deed of assignment.

31. So, for all of those reasons, Mr Pugh's submission, ingenious though it was and well argued though it was, in my judgment, must fail. The end result is that there are no other defences which are to be considered and that the claimant is entitled to judgment on its claim in the amount of £415,075.12 which is inclusive of interest.

L A T E R

32. I am now dealing with costs. There is substantial common ground between the parties. Inevitably, the defendants having lost must pay the costs of the claim. Because of the contractual right to costs on an indemnity basis under the terms of the guarantees, and because of the provisions of Part 44.5 of the Civil Procedure Rules and the authorities cited in the editorial note, it is clear that regardless of any issues of conduct, the claimant is entitled to an order for payment of its costs on an indemnity basis. The only issue which divides the parties is as to whether or not this court should also make an order for indemnity costs under Part 44.3 where, as is well known, the court will order indemnity costs where the conduct of the litigation by the losing party is such as to take the case outside of the norm. It is not immediately clear to me whether there is, in fact, any difference of any significance between indemnity costs under 44.3 and indemnity costs under a contract and under 44.5 but insofar as there is a difference and because the point has been argued, I will deal with it shortly

33. The complaints in summary are, firstly, the serious allegations made in the original defence which were used to defeat the statutory demand and were used to keep the litigation going and then dropped shortly before trial. Secondly, the attempt to contest the authenticity of the deed of assignment which was only dropped once Mr Cooper had provided an explanation. Thirdly, the attempt to allege breach of the Payment Services Regulations alleging a criminal offence.

34. Looking at each of those points in turn, having looked at the original allegations, in my view it would be wrong to characterise them allegations taking the case outside the norm. By that, I mean to say, the original defence did not make scandalous allegations of fraud against the bank or individuals within the bank. Instead, it seems to me that it was perhaps a rather confused and confusing hotchpotch of allegations about mis-selling and about misrepresentations about the terms of the guarantees and whether they were individual or cumulative and the like, which were allegations made against the bank on the basis, as seems to me clear, that Mr Simpson, genuinely and not wholly unreasonably believed in them. They were also allegations which were dropped, as Mr Pugh says, on the sensible basis that it was recognised that, in the end, they were not going to provide a defence to the claim under the guarantee by reference to their financial value.

35. Whilst I am not particularly impressed by this conduct of the litigation, in my view it does not cross that necessarily imprecise boundary such as to justify an award of indemnity costs.

36. The same in my view is true in relation to the applications to amend. The position, it must not be forgotten, is that the claimant was on the verge of going to trial on the basis of seeking to rely only on a heavily redacted deed of assignment and, if it had not been for the judicious intervention of the Court of Appeal in *Hancock*, that is no doubt what it would have done and who knows what the outcome might have been in those circumstances.

37. There has been an argument about whether or not the defendant was justified in complaining about the suggestion that there were different versions of the document and again, perhaps rather more heat than light has been shed so far as that is concerned. However, it does not seem to me that all of that, in totality, justifies indemnity costs even though I want to make it clear, without trying to point any fingers of blame or make findings, that it is, of course, always right that no one should be making allegations against solicitors involved in litigation without having considered very carefully whether they are justified. Quite clearly in this case, as it has turned out, insofar as allegations were made, they have been shown, I make it absolutely clear, to be completely unjustified and Mr Cooper can be very clear about that.

38. As to the Payment Services Regulations point, again it is true in my view that the defendants and those advising them did not properly think through the consequences of alleging breach, given that breach was a criminal offence. However, it does not seem to me, having presided over the case for the last few days and at the previous hearing, that it was being done on the basis that the intent was to try to force or frighten the claimant into abandoning the claim by making allegations of criminal conduct. It seems simply to be a way which the defendants sought, in the end as I ruled, wrongly to try and argue their way out of liability.

39. So, for all of those reasons, I am not satisfied that I should make an order for indemnity costs under Part 44.3 but I will, as I say, make an order for indemnity costs under the guarantee and under Part 44.5

L A T E R

40. The claimant is clearly entitled to an interim payment on account of costs. His Honour Judge Hodge QC budgeted costs on the standard basis of around £132,000. Mr Riley asks for a payment on account of 90 percent in accordance with what is now relatively standard practice and also saying that since he is entitled to contractual indemnity costs that is another reason for concluding that this is not unreasonable in this case. He also asks for 60 percent of the pre-action costs taking into account Judge Hodge's observations. Again, that seems to me to be entirely reasonable. There is then the costs for the recent fairly expensive manoeuvring in relation to the defendants' applications to get in further documents and change the case, all of which will be paid again on the contractual indemnity basis. The claim there is for £69,000. Finally, there are the costs of the applications to adjourn the trials last year.

41. It seems to me that there is clearly going to be a very substantial entitlement and there should be a payment on account in the sum of £200,000 all in.

This Judgment has been approved by the Judge.