IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 242 of 2020 (MRHJ)

BETWEEN

RABSCO INC.

Plaintiff

AND

SURESH PRASAD

Defendant

IN OPEN COURT

Appearances:	**Mr. Ian Huskisson and Mr. Bhavesh Patel of Travers Thorp Alberga for the Plaintiff** **Mr. Nicholas Dixey and Mr. Colm Flanagan of Nelson Law for the Defendant**
HEARD	**25 and 26 August 2021 and 10 November 2021**
Draft circulated:	**29 August 2022**
Judgment Delivered:	**2 September 2022**

Headnote

Guarantee - Construction - Nature of guarantor's obligation - Beneficiary demanding payment under guarantee - Basis on which guarantor required to make payment - Whether obligation of the guarantor waived by oral representation and contract varied

JUDGMENT

Introduction

1. Midland Acres Ltd. ("Midland Acres") was a Cayman Islands company which engaged in the quarrying business. It had significant landholdings in the form of a quarry located at Midland Acres in Bodden Town and provided aggregate and other construction material to the construction industry. It was operated by the Defendant, Suresh Prasad.

2. Midland Acres was a wholly owned subsidiary of Stratford Lakes and Gardens Ltd ("Stratford") a company duly incorporated in the British Virgin Islands. The major shareholder in Stratford was a Cayman Islands company known as Brasco Ltd. ("Brasco") which owned 264 of the 800 shares in Stratford.

3. Brasco was controlled by Ben Torchinsky, now deceased, a professional engineer who once owned one of the world's top engineering firms.

4. Mr. Prasad and Mr. Torchinsky had a close personal and business relationship. It is not disputed that they treated each other in their business relationship and dealings as partners with common ambitions and endeavours and that Midland Acres and its operations was only one of a number of businesses and investment opportunities upon which they collaborated.

5. At Mr. Prasad's request, Mr. Torchinsky loaned substantial sums of money to Midland Acres to assist with developing its quarry business. The loans were made through Brasco. When the loans were made, the terms of the loan would be agreed in principle between Mr. Torchinsky and Mr. Prasad and reduced to writing by Mr. Torchinsky. On each occasion, Mr. Torchinsky would require Mr. Prasad to sign a clause to the effect that Mr. Prasad "personally guaranteed" that he would repay the loan. These agreements would later be drawn up as Promissory Notes executed by Mr. Torchinsky for Brasco, by Mr. Prasad for Midland Acres of which he was the Managing Director and by Mr. Prasad as *"Personal Guarantee."*

6. The various loans made to Midland Acres by Brasco over the years were consolidated and assigned to Rabsco Inc ("Rabsco"), the Plaintiff in this action, by agreement made between Brasco, Rabsco, Stratford, Midland Acres and Mr. Prasad on 1 January 2009 (the "Agreement"). At that date, Midland Acres was indebted to Brasco in the sum of US $9,204, 355 in principal and interest. The Agreement at clause 7.1, headed **"Guarantees,"** sets out at sub-clauses (a) though (e), the guarantees given by the several parties to the Agreement to Rabsco and Brasco.

7. Mr. Torchinsky died in 2013.

8. In 2017, Rabsco, commenced winding up proceedings against Midland Acres. The company was ordered to be wound up by the Grand Court on the 30 July 2020

The Claim

9. On 17 September 2020, Rabsco made formal written demand of Mr. Prasad "*as Guarantor under the Guarantee, for payment of all debts owing by the [Midland Acres] to Rabsco as at 17 September 2020 plus all interest accrued."* Mr. Prasad's personal liability for repayment of the debt was said to arise under clauses 7.1, 7.2 and 7.3 of the Agreement.

10. On the of 20 October 2020, Rabsco commenced these proceedings claiming against Mr. Prasad the sum of USD$35,017,406 as a debt due to Rabsco pursuant to the guarantees, with interest compounding at *"12 % until payment* [sic]."

The Defence

11. In his pleaded Defence, Mr. Prasad avers that his obligations under the clause 7.1 guarantees were expressly waived by Mr. Torchinsky, on behalf of Rabsco, during several discussions which took place between them between 2012 and Mr. Torchinsky's death in 2013 wherein Mr. Torchinsky promised that, in the event of a shortfall realised by any sale of the Midland Acres, Rabsco would not enforce the guarantees. This, he avers, amounted to a material variation of the Agreement.

12. In his evidence, however, Mr. Prasad insisted that none of the guarantees he gave, including the guarantees recorded in the 2009 Agreement, were intended to be guarantees in a true sense but were assurances that whenever the quarry was sold, the monies loaned and the interest accrued thereon would be repaid from the proceeds of sale.

13. There is some tension between the assertion that the obligation under the guarantees had been waived and the assertion that the guarantees were not intended to have legal effect but were mere assurances of some other performance. I consider the duelling defences later in the judgment further below.

14. Mr. Prasad also contends that, properly construed, the operative guarantee set out in clause 7.1 is not a guarantee that he would pay Midland Acres' indebtedness in the event Midland Acres did not, but a guarantee that he would ensure timely performance on the part of Midland Acres of its

promise to repay the loan. Mr. Dixey submits that a breach of that obligation would give rise to a claim which sounds in damages - not in debt - and this action cannot be maintained.

The Law

15. The first issue for resolution is the true construction of the clause 7.1 Guarantee in the 2009 Agreement and the basis on which Mr. Prasad can now be required to make payment to Rabsco.

16. In his submissions on behalf of Mr. Prasad, Mr. Dixey relied on the decision of Sir William Blackburne QC sitting as a Judge of the High Court in *Vossloh Aktiengesellschaft v Alpha Trains (UK) Limited* [2011] 2 All ER (Comm) 307. The Judge's summary of the law relating to contracts of suretyship is one on which I cannot improve and, for that reason, I reproduce it at some length below:

> *"[20] Contracts of suretyship, of which the 2009 guarantee is an example, are an area of law bedevilled by imprecise terminology and where therefore it is important not to confuse the label given by the parties to the surety's obligation (although the label may be indicative of what the parties intend) with the substance of that obligation. Because the parties are free to make any agreement they like, each case must depend upon the true construction of the actual words in which the surety's obligation is expressed. This involves 'construing the instrument in its factual and contractual context having regard to its commercial purpose', a task which the court approaches 'by looking at it as a whole without any preconceptions as to what it is': see Tuckey LJ in* Gold Coast Ltd v Caja de Ahorros del Mediterraneo *[2001] EWCA Civ 1806 at [11] and [15], [2002] 1 All ER (Comm) 142 at [11] and [15]... the court must endeavour to avoid a construction which renders a clause otiose or duplicative.*
>
> *[21] A contract of suretyship is in essence a contract by which one person, the surety, agrees to answer for some existing or future liability of another, the principal (or principal debtor), to a third party, the creditor, and by which the surety's liability is in addition to, and not in substitution for, the liability of the principal. Even the use of the expressions 'creditor' and 'debtor' (as in 'principal debtor') can be misleading: the liability which is 'guaranteed' may consist of the performance of some obligation other than the payment of a debt, and it does not have to be a contractual liability.*
>
> *[22] Contracts of suretyship fall into two main categories: contracts of guarantee and contracts of indemnity. Because they have many similar characteristics, and similar rights and duties arise between the parties, it is not unusual to find the term 'guarantee' used loosely to describe what is in reality an indemnity.*

[23] A contract of guarantee, in the true sense, is a contract whereby the surety (the guarantor) promises the creditor to be responsible for the due performance by the principal of his existing or future obligations to the creditor if the principal fails to perform them or any of them. Depending on its true construction, the obligation undertaken by the surety may be no more than to discharge a liability, for example a particular debt, if the principal does not discharge it so that if for any reason the principal ceases to be liable to pay that debt (it may have been discharged and replaced by some other debt or liability) the surety will not come under any liability to the creditor. ***The surety's liability in such a case is conditional upon the principal's failure to pay the particular debt so that if the condition is fulfilled the surety's liability will sound in debt.*** *In contrast to that is the more usual case (sometimes referred to as a 'see to it' guarantee)* ***where, on the true construction of the contract, the surety undertakes that the principal will carry out his contract and will answer for his default. In such a case, if for any reason the principal fails to act as required by his contract he not only breaks his own contract, but he also puts the surety in breach of his contract with the creditor, thereby entitling the creditor to sue the surety, not for the unpaid debt, but for damages.*** *The damages are for the loss suffered by the creditor due to the principal having failed to do what the surety undertook that he would do: see* Moschi v Lep Air Services Ltd *[1972] 2 All ER 393 at 398, [1973] AC 331 at 344–345 (per Lord Reid).*

[24] An essential distinguishing feature of a true contract of guarantee - but not its only one - is that the liability of the surety (ie the guarantor) is always ancillary, or secondary, to that of the principal, who remains primarily liable to the creditor. There is no liability on the guarantor unless and until the principal has failed to perform his obligation. The guarantor is generally only liable to the same extent that the principal is liable to the creditor…" [emphasis mine]

The Guarantees

17. Under the heading **7.1 Guarantees**, the operative guarantee is as follows:

"(b) Suresh hereby absolutely and unconditionally guarantees to BRASCO the due and punctual payment by Midland Acres of the Indebtedness and all interest accruing thereon, and the due performance by each of Midland Acres and Stratford of all covenants and agreements of Midland Acres in favour of BRASCO which are set forth in this Agreement."

18. Clause 7.2 provides

"The liability of a guarantor under any guarantee set forth in Section7.1 shall not be affected by any indulgence, whether of time for payment or otherwise on the part of the one of RABSCO and BRASCO in whose favour such guarantee is provided (the "Indemnitee") and shall remain in full force and of full effect notwithstanding that the

Indemnitee may do any act or omit to do any act which otherwise would, as a result of operation of law, partially or wholly relieve that guarantor from the liability of that guarantor under such guarantee or otherwise mitigate such liability. Without limiting the generality of the foregoing, the Indemnitee shall not be obliged to make any demand against, pursue any action against or exhaust its remedies against the party hereto (the "Principal") the obligations of which are guaranteed by the guarantee in question before making demand upon and taking any action against the guarantor in respect of that guarantee…and such guarantor shall remain liable under such guarantee notwithstanding any disability or lack of status or power of the principal or any impediment whatsoever to the Indemnitee obtaining payment of performance of the sums or obligations or any of them, the payment or performance of which is guaranteed by such guarantee.

19. Clause 7.3 provides

> *"In the event that any demand is made upon a guarantor to pay or perform under a guarantee of that guarantor which is set forth in Section 7.1, then the obligations in that regard of such guarantor shall be construed as if that guarantor had been a principal covenanter and not a surety.*

The Nature of the Obligation

20. Mr. Huskisson on behalf of the Rabsco suggests that clause 7.1 (b) should be read as containing two parts: the first part - *Suresh hereby absolutely and unconditionally guarantees to BRASCO the due and punctual payment by Midland Acres of the Indebtedness and all interest accruing thereon* – is a contract of guarantee in the true sense, as described by Blackbourne J in *Vossloh*, and created an obligation in Mr. Prasad to discharge Midland Acres' liability in the event of non-payment, a liability which sounds in debt.

21. The second part of the clause - *and the due performance by each of Midland Acres and Stratford of all covenants and agreement of Midland Acres in favour of BRASCO which are set forth in this Agreement"* - is a 'performance' or 'see to it' guarantee as described by the learned Judge as described in, giving rise to a claim in damages if not performed.

22. Mr. Huskisson submits, further, that whether the analysis is debt or damages, there is no escaping the conclusion that Mr. Prasad is liable on his guarantee. As Midland Acres' obligation is to repay its debt to the Rabsco, damages would have to be calculated in order to make good Rabsco's loss which is Midland Acres' full indebtedness.

23. I consider that on a plain reading of clause 7.1(b) both parts are 'see to it' clauses and record Mr. Prasad's undertaking to ensure that *Midland Acres* would pay the debt and that *Midland Acres* would perform the other covenants set out in the Agreement, a breach of which would sound in damages.

24. What clause 7.1(b) is *not* is a promise to pay Midland Acres' indebtedness if Midland Acres did not.

25. That the parties knew how to craft a clause fixing Mr. Prasad with personally liability to pay a debt is clear, they having done so in the many documents exhibited which demonstrated the course of conduct of these loans by Mr. Torchinsky and Mr. Prasad. On each of these agreements to lend, as already noted, it is recorded that Mr. Prasad agreed, *inter alia*, to "*personally guarantee repayment"* or to "*personally guarantee that the repayment agreement…will be honored by Midland Acres and if not, will be paid by me personally."*

26. Mr. Huskisson also prays in aid clause 7.3, which states that where demand is made upon a guarantor then the obligations of the guarantor shall be construed as if that guarantor had been a principal covenanter and not a surety, but it adds nothing the construction of clause 7.1 as it is operative only where the guarantor undertook to *"pay or perform".*

27. Mr. Huskisson submitted that there was no essential difference whether the claim sounds in debt or damages, but there is a material difference. They are distinct remedies with their own elements. In a claim for damages, there is no existing obligation to pay any amount: there is no debt due. Damages become a debt due, not when the loss is quantified by the party complaining of breach, but when a competent Court determines that a party has committed a breach, assesses the quantum of loss and awards damages taking into account the various restrictions on recovery of damages, such as the requirement to mitigate loss.

28. Where the proper cause of action is a claim for damages, a claim for debt cannot be maintained. Rabsco's claim falls to be dismissed.

Was there a Variation?

29. Whether the obligation imposed by clause 7.1 gave rise to a claim in debt or in damages against Mr. Prasad, the question remains whether there had been a variation of the Agreement arising from oral discussions between Mr. Torchinsky and Mr. Prasad in 2012 through to his death in 2013, as alleged.

30. In the circumstances where Rabsco have pleaded a claim that cannot be maintained, I do not consider that I am required to resolve that issue.

31. If I were wrong about that, then I would hold that Mr. Prasad has failed to establish on a balance of probabilities that there had been a variation of the Agreement in the terms pleaded in the Defence.

32. The sum total of the evidence in support of the alleged variation is Mr. Prasad's own account. There is no evidence of any conduct by Mr. Torchinsky that would support a finding that he had made a promise to Mr. Prasad not to enforce the guarantee in the event of a shortfall realised by any sale of the Company, as alleged. None of the contemporaneous documents support the allegation. In fact, the evidence goes the other way as it discloses that in November 2013 - during the very period when Mr. Torchinsky is said to have waived Mr. Prasad's liability on his guarantee - Mr. Torchinsky lent money to Mr. Prasad for Midland Acres on the express condition that Mr. Prasad personally guarantee the loan.

33. Mr. Dixey boldly submits that the Court should accept Mr. Prasad's evidence because there is no-one who can controvert it but, given that Mr. Prasad has run defences which inherently conflict as noted at para 12 *supra*, I think the Court is bound to look for some independent evidence to support his evidence and there is none.

34. Mr. Prasad agreed, in the course of being cross-examined by Mr. Huskisson, that Mr. Torchinsky kept detailed records of their transactions and kept track of the unpaid interest on the loans.

35. The 2009 Agreement plainly records a decision taken by Mr. Torchinsky in 2009 to no longer hold Mr. Prasad personally liable for the loans made to Midland Acres but liable only for any shortfall

- damages - between whatever Midland Acres paid on the debt and whatever sums remained due and owing to Rabsco.

36. It is simply not credible that Mr. Torchinsky would decide to relieve Mr. Prasad of any liability to Rabsco under his guarantee at clause 7.1 but not make a record of it. I reject Mr. Prasad's evidence that Mr. Torchinsky made the oral representations alleged.

Conclusion

37. Rabsco's claim is dismissed for the reason set out at paragraphs 27 and 28 *ante*. Costs follow the event and I order that Rabsco pay Mr. Prasad's costs of the action on a standard basis, such costs to be taxed if not agreed.

38. It only remains for me to thank the parties for their patience in awaiting this judgment.

DATED THE 2 SEPTEMBER 2022

Hon. Justice Ramsay-Hale
Judge of the Grand Court