IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 357

Originating Claim No 232 of 2023 (Summons No 2359 of 2023)

Between

IMC Transworld Pte Ltd

… *Claimant*

And

Ashapura Minechem Limited

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — Summary judgment]
[Credit and Security — Guarantees and indemnities]

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v
Ashapura Minechem Ltd

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General Division of the High Court — Originating Claim No 232 of 2023
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Lai Siu Chiu SJ
6 October 2023

26 December 2023

Lai Siu Chiu SJ:

Introduction

1 Summons No 2359 of 2023 (the "Summons") is an application for summary judgment. It pertains to a guarantee entered into between IMC Transworld Pte Ltd (the "claimant") and Ashapura Minechem Limited (the "defendant"). Pursuant to the guarantee, the defendant agreed to guarantee various payment obligations of Al Rock Mining FZE (the "Charterer") to the claimant under a Contract of Affreightment (the "CoA"). Disputes under the CoA led the claimant to commence arbitration proceedings in London against the Charterer, which culminated in a series of arbitration awards in favour of the claimant. Following the Charterer's failure to satisfy these awards, the claimant now seeks recovery from the defendant under the guarantee.

2 After the hearing on 6 October 2023, I granted summary judgment in favour of the claimant. As the defendant has appealed against my decision (in Civil Appeal No 114 of 2023), I set out my grounds of decision below.

Facts

The parties

3 The claimant is a company incorporated in Singapore and is in the business of chartering ships and boats.[1] Mr Kim Tae Kyun is the claimant's director.[2]

4 The defendant is a listed company incorporated in India and is in the business of the production and trade of minerals.[3] Mr Deepak Nirmalchandra Kamath is the "General Manager – Chartering" of the defendant.[4]

5 The Charterer is a company incorporated in the United Arab Emirates (the "UAE").[5] The Charterer was de-registered on 28 October 2021.[6]

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1 Affidavit of Deepak Nirmalchandra Kamath dated 28 August 2023 ("1ADNK") at para 2.1.2.

2 2nd Affidavit of Kim Tae Kyun dated 2 August 2023 ("2KTK") at para 1.

3 1ADNK at para 2.1.1.

4 1ADNK at para 1.1.1.

5 1ADNK at para 2.1.3.

6 1ADNK at para 2.1.3.

Background facts

The Guarantee

6 The claimant's claim against the defendant arose out of a written guarantee entered into between them dated 21 November 2012 (the "Guarantee").[7]

7 Under cl 1 of the Guarantee, the defendant guaranteed, as the "primary obligor and not as surety only", the payment of freight, dead freight, demurrage and/or all sums of money which the Charterer has agreed or is liable or become liable to pay to the claimant under the CoA dated 15 November 2012 entered into between the claimant and the Charterer as the disponent owner and charterer, respectively.[8]

8 Disputes under the CoA arose on or about 19 June 2014 and the claimant commenced arbitration proceedings in London against the Charterer pursuant to cl 28 of the CoA.[9]

The claimant's successful awards against the Charterer

9 The claimant obtained a final arbitration award dated 6 May 2021 (the "Final Arbitration Award") in its favour. Under the Final Arbitration Award, the Tribunal found that the claimant's claim against the Charterer succeeds in the sum of US$205,018.20. Accordingly, the Tribunal ordered that the Charterer pay to the claimant the said sum together with interest thereon at the annual rate

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7 1ADNK at para 2.2.1 and Tab 2.

8 1ADBNK at p 20.

9 1ADBNK at p 121.

of 4.5 per cent compounded at three-monthly rests from 1 September 2014 until the date of payment to the claimant.[10]

10 The Tribunal also directed that the Charterers pay the claimants' costs of reference.[11] The claimant then applied for the costs of the reference to be assessed. By way of a final arbitration award as to costs dated 3 August 2021 (the "Costs Award"), the Tribunal ordered, *inter alia*, that the claimant's recoverable costs of the reference were £75,710.97 and the Charterer pay to the claimant £75,710.97 together with interest thereon at the annual rate of 4 per cent compounded at three-monthly rests from and including 6 May 2021 until the date of payment.[12]

11 Henceforth, I shall refer to the Final Arbitration Award and the Costs Award as the "Arbitration Awards" collectively.

12 By way of an email dated 8 September 2021, the claimant's English solicitors wrote to Hill Dickinson LLP, the Charterer's English solicitors who represented the Charterer in the arbitration proceedings, demanding payment under the Arbitration Awards. To date, the Charterer has not paid anything under the Arbitration Awards.[13]

The claimant's recovery of the Charterer's liabilities against the defendant pursuant to the Guarantee

13 On 4 October 2021, the claimant, through its solicitors in India, Bose & Mitra & Co., sent a demand to the defendant pursuant to the Guarantee, for

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10 1ADBNK at pp 27–31.

11 1ADBNK at p 30.

12 1ADBNK at pp 71–78.

13 1ADBNK at para 2.3.1(d); 2KTK at para 18.

payment of US$281,437.02 plus £102,045.08 within three business days, being the amount owing from the Charterer to the claimant under the Arbitration Awards inclusive of interest calculated up to 1 October 2021.[14]

14 The defendant replied by way of its solicitors' letter dated 24 October 2021 contending that the Arbitration Awards did not bind it because it is not a party to the arbitration agreement.[15]

The claimant's commencement of enforcement proceedings in Singapore against the Charterers in OA 584

15 The claimant applied for leave to enforce the Arbitration Awards in Singapore *vide* Originating Application No 584 of 2022 ("OA 584"). The claimant obtained leave to enforce the Arbitration Awards by way of HC/ORC 5548/2022 dated 29 October 2022 (the "Enforcement Order"). The Enforcement Order was served on the Charterer on 22 December 2022.[16]

16 Following the expiry of more than 21 days after service of the Enforcement Order and the Charterer not having applied to set aside the same, the claimant proceeded to obtain judgment in HC/JUD 46/2023 (the "Judgment"). A copy of the Judgment was served on the Charterer on 21 February 2023.[17]

17 On 17 March 2023, the claimant, through its solicitors in India, sent another demand to the defendant's Indian solicitors, for payment within seven days of US$431,725 being the total amount owing from the Charterer to the

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14 1ADNK at para 2.3.1; 2KTK at para 19.

15 1ADNK at para 2.3.3.

16 2KTK at para 26.

17 2KTK at para 27.

claimant inclusive of accrued interest. Enclosed with the demand was a copy of the Judgment.[18]

18 In its reply on 5 April 2023, the defendant raised the following objections:[19]

(a) it was not a party to the arbitration between the Charterer and the claimant and hence was not bound by the Arbitration Awards;

(b) the Judgment obtained against the Charterer is liable to be set aside because the Charterer was de-registered and hence non-existent;

(c) there was no valid service by the claimant of the Enforcement Order on the Charterer; and

(d) the Judgment is liable to be set aside because the claimant suppressed the fact that the Charterer had been de-registered from the court.

19 Following the defendant's refusal to make payment under the Guarantee, the claimant commenced the present proceedings in Originating Claim No 232 of 2023 on 19 April 2023 ("OC 232"). On 2 August 2023, the claimant applied for summary judgment to be entered against the defendant by way of the Summons.

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18 1ADNK at para 2.3.4; 2KTK at para 28.

19 1ADNK at para 2.3.5.

The parties' cases

The claimant's case

20 The claimant submitted that the requirements for the grant of summary judgment have been satisfied. It averred that it has established a *prima facie* case. The defendant has guaranteed, as the primary obligor and not as surety only, the payment of freight, dead freight, demurrage and/or all sums of money which the Charterer has agreed, or is liable or become liable to pay to the claimant under the CoA entered into between the claimant as the disponent owners and the Charterer as charterers. The Guarantee sets out the defendant's obligations to make payment within three business days of a demand from the claimant under the Guarantee.[20]

21 Furthermore, the defendant has raised no defence nor triable issues. In particular, the following defences and/or triable issues raised by the defendant ought to be rejected:

(a) The defendant cannot allege in its defence that pre-contractual negotiations show that parties had intended the scope of the Guarantee to cover only the existing liabilities of the Charterer.[21] The defendant has not provided details of such negotiations and this is not supported by the express wording of the Guarantee.[22] In any event, the defendant's obligation to make payment accrued before the Charterer's de-registration, as the claimant made a demand on the Guarantee on

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20 Claimant's Written Submissions dated 25 September 2023 ("CWS") at paras 40–41.

21 CWS at para 49.

22 CWS at paras 51–52 and 56.

4 October 2021, before the Charterer's alleged de-registration on 28 October 2018.[23]

(b) The claimant also refuted the defendant's objection that the Guarantee was not meant to be an "on demand" guarantee.[24] This was borne out by neither the evidence nor the text of the Guarantee.[25]

(c) There was no pre-condition in the Guarantee for the claimant to first seek enforcement of the awards in the UAE before commencing an action against the defendant on the Guarantee.[26] Relatedly, the defendant's liability under the Guarantee was also not preconditioned upon recognition and enforcement of the claimant's Arbitration Awards.[27]

(d) The claimant's claim fell within the scope of the Guarantee.[28] Clause 4 of the Guarantee provides that the Guarantee is an "on demand" guarantee and that the claimant's written demand shall be conclusive evidence.

(e) The defendant's allegations in relation to OA 584 were irrelevant to the present claim, as the claimant's claim in OC 232 is based on the Guarantee.[29] Specifically, the defendant's allegation that

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23 CWS at paras 54–55.

24 CWS at paras 58–59.

25 CWS at paras 59–60.

26 CWS at paras 62–63.

27 CWS at paras 66–73.

28 CWS at para 65.

29 CWS at para 74.

the claimant was aware of the Charterer's de-registration and subsequent failure to disclose this alleged material fact was immaterial.[30]

22 The court should exercise its discretion to grant summary judgment on the merits. As the claimant intended to enforce the judgment in India, the claimant required the judgment to be on the merits to be enforceable by the Indian courts. If the Court does not exercise its powers to grant the application, the claimant would face serious injustice as it cannot realise the fruits of its litigation.[31]

The defendant's case

23 The defendant submitted that summary judgment should not be entered against it. The claimant has not established a *prima facie* case against the defendant. The claimant has only established a case against the Charterer but not the defendant in the form of the Arbitration Awards issued against the Charterer.[32] However, the claimant has not shown the Charterer's default, which would thereby crystallise the defendant's liability to pay under the Guarantee. An arbitration award obtained by the claimant against the Charterer does not constitute evidence of default. Furthermore, there were issues to be tried *vis-à-vis* the Guarantee, the claimant's lack of full and frank disclosure in the enforcement proceedings, the requirements of service and the claimant's choice to enforce the Arbitration Awards in Singapore.[33]

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30 CWS at para 74.

31 CWS at para 87.

32 Defendant's Written Submissions dated 25 September 2023 ("DWS") at para 3.2.1.

33 DWS at paras 4.2.9 – 4.2.10, 4.2.17, 4.3.6, 4.4.5, 4.4.6 and 4.5.2.

Issues to be determined

24 Following from the preceding paragraphs, the primary issue for my determination was whether the claimant was entitled to summary judgment against the defendant.

Whether the requirements for summary judgment have been made out

25 The principles for the grant of summary judgment are well settled. To obtain summary judgment, a claimant must show that he has a *prima facie* case for his claims. If he fails to do so, his application ought to be dismissed. If the claimant satisfies this, the burden then shifts to the defendant to show that there is an issue or question in dispute which ought to be tried or if there ought for some other reason to be a trial: see *Ma Hongjin v SCP Holdings Pte Ltd* [2018] 4 SLR 1276 at [31]–[33].

The central inquiry was whether the Guarantee operated as an "on demand" guarantee or a simple guarantee

26 Before proceeding with my analysis on whether the claimant was entitled to summary judgment, it would be fruitful to distil the critical issue which falls to be decided in the present case, which hinged on the nature of the Guarantee, *viz*, whether the Guarantee operated as a form of "on demand" guarantee or a simple guarantee.

27 It was the claimant's position that the defendant was liable as the primary obligor and not only as surety, under the Guarantee. In other words, the defendant's liability arose strictly from the claimant's written demand under the Guarantee, and the claimant was "not obliged or required to attempt to enforce

the [Arbitration Awards]".[34] From the foregoing therefore, the claimant's position was essentially that the Guarantee operated as what it described to be an "on demand" guarantee[35] in the sense that the defendant was liable as a primary debtor to the claimant, that the defendant's liability was not affected by the validity of the underlying obligation and that the defendant's liability to pay was triggered upon a simple demand by the claimant. I pause here to observe that an "on demand" guarantee has also been referred to as an "on demand performance guarantee", "first demand performance bond", "first demand performance guarantee", "demand guarantee", or "first demand guarantee": see *TA Private Capital Security Agent Ltd and another v UD Trading Group Holding Pte Ltd and another* [2023] SGHCR 1 at [50]. For ease of reference, I adopt the term "'on demand' guarantee" here as it was used in the parties' submissions.

28 As stated in Geraldine Andrews & Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 7th Ed, 2015) ("*Law of Guarantees*") at para 16-001, "on demand" guarantees are essentially unconditional undertakings to pay a specified amount to a named beneficiary, usually on demand, and sometimes on the presentation of certain specified documents. An "on demand" guarantee is not a guarantee in the true sense but is instead a stringent form of a contract of indemnity: see *Law of Guarantees* at para 1-016.

29 The claimant's position stood in stark contrast to the defendant's, which to my understanding was, that the Guarantee did not operate as a form of "on demand" guarantee (or "indemnity",[36] as the defendant referred to it at one point

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34 CWS at para 64.

35 CWS at para 58.

36 DWS at para 4.2.16.

in its submissions).[37] Rather, it was a *simple* guarantee which was "contingent upon the Charterer's existing liabilities and/or obligations to the claimant pursuant to an enforceable judgment".[38] Under a simple guarantee, the guarantor would be liable as a secondary debtor, such that its liability would be contingent upon the principal debtor's failure to perform its underlying obligation guaranteed by the guarantor. According to the defendant, the claimant has not proven actual default by the Charterer,[39] which, under a simple guarantee, was necessary before a creditor was entitled to call for payment under the guarantee.

30 In the light of the parties' submissions, it was clear to me that the present application for summary judgment hinged on the nature of the Guarantee, *viz*, whether the Guarantee operated as a form of "on demand" guarantee or a simple guarantee. At its core, this was a question of the construction of the Guarantee to be determined on a case-by-case basis.

31 If I were to find that the Guarantee operates as a simple guarantee, the claimant's case would necessarily fail, given that the claimant had not proven actual default by the Charterer. While the claimant has procured the Arbitration Awards, *PT Jaya Sumpiles Indonesia and another v Kristle Trading Ltd and another appeal* [2009] 3 SLR(R) 689 ("*PT Jaya*"), in endorsing the proposition of law set forth in *Re Kitchin Ex p Young* (1881) LR 17 Ch D 668, is authority from our apex court that an arbitration award obtained by a creditor against the principal debtor does not constitute evidence that may be used to establish a surety's liability. While it is, of course open to the parties, by "express words" to agree for the guarantor to be liable to pay any sum awarded in an arbitration

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37 1ADNK at para 2.2.4.

38 1ADNK at para 2.2.4.

39 DWS at para 4.2.18.

between the principal debtor and the creditor, these words must be clearly stated: see *Law of Guarantees* at para 7-035. *Compania Sudamericana de Fletes SA v African Continental Bank Ltd (The Rosarina)* [1973] 1 Lloyd's Rep 21 is one example of a case where the courts have allowed a guarantee that contained an express promise by the surety to pay "up to the amount stated above in accordance with any arbitration award rendered in London (under the terms of the charterparty)". Nothing on the face of the Guarantee here expressly and clearly provides that the defendant is liable to pay any sum awarded in an arbitration between the claimant and the Charterer. Accordingly, it stood to reason that the success of the claimant's case was predicated on the Guarantee being construed to operate as an "on demand" guarantee rather than a simple guarantee.

The Guarantee operates as an "on demand" guarantee

32 The salient terms of the Guarantee provide:[40]

> 1. Reference is made to the charter party relating to "6 shipments of 75000-85000 MT Bauxite", via India to China dated shipment Period 20th December 2012 to 31st May 2013 between the Owners and A/C Age Trading FZC or M/S, Alrock Mining FZE, UAE (the "Charterers") and all addendums thereto from time to time (collectively, the "Charter party"). In consideration of the Owners entering into the Contract with the Charterers, we irrevocably and unconditionally guarantee, as the primary obligor and not as surety only:
>
> > (i) the performance by the Charterers of all the obligations on the part of the Charterers contained in the Charter party, including but not limited to the punctual payment of Freight/ Dead Freight/Demurrage, promptly after the date of demand by the Owners upon us, and
> >
> > (ii) promise to pay or cause to be paid on or before the expiration of three (3) Business Days after the date of demand by the Owners upon us, each and every sum of

[40] 1ADBNK at pp 20–21.

money which the Charterers have agreed or are liable, or from time to time become liable, to pay to the Owners under the Charter party, including without limitation, any amount payable by way of damages for breach of any of the terms and conditions of the Charter party, and have failed to pay when due.

2. As a separate and independent stipulation, we as primary obligor and not as surety only, further hereby irrevocably and unconditionally agree to indemnify the Owners on demand and keep the Owners indemnified against all costs, expenses and liabilities incurred by the Owners as a result of any breach or non-performance by the Charterers of any of the Charterer's obligations under or pursuant to the Charter party.

3. This Guarantee:

(i) shall be a continuing security for the performance by the Charterers of all its obligations actual or contingent under the Charter party and the payment of all monies and liabilities whatsoever owing from time to time (whether actual or contingent) by the Charterers to the Owners under the Charter party and shall not be satisfied by any partial payment of such obligations or by an intermediate payment or satisfaction of any part of such monies or liabilities;

(ii) shall be in addition to, and shall not be prejudiced or affected by any other security for the obligation of the Charterer which may be from time to time held by the Owners;

(iii) shall remain in force notwithstanding the granting of time or other indulgence given by the Owners to the Charterers for the performance of any of its obligations under the Charter party and notwithstanding any violation of the terms of the Charter party; and

(iv) shall be a continuing guarantee and shall remain in full force and effect until all the Charterer's obligations under the Charter party are discharged and/or all monies due to the Owners from the Charterers and/or pursuant to the Charter party and/or by way of damages have been paid in full, whichever is the later.

4. We shall make payment of any and all sums demanded by the Owners under this Guarantee in immediately available and freely transferable funds to such account as specified by the Owners, from time to time without set-off or counterclaim, free and clear of any deduction, withholding, bank charges, fees or any other costs/expenses, within three (3) Business Days after the date of the Owners' written demand for payment,

> which such written demand shall be conclusive evidence of the amount due for all purposes under this Guarantee

33 To recapitulate, the defendant took the position that the Guarantee was not intended to be an "on demand" guarantee. Instead, the defendant's obligation under the Guarantee, which was merely a simple guarantee to make payment to the claimant, was contingent upon the Charterer's existing liabilities and/or obligations to the claimant, pursuant to an enforceable judgment.[41] In my view, the Guarantee operated as an "on demand" guarantee. Clause 1 of the Guarantee could not be clearer – it provides that the defendant "irrevocably and unconditionally guarantee" in the capacity of the "primary obligor and not as surety only" to guarantee the performance by the Charterer of all the obligations on the part of the Charterer (cl 1(i)) and that the defendant undertakes to make payment upon demand of "each and every sum of money which the Charterers have agreed or are liable, or from time to time become liable, to pay to the Owners under the Charter party," and which the Charterer "have failed to pay when due" (cl 1(ii)).

34 An arguable case may be made that the wording of cl 1(ii) suggests that it merely operated in the form of a simple guarantee given that the defendant's obligation to pay appeared to be *contingent* on sums for which the Charterer "have failed to pay when due". Even if cl 1 may operate as a simple guarantee, this did not preclude the operation of cl 2 as a separately enforceable "on demand" guarantee by the defendant. Clause 2 provides that the defendant has undertaken a "separate and independent stipulation" as "primary obligor and not as surety only" to "irrevocably and unconditionally agree" to "indemnify the [claimant] *on demand*" [emphasis added]. These factors pointed to the conclusion that the defendant's obligation to pay under cl 2 was a primary one

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41 1ADNK at para 2.2.4; DWS at para 4.2.12.

to make payment *on demand,* which was not co-extensive with the Charterer's liability – as principal debtor – such co-extensiveness of liability being otherwise consistent with a simple guarantee. The defendant's liability under the Guarantee was *not* contingent on the Charterer's default of the underlying obligation.

35 I did not agree with the defendant's objection that the term "primary obligor" does not have the effect of an indemnity (or "on demand" guarantee) and that the defendant is therefore not liable as principal debtor.[42] In taking this position, the defendant relied on *PT Jaya*. In *PT Jaya*, the Court of Appeal found (at [57]) that the overall effect of the guarantee in that case was not an indemnity, nor did it make the guarantors liable as principal debtors. This was because "the [g]uarantee was replete with the words '[g]uarantor' and 'guarantee'", with the words "primary obligor" being used only once in the guarantee. Furthermore, the words "indemnity" and "indemnify" did not appear in that guarantee at all. As the Court of Appeal acknowledged in *PT Jaya* (at [52]), citing James O'Donovan & John Phillips, *The Modern Contract of Guarantee* (Sweet & Maxwell, English Ed, 2003) at para 1-101, that the dominant view (which the court found applied on the facts of *PT Jaya*) is that "primary obligor" clauses does "not convert what would otherwise be interpreted as a contract of guarantee into a contract of indemnity", it accepted that ultimately, whether a contract provides for an indemnity is a "matter of construction in each case [involving a 'principal debtor' clause] whether a guarantee or an indemnity has been given": see Low Kee Yang, *The Law of Guarantees in Singapore and Malaysia* (LexisNexis Butterworths, 2nd Ed, 2003) at p 32.

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42 DWS at para 4.2.16.

36 In my view, the facts of *PT Jaya* were distinguishable. Unlike in *PT Jaya*, the term "primary obligor" is referenced in both cll 1 and 2, with the defendant being stipulated to have assumed this obligation "irrevocably and unconditionally" in both instances where this term is used. Moreover, cl 2 expressly provides that the defendant "irrevocably and unconditionally agree[s] to *indemnify* the Owners on demand and keep the Owners *indemnified* against all costs, expenses and liabilities incurred by the Owners" which may arise "as a result of any breach or non-performance by the Charterers of any of Charterers' obligations under or pursuant to the Charter party" [emphasis added].

37 Moving beyond cll 1 and 2 of the Guarantee, the presence of cl 4, which is what is known as a conclusive evidence clause, was another factor pointing in favour of the Guarantee being construed as an "on demand" guarantee. Clause 4 provides that the defendant "shall make payment of any and all sums demanded" within three business days after the date of the claimant's written demand for payment, and such written demand shall be "conclusive evidence of the amount due for all purposes" under the Guarantee. Such payment is to be made "without set-off or counterclaim, free and clear of any deduction, withholding, bank charges, fees or any other costs/expenses".[43] I did not accept the defendant's objection that cl 4 of the Guarantee does not provide conclusive evidence of the defendant's *liability* under the Guarantee. It is not the case as the defendant alleges, that the claimant's written demand merely crystallises the *quantum* of the defendant's liability rather than the defendant's liability itself.[44] Clause 4 provides that the defendant "shall make payment of *any and all sums demanded by the [claimant]* under this Guarantee" [emphasis added]. No

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43 1ADNK at p 21.

44 DWS at para 4.2.15.

distinction is drawn between sums which were, *in fact* due owing and sums which are *expressed* to be due and owing. From the plain wording of cl 4, what mattered was that payment was required of "any and all sums demanded" by the claimant. While I was alive to the objection that cl 4 states that the "written demand shall be conclusive evidence of the *amount due* for all purposes under this Guarantee" [emphasis added], this did not necessarily mean that such a demand was conclusive *only* in relation to the quantum of the defendant's liability. It could *also* extend to the defendant's liability.

38 In reaching this conclusion, I was guided by the decision of Sir Jeremy Cooke in *Bitumen Invest AS v Richmond Mercantile Ltd FZC* [2016] EWHC 2957 (Comm) ("*Bitumen*"). In that case, the claimant, the owner of a vessel, entered into a contract titled "Deed of Guarantee" with the defendant, the parent company of the bareboat charterer of the vessel, for the defendant to guarantee the performance of the bareboat charterer's payment obligations to the claimant. The claimant applied for summary judgment against the defendant in respect of sums alleged to be due under a deed of guarantee. The relevant clauses of the deed provided, among other things (see *Bitumen* at [19]):

> [A] In consideration of the Owners entering into the Charter with the Charterers and delivering the vessel thereunder, and for other good and valuable consideration (the receipt and adequacy of which the Guarantor hereby acknowledges) the Guarantor hereby unconditionally and irrevocably guarantees as primary obligor and not merely as surety the due and proper performance of all obligations, including payment obligations, which the Charterers incur or may incur towards the Owners under the Charter (the 'Guaranteed Obligations') and to pay to the Owners on demand all monies as may fall due from the Charterers to the Owners and to discharge all Guaranteed Obligations or any part thereof when the same become due for payment or discharge.
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> …

> [C] The Guarantor expressly undertakes to make payment on demand of any amount certified by Owners by written notice to be due to the Owners as a consequence of the Charterers not having fulfilled their obligations under the Charter, within five (5) Business Days after receipt of written notice for payment from the Owners.
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> [D] Any payments under this Guarantee shall be made in full, free and clear of any deductions, withholdings, set-offs or counterclaims of any nature whatsoever …

39 In granting summary judgment to the claimant, Sir Jeremy Cooke held that the "key feature of the Deed of Guarantee appear[ed] in paragraph C" of the clause, as the "trigger for payment is the issue of a demand by the Owners for an amount certified by them, by written notice, as due as a consequence of [the principal debtor] failing to fulfil its obligations under the Charter": see *Bitumen* at [22]. Most crucially for our present purposes, Sir Jeremy Cooke found that the "certification of any amount as due as a consequence of non-fulfilment of [the principal debtor's] obligations must go, inevitably, to liability since, otherwise, the certification of sums as due is meaningless": see *Bitumen* at [23]. Having found as such, Sir Jeremy Cooke concluded that "the clear objective intention of the instrument is that payment should be triggered upon certification in accordance with paragraph C and that there should be no room for defence to such a certification by reason of the terms of paragraph D, absent fraud". Once the defendant received the demand in accordance with paragraph C, they became liable to pay the certified sums without any deductions: see *Bitumen* at [26].

40 Likewise, *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 is also instructive. There, the High Court of Australia was confronted with a clause which provided that "a certificate signed by the Manager … stating the balance of principal and interest due to you by the customer, shall be conclusive evidence of the indebtedness at such date of the customer to you". The court

found that this clause provides that the certificate could provide conclusive evidence as to not merely the quantum of the liability but also the existence of the liability itself. In the words of the majority (at 651):

> *It is not easy to see how the amount can be certified unless the certifier forms some conclusion as to what items ought to be taken into account, and such a conclusion goes to the existence of the indebtedness.* Perhaps such a clause should not be interpreted as covering all grounds which go to the validity of a debt; for instance, illegality … But the *manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt* and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness. The clause means what it says, …
>
> [emphasis added]

41 For completeness, I noted that counsel for the defendant sought to persuade me with the submission that the parties did not intend for the Guarantee to operate "on demand". This could be seen from the claimant's conduct where it had only demanded against the defendant in 2013, almost ten years after the claimant's "long-drawn arbitration" with the Charterer. In doing so, the defendant was essentially attempting to rely on the parties' subsequent conduct in the interpretation of the Guarantee. I was not persuaded that this would detract from my conclusion that the wording of the Guarantee is such that it operates as an "on demand" guarantee rather than a simple guarantee. In any case, as the Court of Appeal emphasised in its recent decision in *Lim Siau Hing @ Lim Kim Hoe and another v Compass Consulting Pte Ltd and another appeal* [2023] SGCA 39 at [96], "it remains an open question whether evidence of subsequent conduct may be admitted for the purposes of contractual interpretation". As the question did not arise for the Court of Appeal's determination on the facts, it declined to express its views on the admissibility of subsequent conduct in contractual interpretation cases. In the present case, I did not think that subsequent conduct should be admitted to support the defendant's interpretation of the Guarantee.

42 From the above analysis, I found that the Guarantee operated an "on demand" guarantee (or an indemnity) such that the defendant was liable upon the claimant's demand.

43 I turn next to address the defendant's submission that a triable issue arose over the scope of the Guarantee, *viz*, whether the Guarantee covered only the *existing* liabilities of the Charterer that were enforceable against the Charterer and not liabilities of the Charterer that have ceased to exist.[45] Again, this is a matter of construction concerning the parties' intention – as objectively ascertained.[46] I was not persuaded by the defendant's bare assertion that pre-contractual negotiations show that parties had intended for the scope of the Guarantee only to cover the existing liabilities of the Charterer.[47] No details have been provided of such negotiations to indicate that this could potentially be an arguable point of dispute at trial. The court will not grant permission to defend if the defendant only provides a mere assertion, contained in an affidavit, of a given situation which forms the basis of his defence: see *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 at [19], citing *Prosperous Credit Pte Ltd v Gen Hwa Franchise International Pte Ltd* [1998] 1 SLR(R) 53 at [14]. Such a claim is also unsupported by the wording of the Guarantee.[48] As the claimant pointed out, nothing in the Guarantee states that the de-registration of the Charterer would render a claim unenforceable.[49] In any event, the defendant's obligation to make payment accrued *before* the

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45 DWS at para 4.2.5.

46 DWS at para 4.2.9.

47 CWS at para 49; 1ADNK at para 2.2.2.

48 CWS at paras 51–52 and 56.

49 CWS at para 52.

Charterer's de-registration as the claimant made a demand on the Guarantee before the Charterer's alleged de-registration on 28 October 2018.[50]

The defendant's alleged claims in relation to OA 584

44 Moving beyond the defendant's objections regarding the terms of the Guarantee, the defendant submitted in the alternative that triable issues were raised regarding the claimant's conduct in the enforcement proceedings.

45 First, the defendant alleged that triable issues were raised in relation to the claimant's level of disclosure in the enforcement proceedings. As the claimant based its claim on the Guarantee, the claimant must satisfy the Court that the Enforcement Order was validly obtained.[51] In this regard, the claimant must make full and frank disclosure when it seeks leave to enforce the Final Arbitration Award. The defendant averred that there was thus a triable issue of fact as to whether the claimant had disclosed the material fact of the de-registration of the Charterer at the time of its application for leave to enforce the Final Arbitration Award.[52]

46 In my view, the defendant's objection could not stand. Beyond a bare assertion, there was no evidence hinting that the claimant knew that the Charterer was de-registered at the time of service on the Charterer in OA 584. Instead, I accepted the claimant's case that it was not aware that the defendant was de-registered until it received the defendant's reply of 5 April 2023. The claimant's UAE lawyers were "informed that the trade license of [the Charterer] had expired at the end of 2021 and … was no longer present/registered with

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50 CWS at paras 54–55.

51 DWS at para 4.3.1.

52 DWS at para 4.3.5.

Rakez Business Centre".[53] They were further informed by a Rakez Business Centre Customer Service Agent that "the license expired on 6 December 2021".[54] From this, it appeared that there was no indication to the claimant that the Charterer was de-registered. The evidence did not show that the claimant's UAE lawyers had informed the claimant that the Charterer was de-registered at the time of service of the Enforcement Order. Instead, it was the advice of the claimant's UAE lawyers to effect service by email on the Charterer, which the UAE lawyers carried out.[55]

47 Second, the defendant also raised a litany of other potentially triable issues. With regards to the requirement of service, the defendant submitted that there was a question of fact as to whether the Enforcement Order was served on the Charterer on 22 December 2022, given that the Charterer was de-registered by then and cannot have been served.[56] Further, there was an issue of whether the Enforcement Order was deemed to be validly served. This involved a dispute of fact regarding whether service was effected in accordance with UAE law and, subsequently, whether it constituted valid service in light of all the circumstances of the case.[57]

48 The defendant submitted that if the court were to find that the Enforcement Order was not validly served on the Charterer, the further issue to be determined was whether the Enforcement Order remains enforceable.[58] There were also issues to be tried concerning the claimant's choice to enforce

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53 2KTK at p 22, para 12.

54 2KTK at p 22, para 13.

55 CWS at para 77.

56 DWS at para 4.4.4.

57 DWS at paras 4.4.6–4.4.7.

58 DWS at para 4.4.13.

the Arbitration Awards in Singapore.[59] In this regard, there was an issue of whether the claimant knew of the Charterer's presence and/or assets in Singapore in seeking the Enforcement Order. Given that the Charterer was incorporated in the UAE and that, on the facts, there was no indication that the Charterer had any assets or presence in Singapore, it was questionable why the Charterer chose to seek to enforce the Arbitration Awards in Singapore without seeking enforcement of the same in the UAE. If the court were to find that the claimant's failure to disclose the information of the existence or presence of the Charterer in Singapore was deliberate, this may be grounds to set aside the Enforcement Order for being contrary to public policy arising from the claimant's opportunistic use of the procedure of the Singapore courts to seek an advantage in enforcing the Guarantee against the defendant.

49 Finally, the defendant submitted that even in the absence of a specific triable issue, there are other reasons why the matter should go to trial: *Akfel Commodities Turkey Holding Anonim Sirketi v Townsend, Adam* [2019] 2 SLR 412 at [30].[60] According to the defendant, there were circumstances calling for further investigation. This included the claimant's assertion that service on a de-registered entity is possible,[61] and the claimant's purported knowledge of the Charterer's de-registration by the date of service of the Enforcement Order on 22 December 2022.[62] The defendant also averred that since all documents relating to the liabilities owing by the Charterer to the claimant upon which the Arbitration Awards were issued are under the control

59 DWS at paras 4.5.1–4.5.7.

60 DWS at para 5.1.1.

61 DWS at para 5.2.2.

62 DWS at para 5.2.3.

of the claimant,[63] these documents ought to be provided to the defendant, who was not a party to the arbitration proceedings.

50 In my view, the above objections neither raised potentially triable issues nor good reasons why the case should proceed to trial. As mentioned above, the claimant's claim was based on the Guarantee. As I have earlier found, the defendant is liable "on demand" under the Guarantee as a primary obligor. In other words, the Guarantee is the *source* of the claimant's claim. Therefore, the defendant's allegations with respect to the claimant's conduct in the enforcement proceedings, service, and other matters that purportedly call for further investigation were irrelevant.

51 In these circumstances, the defendant has not raised triable issues as to why the matter should proceed to trial.

52 Accordingly, I granted summary judgment in favour of the claimant. For the avoidance of doubt, having had the opportunity to hear both counsel for the claimant and the defendant, my judgment is granted on the merits.

Conclusion

53 For the reasons stated above, I ordered that summary judgment on the merits be entered against the defendant. As the claimant is the successful party, costs were to be in the cause, with such costs awarded to the claimant on an indemnity basis under the terms of the Guarantee. I fixed the costs to the

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63 DWS at para 5.2.4.

claimant at $30,000, excluding disbursements which would be on a reimbursement basis.

Lai Siu Chiu
Senior Judge

Chua Chok Wah and Nur Rafizah bte Mohamed Abdul Gaffoor (Joseph Tan Jude Benny LLP) for the claimant;
Lin Weiwen Moses, Soong Jun De and Manvindar Kaur Sethi d/o Sarwan Sing (Shook Lin & Bok LLP) for the defendant.