# Catalyst Business Finance Limited v Very Tangy Television Limited, Richard Tuckwell, Very Tangy Media Limited

No.HQ17X01808

High Court of Justice Queens Bench Division

4 May 2018

**[2018] EWHC 1669 (QB)**

**2018 WL 04567271**

Before: Mrs Justice Jefford

Friday, 4 May 2018

## Representation

Mr S. Mills (instructed by PDT Solicitors LLP) appeared on behalf of the Claimant.

Mr P. Patterson (instructed by Candey Solicitors) appeared on behalf of the Second Defendant.

## Judgment

Mrs Justice Jefford:

1 This is an application for summary judgment by the claimant, Catalyst Business Finance Limited ("Catalyst"), against the second defendant, Mr Richard Tuckwell. The application was first listed before Master Thornett on 19 March 2018 with a time estimate of two hours. Having reviewed the papers, he regarded that time estimate as inadequate and adjourned the matter to be heard by a judge with a time estimate of one day, with two hours pre-reading. In due course the matter came before me on 2 May 2018. Both parties provided skeleton arguments, including suggested pre-reading lists. The claimant's estimate of pre-reading was one hour, the defendant's was three hours. The hearing took a court day, and I reserved judgment to today, 4 May 2018.

## The factual background

2 I take the history of this matter principally from the statement of Mr Tuckwell. He describes himself as a consultant and entrepreneur operating in the digital media industry. His business activities were mainly carried out through the first defendant, Very Tangy Television Ltd. ("VTTL"), and the third defendant, Very Tangy Media Ltd. ("VTML"). In early 2015 Mr Tuckwell wanted to expand VTTL's business activities, for which he sought investment of approximately US$40 million. He identified a potential source of investment as Vanguard Equity Fund LLC. Vanguard imposed certain conditions on investment, which in turn required expenditure by VTTL and for which it also needed finance. VTTL obtained short-term finance for that expenditure by a Loan Agreement with Catalyst, dated 28 May 2015, although Mr Tuckwell says that it was not signed until 29 May. Nothing turns on that. Mr Tuckwell entered into a Personal Guarantee and Indemnity, also dated 28 May 2015, and VTML entered into a Corporate Guarantee and Indemnity of the same date. It is common ground that two sums of £50,000 and of £30,000 were subsequently transferred (to use a neutral term) by Catalyst to VTTL.

## The terms of the Loan Agreement

3 Catalyst, VTTL and Mr Tuckwell as Guarantor were all parties to the Loan Agreement which recited that:

> "The purpose of this Agreement is to set out the contractual terms under which the Lender [that is Catalyst] will lend and the Borrower [that is VTTL] will borrow the sum of the Loan and matters relating to the Guarantee which the Guarantor gives for the Borrower's obligations."

4 As I will set out, the Loan Agreement is, as so often happens, a less than felicitously-worded document in a number of respects. It contains the following definitions:

(i) 'Advance' means "any part of the Loan drawn down by the Borrower at his request".

(ii) 'Loan' means "the total amount of money lent by the Lender to the Borrower together with accumulated interest."

(iii) definitions of a basic and higher rate of interest.

5 It then contains the following provisions.

(i) Clause 2, headed "Amount of the Loan", provides:

> "The Loan is in the sum of £500,000.00 …or such greater sum as shall in fact have been lent by the Lender to the Borrower at any time this agreement subsists, or such lesser sum as shall be outstanding after part repayment has been made."

(ii) Clause 4, concerning advances, provides:

> "The Loan shall be drawn down in a single sum (or such other sums as shall be agreed between the Parties) as soon as this agreement has been signed."

(iii) Clause 5, as to repayment, provides:

> "The Loan shall be repaid 90 days after the date the Advance is made unless otherwise agreed in writing by both the Lender and the Borrower."

(iv) Clause 11.1 provides that:

> "An 'event of default' occurs when:
>
> > "12.1 The Borrower fails to pay in full and on the due date for payment any sum due and remains in default for 14 days after the Lender by notice to the Borrower has demanded immediate payment;"

(v) Clause 12 provides that:

> "12.1 Where an event of default has occurred the Lender may issue a notice of default.

When the Lender does so, the whole amount of the Loan then outstanding and any unpaid interest immediately fall due for payment."

The Lender then becomes entitled to the higher rate of interest.

Clause 12.4 then provides:

"When an event of default happens, the Lender may serve on the Borrower and upon the Guarantor a notice specifying the default and may forthwith demand that either or both of them make good the default."

6 The body of the Loan Agreement is followed by two schedules. Although clause 10.9.4 in the body of the Agreement refers to Schedule 1, that is in the context of assets subject to a lien. That is not in fact the subject matter of Schedule 1. Schedule 1 is entitled "Conditions Precedent", and there is no reference to conditions precedent in the body of the Agreement. The first eight paragraphs of Schedule 1 set out matters such as "A duly executed copy of this agreement". It then states:

"9. Up to £50,000 advance subject to the above.

10. A further £175,000 to be made available subject to sight and satisfaction of the signed heads of terms from Vanguard Equity Fund …

11. A further £275,000 to be made available subject to sight and satisfaction of the signed contract with Select TV Solutions Inc."

7 There was some discussion and clarification of both Catalyst's and Mr Tuckwell's cases on Schedule 1 in the course of the hearing. As clarified, my understanding of the parties' respective cases is as follows.

(i) Although Mr Tuckwell, on the face of the pleadings, took issue with the incorporation of Schedule 1, it was not his case that the page of the schedule did not form part of the Agreement. Rather, his case was that it was, at the lowest, not clear what the contractual significance of Schedule 1 was, because of the absence of any relevant reference in the body of the Agreement. Catalyst's obligations under the Loan Agreement were to loan the sum of £500,000. It was not limited to an obligation to pay instalments which were themselves subject to conditions precedent.

(ii) Catalyst's case in its Reply at paragraph 5 disavowed the argument that Schedule 1 contained conditions precedent. Nonetheless, Catalyst contended that the performance of the matters in paragraphs 1 to 8 were conditions precedent to Catalyst's obligation to pay the sum up to £50,000. Catalyst said that underparagraphs 10 and 11, it agreed to provide the further sums "subject to sight and satisfaction" of the documents referred to, and that, as a matter of construction and/or as an implied term, VTTL was obliged to provide such further information and documentation as was reasonably required by Catalyst to determine whether the terms were satisfactory to it.

8 It may be purely a question of terminology or characterisation, but that seems to me that Catalyst's care did indeed amount to an argument that the obligation to loan the amounts referred to did not arise until the "Conditions Precedent" in Schedule 1 had been fulfilled.

## The terms of the Personal Guarantee and Indemnity

9 Mr Tuckwell's Personal Guarantee and Indemnity contained the following terms. Clause 1 set

out definitions. These included:

> " 'Agreement' means the Loan Agreement …
>
> 'Costs' means costs and expenses of any kind whatsoever on a full indemnity basis including, without limitation, legal expenses;
>
> 'Losses' means losses, costs, damages, claims, interest and expenses …"

10 Clause 2 provided as follows:

> "I hereby irrevocably and unconditionally guarantee:
>
> 2.1 the punctual payment, due performance and discharge of all of the obligations to you of the Borrower under the Agreement or any other agreement between you and the Borrower; and
>
> 2.2 immediately upon demand to pay to you all amounts payable to you by the Borrower now and/or which may at any time hereafter become payable to you by the Borrower whether arising under the Agreement or otherwise so that you may enforce this provision against me at any time, without prior demand on the Borrower (and without any obligation on you to make demand, enforce or seek to enforce any claim, right or remedy against the Borrower or any other person); and
>
> 2.3 to pay to you all Costs incurred in enforcing or attempting to enforce the terms of this deed against me and the terms of any other guarantee and/or indemnity given by any other party in respect of the obligations of the Borrower to you.
>
> 3. Without prejudice to the provisions of clause 2 above, I indemnify and hold you harmless against all Losses and Costs that you may suffer or incur by reason of any failure of the Borrower to comply with any term of the Agreement and against all Losses and Costs arising out of or in connection with the recovery by you of any monies due to you whether by the Borrower under the Agreement and/or under this deed and/or by any Co-surety and any Costs incurred by you in connection with any discharge or release of this deed…
>
> 5. For the purpose of determining my liability hereunder I shall be bound by any acknowledgement or admission by the Borrower and/or I shall accept and be bound by a certificate of indebtedness signed by any of your directors (safe for manifest error or error of law). In arriving at the amount payable to you hereunder, you shall be entitled to take into account all Losses and Costs suffered or incurred by you (whether actual or contingent) and to make a reasonable estimate of any such liability the amount of which cannot be immediately ascertained…
>
> 7. I agree that my liability hereunder shall not be affected by:
>
> 7.1 any indulgence granted or made by you to or with the Borrower or any Co-surety;
>
> 7.2 any waiver of your rights against the Borrower or any Co-surety or any other person;
>
> 7.3 any variation to the Agreement and/or to any other document executed by any person in connection therewith …"

11 I shall not read the balance of 7.3 to 7.6, but they are all in similar vein in terms of setting out those matters which shall not affect the liability of the Guarantor. Clause 7.7 then provides that it shall also not be affected by:

> "…any invalidity, illegality, unenforceability, irregularity or frustration of any actual or purported obligation of, or security held from, the Borrower or any other person;"

The concluding words of clause 7, which I will set out, apply to the entirety of clause 7:

> "and I shall be liable under this deed in every respect as a principal debtor."

## The events

12 I turn next to the events that happened and that are in evidence before me on this application, and in particular to the sums that were in fact loaned from Catalyst to VTTL and the evidence surrounding those loans.

13 Mr Tuckwell's statement set out how he was introduced to Catalyst. His first meeting was on 21 May 2015 with a Mr Lawrence, after which meeting he undertook to provide a term sheet reflecting the basis on which Vanguard would be investing in VTTL. That he provided on 26 May. He said that up to that point there had been little urgency in obtaining short-term finance but that changed when it became evident that VTTL would be required to pay Vanguard's costs (about US$45,000) of visiting the UK and inspecting VTTL's premises.

14 On 27 May 2015 he received an email from Ms Anthony of Catalyst which said that Catalyst were interested in pursuing the matter further. Amongst other things, the email asked for a breakdown of what the £500,000 was needed for, which Mr Tuckwell then provided.

15 In his statement he then said this in paras.17 to 19:

> "17. At about 09:15 on 28 May 2015, I attended Catalyst's offices where I met a number of employees of Catalyst, including Mr Lawrence and Ms Anthony. By the time that meeting had concluded, I understood that Catalyst would, subject to the approval of its board, be lending VTTL the sum of £500,000 in a single tranche.
>
> 18. During the afternoon of 28 May 2015, I had a telephone call with Ms Anthony. During that call, Ms Anthony made the following representations to me:
>
> 18.1. that Catalyst's board had agreed to lend VTTL the sum of £500,000 and she (Ms Anthony) was content that the agreement could be finalised without difficulty; and
>
> 18.2. that I would be required to give a personal guarantee and allow a charge to be entered against the property which I own and live in.
>
> 19. In light of these representations, I asked Ms Anthony to confirm that if I signed the personal guarantee and agreed to the charge being entered over my property, the short-term funding would thereafter be forthcoming. I indicated that I would only sign the personal guarantee and agree to the entry of the charge over the property if I had that reassurance because VTTL would need imminently to sign leases on a premises and make a payment to Vanguard. Ms Anthony indicated that she could see no reason why VTTL could not make those payments and she was confident the lending would follow shortly upon the signing of the personal guarantee."

16 Mr Tuckwell says that he relied on those representations in signing leases for office premises and transferring monies to Vanguard.

17 He was then provided with various documents by email from Ms Anthony, including the Loan Agreement, the Personal Guarantee and the Corporate Guarantee. I note that the covering email said that there had been some feedback from the Catalyst Board (although still awaiting full approval), who had adjusted the value of the three advances of the Loan. These adjustments reflected what now appears in Schedule 1.

18 Mr Tuckwell attended his solicitor's offices on 29 May 2015 to sign the documents and dropped them off with Catalyst. He says that he was at that point asked by Ms Anthony to provide proof of funds in respect of Vanguard, which he said came as a surprise to him and which he did not have. His statement, at paras.25 and 26, then says this:

> "25. At this time, I was becoming desperate. Although it was still essential that VTTL received the full sum of £500,000, I was concerned how long it might take me to obtain the proof of funds in relation to Vanguard which Catalyst was now demanding. It was essential that sum (sic) money would be released by Catalyst immediately and, therefore, I asked Ms Anthony whether, in the worst case, the sum of £50,000 could be released that day (29 May 2015) with the balance coming once I could obtain proof of funds.
>
> 26. Catalyst responded to this request by transferring to me the sum of £50,000 on the evening of 29 May 2015."

19 It is sufficient at this point to say that Catalyst disputes some of this version of events. It has done so through the second statement of its solicitor, Mr Angas, which sets out what he has been told by Ms Anthony. In particular, she disputes that she made the representations Mr Tuckwell refers to and Mr Angas exhibits a number of emails that appear to be inconsistent with Mr Tuckwell's position. Mr Tuckwell says nothing further about the sum of £30,000.

20 On the evidence before me, what appears to have happened is that Vanguard did not go ahead with the investment. On 30 May 2015, Mr Tuckwell made various proposals to Catalyst about how that might be dealt with. Nothing appears to have happened immediately after that. In his third statement, Mr Angas says that on 29 July 2015 Mr Tuckwell, by an email (which I observe appears to have been intended to be exhibited but was not), asked for the release of a further £50,000 "but minimum £30,000". On 23 August 2015, Mr Tuckwell emailed Ms Anthony and said that he had finally secured the funding Vanguard had let him down over, and asking whether, on the basis of the information he now provided, the Board would now approve the release of the balance of £450,000. The following day he provided a Memorandum of Understanding with Select TV and asked again for some release of funds. On 1 September a further £30,000 was transferred to VTTL. Mr Angas says he was informed by Ms Anthony that that is all that Catalyst was prepared to advance.

21 On 10 May 2016, by solicitor's letter, Catalyst demanded repayment of the sum of £80,000. When that money was not repaid, by letter dated 24 March 2016, Catalyst identified an event of default and demanded repayment plus legal costs. By letter dated 28 June 2016, repayment was then demanded from Mr Tuckwell pursuant to the Personal Guarantee.

22 The Claim Form and Particulars of Claim were issued on 24 May 2017. A Defence and Counterclaim (to which I shall return) followed, and a Reply and Defence to Counterclaim. This application for summary judgment was issued on 10 January 2018. On 22 January 2018 there was a costs and case management conference before Master Thornett. Directions were given for the hearing of this application. Directions were further given for trial of all issues except for the issues on the counterclaim of causation and damages. The trial against all three defendants is fixed for four days in November this year.

23 Also on 10 January 2018, Catalyst issued its first certificate of indebtedness. That certificate said this:

> "'Re:
>
> (1) Loan agreement: Secured by guarantor' dated 28 May 2015 made between Catalyst Business Finance Limited and Very Tangy Television Limited as 'Borrower' and Richard Tuckwell as 'Guarantor'.
>
> (2) Guarantee and Indemnity dated 28 May 2015 made between Catalyst Business Finance Limited and Richard Tuckwell ('the Guarantee')
>
> I hereby certify that:
>
> (1) the amount payable to Catalyst Business Finance Limited by Very Tangy Television Limited as at the date of demand on Richard Tuckwell was £142,936.00; and that
>
> (2) interest has accrued on such sum under the Guarantee and today amounts to £7,145.76."

The document was signed by what can only be described as a squiggle but, there appears to be no dispute, is the signature of Mr Stuart Fraser. His name appears below in typeface as:

> "Stuart Fraser
>
> Director
>
> for and on behalf of Catalyst Business Finance Limited."

Since then there have been four further certificates of indebtedness issued.

24 On 21 February 2018 a further certificate was issued, again signed by Mr Fraser. The recital part was in identical terms to the first certificate. It then said:

> "I hereby certify that:
>
> (1) the amount payable to Catalyst Business Finance Limited by Very Tangy Television Limited and the amount payable under the Guarantee as at the date of demand on Richard Tuckwell was £142,936.00; and that
>
> (2) interest has accrued on such sum under the Guarantee and today amounts to £9,090.28."

The wording is therefore different to the extent that it expressly refers to the liability of the Guarantor. Catalyst does not in fact rely on this certificate on this application because it accepts that the calculation of interest is wrong. On 1 May a further certificate in similar terms was issued, with a different sum of interest, but which was dated 2 May.

25 On 2 May, a further certificate in identical terms, and this time also dated 2 May, and signed by Mr Fraser, was issued. It identified Mr Fraser as a director of Catalyst but his name was not typed in. On 2 May, a yet further version in identical terms was issued, save that this time Mr Fraser's name also appeared in type.

## Catalyst's case on this application

26 With that background, I turn finally to Catalyst's case on this application. I summarise Mr Mills' arguments on behalf of Catalyst as follows: (1) under the Personal Guarantee, Mr Tuckwell's obligations are primary and not secondary obligations; in the alternative, his obligations under clause 3 at the least - that is the indemnity provision - are primary obligations. (2) The certificate of indebtedness is not a condition of liability or the matter that fixes him with liability. It is, however, conclusive evidence both as to Mr Tuckwell's liability and quantum. (3) The only exception is where there is a manifest error or manifest error of law on the face of the certificate, alternatively, an error of law. (4) In this case there is no such error. (5) Accordingly, there can be no real prospect of Mr Tuckwell successfully defending the claim against him.

## Primary or secondary obligations

27 Before I consider the defendant's defences, I shall deal first with the issue of whether Mr Tuckwell's obligations are primary or secondary. I refer first to the decision of Sir William Blackburne in *Vossloh Aktiengesellschaft v Alpha Trains [2010] EWHC 2443 (Ch)* , which contains an admirable exposition of the difference between contracts of guarantee in which the guarantor's obligation is secondary, and contracts of indemnity in which the obligation is primary. I trust I will be forgiven for citing from that judgment at some length. Paragraph 21 summarises the position thus:

> "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: [1] contracts of guarantee and [2] 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."

The balance of that paragraph then identifies that that obligation may be an obligation to answer for a debt or for failure of the principal obligor to perform.

"24. An essential distinguishing feature of a true contract of guarantee - but not its only one - is that the liability of the surety (i.e. 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. This has the consequence that there is usually no liability on the part of the guarantor if the underlying obligation is void or unenforceable, or if the obligation ceases to exist (to which principle - the so-called principle of co-extensiveness - there are, however, a number of exceptions)…

25. In contrast to the contract of guarantee is the contract of indemnity. In one sense all contracts of guarantee (strictly so called) are contracts of indemnity (as indeed are many contracts of insurance) since, in its widest sense, an indemnity is an obligation imposed by operation of law or by agreement of the parties. In the narrower sense in which, in the current context, the expression occurs, a contract of indemnity denotes a contract where the person who gives the indemnity undertakes his indemnity obligation by way of security for the performance of an obligation by another. Its essential distinguishing feature is that, unlike a contract of guarantee (strictly so called), a primary liability falls upon the giver of the indemnity. Unless (as is quite possible) he has undertaken his liability jointly with the principal, his liability is wholly independent of any liability which may arise as between the principal and the creditor. It will usually be implicit in such an arrangement that as between the principal and the giver of the indemnity, the principal is to be primarily liable, so that if the indemnifier has to pay first he has a right of recourse against the principal…

26. The fact that the obligation to indemnify is primary and independent has the effect that the principle of co-extensiveness does not apply to a contract of indemnity. The indemnity not only shifts the burden of the principal's insolvency on to the indemnifier but it also safeguards the creditor against the possibility that his underlying transaction with the principal is void or unenforceable. It also prevents the discharge of the principal or any variation or compromise of the creditor's claims against the principal from necessarily affecting the liability of the indemnifier under his contract with the creditor. Otherwise, the rights and duties of the parties to a contract of indemnity are generally the same as those of the parties to a contract of guarantee.

27. So much for some of the essential differences. Whether a particular contract of suretyship is of the one kind or the other or, indeed, a combination of the two turns on its true construction. A contract which contains a provision preserving liability in circumstances where a guarantor would otherwise be discharged (for example, the granting of time by the creditor to the principal or a material variation of the underlying contract between the principal and the creditor, without (in either case) the guarantor's consent) will usually indicate that the contract is one of guarantee because such a provision would be unnecessary if the contract were one of indemnity. On the other hand, a provision stating that the surety is to be liable in circumstances where the principal has ceased to be liable (for example, on the principal's release by the creditor) may be indicative either of a guarantee (because the provision would be unnecessary in

> the case of a contract of indemnity) or of an indemnity (because it makes clear that the liability of the surety was intended to continue …
>
> 28. This brings me to the so-called 'performance bond', sometimes known as a 'performance guarantee', often as a 'demand bond' or 'demand guarantee' or even as a 'first demand guarantee'. In the context of the present dispute I prefer the expression 'demand bond'. In essence it is a particularly stringent contract of indemnity. It is a contractual undertaking by a person, usually a bank, to pay a specified amount of money to a third party on the occurrence of a stated event, usually the non-fulfilment of a contractual obligation by the principal to that third party. Sometimes the wording of the contract has the result that the liability of the person who has given the bond arises on mere demand by the creditor, notwithstanding that it may be evident that the principal is not in any way in default or even that the creditor himself is in default under his contract with the principal. It all depends on the wording of the instrument. It is often a difficult question to determine whether, on its true construction, a particular contract which provides for payment on demand is a performance or demand bond …or whether it is a guarantee (strictly so called) where the obligation to pay is of the 'see to it' kind, i.e. conditional on proof by the creditor of default by the principal…
>
> 34. The result of the foregoing brief survey is that, with the parties free to agree whatever terms they choose, there is in this field of law a spectrum of contractual possibilities ranging from the classic contract of guarantee, properly so called, at the one end, where the liability of the guarantor is exclusively secondary and will be discharged if, for example, there is any material variation to the underlying contract between principal and creditor, to the performance or demand bond (or demand guarantee) at the other end, where liability in the giver of the bond may be triggered by mere demand and without proof of default …There may be little to distinguish (and it may not matter) whether the obligation undertaken is in the nature of a guarantee (strictly so called) or an indemnity. Where it does matter, the question is whether the liability to be enforced is secondary (or ancillary) to that of the principal (however qualified that liability may be), in which case the obligation is in the nature of a guarantee, or primary, in which case it will be in the nature of an indemnity and, if the latter, may be enforceable merely on demand (as with a performance or demand bond) or conditional on proof of default by the principal or on satisfaction of some other event or requirement. Where on the spectrum a particular case falls may call for a nice judgment on the part of the court faced with the task of construing the instrument in question. The instant case calls for just such a judgment."

That last sentence is a quote from the decision of Sir William Blackburne in *Vossloh* . It applies, in my view, equally to the present case.

28 Mr Mills argues that the Personal Guarantee is one that imposes primary liability. He relies on the following matters.

> (i) He points to the fact that under clause 2.3 the second defendant agreed to pay "all Costs incurred in enforcing or attempting to enforce the terms of …any other guarantee and/or indemnity given by any other party in respect of the obligations of the Borrower", and that extends beyond the obligations of VTTL.
>
> (ii) By clause 3, Mr Tuckwell agreed to indemnify Catalyst "against all Losses and Costs arising out of or in connection with the recovery by you of any monies due to you whether by the Borrower under the Agreement …or by any Co-surety …". Again, he says that VTTL did not assume the same liability.
>
> (iii) He relies particularly on the words in clause 5, that the Guarantor "shall be bound by any acknowledgement or admission by the Borrower" which indicate that an acknowledgement or admission would suffice to establish liability even if on detailed examination there was no liability.
>
> (iv) He relies on the fact that the reference in clause 3 to a reasonable estimate of the

second defendant's liability under the Guarantee demonstrates clearly that the liability of the second defendant is not dependent on the liability of the first defendant. And he points to two matters in clause 7. Firstly, the express provision in clause 7.7 that the second defendant's liability under the Guarantee will not be affected by "any invalidity, illegality, unenforceability, irregularity or frustration" of the obligation of the Borrower, and, secondly, the clear words of clause 7 that the Guarantor "shall be liable under this deed in every respect as a principal debtor".

29 Mr Patterson, on the other hand, relies on the wording, in particular, of clauses 2.1 to 2.3 as evidencing the fact that the liability of the Guarantor was dependent on and secondary to that of VTTL. Further, in clause 3, the liability to indemnify arises from the failure of the Borrower to comply with the terms of the Loan Agreement. The wording of clauses 7.1 to 7.6 is also material because they are the sort of clauses that preserve the Guarantor's obligations in the event of variation to the underlying contract and are therefore relevant only in the context of secondary liability.

30 Having sought to exercise the kind of nice judgment advocated or identified in *Vossloh* , it is my view that the Personal Guarantee given by Mr Tuckwell is properly regarded as a hybrid document in which some of the obligations are primary and some are secondary. As already indicated, the distinction between primary and secondary obligations is potentially material because if the Personal Guarantee is a true guarantee, the principle of coextensiveness applies and the Guarantor is entitled to the benefit of any defences available to the primary obligor. In this case, that would mean that Mr Tuckwell was entitled to the benefit of the potential set off of VTTL's counterclaim, and for this application to succeed, I would have to decide that that had no real prospect of success. For the reasons I shall explain later in this judgment, I might well have reached that conclusion, but it is not necessary for me to do so. If Mr Tuckwell has a relevant primary obligation, then he does not have the benefit of that defence of set off. It seems to me quite clear that, whatever view I take of the Personal Guarantee as a whole - and Mr Mills urged upon me that I should give it a characterisation as a whole - Mr Tuckwell's obligations under clause 3 are primary obligations. There was an express obligation to indemnify against losses or costs suffered or incurred by reason of a failure of the borrower to comply with the terms of the Loan Agreement. Although that liability to indemnify follows from a failure of the Borrower, it is clearly a primary obligation because it extends beyond losses and costs for which the Borrower is liable. In that respect, I accept the submissions of Mr Mills which I have already recited, and that seems to me to be consistent with the provisions of clause 7.7 and the express recognition of primary liability in clause 7 itself, which would themselves be pointless if the document as a whole only gave rise to a secondary liability.

## The obligation to repay

31 That brings me, therefore, to the next matter, which is VTTL's obligation to repay. As I understand it, Mr Patterson submits that there is a real prospect of success on the defence that there was no obligation on the part of VTTL to repay the £80,000 transferred to it. This argument assumes that the certificate of indebtedness does not put this point beyond argument. Mr Mills, on behalf of Catalyst, submits that the certificate of indebtedness does so, and that therefore I do not need to consider the underlying argument. But, in any event, the same argument would arise on the basis that Mr Patterson submits that there is a real prospect of success on the argument that there is an error of law in the certificate. It is therefore convenient to take this point first.

32 There are a number of strands to the argument that VTTL was under no obligation to repay £80,000. Firstly, on the face of the pleadings, issue is taken with whether the £50,000 and the £30,000 sums were loaned pursuant to the Loan Agreement. In particular, it is noted that there was no reference to £30,000 in the Loan Agreement. Catalyst is put to proof. I have no hesitation in rejecting this argument and finding that it has no real prospect of success. The Loan Agreement clearly provided for the Loan of £500,000 to be drawn down in a single sum or in smaller amounts agreed between the parties, and defined as Advances. There is no other legal basis on which the £50,000 or the £30,000 could possibly have been paid. The emails I have seen make it clear that Mr Tuckwell, on behalf of VTTL, was seeking sums under the Loan Agreement.

33 Secondly, it is submitted that no obligation to repay any amount arose until after the whole of the £500,000 was advanced. This raises a pure issue of construction, and that is an issue which I can and should deal with on a summary judgment basis if I consider that all the relevant evidence is before me. Mr Patterson sought to persuade me that it is a matter on which I should not reach a conclusion at this stage. Directions have been given for disclosure and witness statements going to the same issue, and he submits that the court cannot properly construe the Loan Agreement without the benefit of full evidence as to the circumstances in which the Loan was sought and the purpose in seeking the Loan. Despite that submission, and despite the fact that Mr Tuckwell is the guiding mind of VTTL, no issue or evidence was identified that might affect the construction of the Agreement. This, therefore, seems to me to be a short point of construction which I can determine on a summary basis.

34 The Loan Agreement expressly provides that the Loan may be drawn down in a single sum or such other sums as may be agreed. These other sums are Advances, of which the definition is "any part of the Loan drawn down by the Borrower at his request". The repayment obligation arises 90 days after the Advance is made, unless otherwise agreed. As a matter of construction, clause 5, taken with clause 4, provides that the Loan, of which the definition is the total amount loaned, shall be repaid 90 days after the Advance is made. In other words, if the Loan is made in parts, those parts are the Advances and are repayable after 90 days. The amount repayable will accumulate with each Advance. If clause 5 were construed otherwise, it would have the perverse result that Catalyst would not have the right to be repaid, and VTTL no obligation to repay, until the whole of the Loan of £500,000 had been made. Thus, if the Loan were drawn down bit by bit, VTTL could delay repayment almost indefinitely. To take an absurd example, if VTTL drew down £499,999.99, it would still have no obligation to repay. The effect would also be that the only obligation to repay would relate to the total sum of £500,000, and that would be inconsistent with the wording of clause 11.1 which refers to "any sum due", and with the wording of clause 12. That absurdity is not met by the argument that the Loan was intended to be made in three tranches, because the latter sums of £175,000 and £275,000 referred to in Schedule 1 are "available" under paras.10 and 11 of that schedule, and clause 4 places no limitation on the amounts that can be drawn down.

35 Mr Patterson argues that the claimant's construction also leads to an improbable result, and he gives that as one reason why this matter should await resolution at a full trial. He argues that if a first Advance were made on day one, it would be repayable on day 90 or 91. If a second Advance were then made on, say, day 89, it too would become repayable on day 90 or 91 because "the Loan" would then be the total of both advances. It seems to me that in this example, and giving the clause a commercial construction, it must mean that the whole of the Loan becomes repayable 90 days after the second advance. It is open to question whether instead each Advance becomes repayable 90 days after it was made, but the issue does not arise here and does not need to be resolved in order to reject the second defendant's argument.

36 It follows, in my judgment, that, irrespective of the effect of the certificate of indebtedness, VTTL was obliged to repay the £80,000 and failed to do so. Catalyst has suffered loss in the amount paid, plus interest, and the second defendant has indemnified Catalyst against that loss. That is his primary liability, and the quantification of that loss does not take into account any potential set-off which would convert it into a secondary liability.

## Conclusive evidence

37 Although I have approached the matter in this way, as I have already said, Mr Mills' primary argument for Catalyst was that I did not need to consider such issues because of the existence of the certificate of indebtedness which Mr Tuckwell has agreed determines his liability. The issue of primary or secondary liability comes into play in this respect as well. I have had my attention drawn to two paragraphs in **Andrews & Millett** on The Law of Guarantees. Paragraph 1-016 says:

> "The question that the court will always be faced with is what, objectively, the parties to the contract intended. It can hardly ever be the case that the parties will be taken to have intended that a conclusive evidence clause in a guarantee will transform it into a performance bond, when they had not used a more direct and obvious route to achieve that end. The commercial function of conclusive evidence clauses in standard form

> guarantees is to avoid debate about the correctness of the calculation of any sums that are due if, but only if, liability is established."

Secondly, at para.7-032, which is in respect of conclusive evidence clauses:

> "Once the creditor has proved the existence and terms of a contract, he must establish that the surety is liable, which in turn usually involves proving that the principal is liable. A very useful way of cutting short the evidential process is to make sure that the contract of suretyship contains a 'conclusive evidence clause'. The terms of such clauses vary, but a typical wording will provide that a notice in a certain form, or a demand by the creditor, signed by one of its officers, shall be conclusive as between creditor and surety of the amount for which the principal is liable, or the amount payable by the principal, save in of case of manifest error."

38 Mr Mills submits on behalf of Catalyst that what is said in both of those paragraphs is clearly in the context of a true guarantee where the court, if I can put it this way, leans away from finding that a conclusive evidence clause has the effect of turning a guarantee into a performance bond, in the sense of an on-demand bond, and therefore away from construing a conclusive evidence clause as determining both liability and quantum. He submits that where the obligation is primary, no such presumption or tendency in construction should apply. Mr Patterson submits the opposite, and says that I should be, at the very least, wary of construing a conclusive evidence clause as providing for conclusivity both as to liability and quantum in a document which, on his case, gives rise only to secondary liability and which I have already found is of a hybrid type.

39 I refer to two authorities which assist me in considering this issue. The first is *IIG v Van Der Merwe [2008] EWCA (Civ) 542* . In that case, the directors of a company provided personal guarantees. The personal guarantees - and I take this from the headnote of the Lloyd's Report for convenience - stated that the guarantor agreed:

> "…as principal obligor and not merely as surety that it will immediately upon demand unconditionally pay to the lender the guaranteed moneys which have not been so paid."

Clause 4.2 provided that:

> "A certificate in writing signed by a duly authorised officer stating the amount at any particular time due and payable by the guarantor shall, save for manifest error, be conclusive and binding on the guarantor for the purposes hereof."

40 At first instance, the judge held that the guarantee was an on-demand guarantee, which rendered the Van Der Merwes primary debtors, and that there was no manifest error in the certificate demanding payment. The matter came before the Court of Appeal, at which time in argument it was common ground that the judge had been correct in taking the view that there was a strong presumption against deeds of guarantee being demand bonds and that the presumption would be replaced only if there was clear wording to the contrary. I summarise the Court of Appeal's decision by saying that they concluded that there was such clear wording. At paragraph 30, Rimer LJ said this:

> "The question at the end of the day is what on the true language of these deeds of guarantee did the Van Der Merwes agree. I accept there is a presumption against these being demand bonds or guarantees; I also accept that the documents must be looked at as a whole. I accept that clause 3 which would only be necessary if the deeds were or might be undertaking a secondary liability, points in favour of the presumption and that there are other terms which appear in what I would call normal guarantees given to banks in relation to a customer's indebtedness. It will thus only be if clear language has been used in the operative clauses that the presumption will be rebutted.
>
> 31. I turn thus to the operative language of the deeds of guarantee."

He then recited clause 2.1 and the definition of guaranteed monies. He said:

> "The obligation to pay monies 'expressed to be due' 'upon demand' 'unconditionally' as 'principal obligor' …would indicate that the Van Der Merwes were taking on something more than a secondary obligation."

He then referred to clause 4.2 and the certificate, and said this:

> "I agree with the judge that that clause puts the matter beyond doubt. Any presumption has by the language used been clearly rebutted. Apart from manifest error, the Van Der Merwes have bound themselves to pay on demand as primary obligor the amount stated in a certificate pursuant to clause 4.2."

41 The second case to which I have been referred, is *ABM Amro Commercial Finance Plc v McGinn [2014] EWHC 1674 (Comm)* . In that case, the terms of the guarantee which had been given were recited at paragraph 9 of the judgment of Flaux J (as he then was). Clause 1 provided that in consideration of ABM Amro:

> "…entering into or continuing any Agreement for the sale or purchase or factoring or discounting of debts [and providing other financial facilities] I [the guarantor] hereby agree to indemnify you against all loss you may suffer in consequence of."

Various matters were then set out, including breaches by the company of various terms. Then:

> "For the purpose of determining my liability under this Indemnity I shall be bound by any acknowledgement or admission by the Company and by any judgment in your favour against the Company. For such purpose and for determining either the amount payable to you by the Company or the amount of any losses, costs, damages claims (whether prospective or actual and whether as claimant or defendant) interest and expenses ('Losses') I shall accept and be bound by a certificate signed by any of your directors. In any proceedings such certificate shall be treated as conclusive evidence (except for manifest error) of the amounts so payable or of any Losses. In arriving at the amount payable to you by the Company you shall be entitled to take into account all liabilities (whether actual or contingent) and to make a reasonable estimate of any contingent liability."

There was then an express provision in that instance that this agreement was in addition to:

> "…and not in substitution for any other security taken or to be taken for the performance of the Company's obligations under any such Agreement."

42 The terms of clause 3 which I have quoted are, as has been submitted on behalf of Catalyst, in very similar language to the provisions of clause 5 in the Personal Guarantee in the present case.

43 It is not necessary to go into any detail as to the reasoning in the judgment, save in the following respects. Firstly, Flaux J concluded at paragraph 36 of the judgment that, irrespective of the submissions that had been made to him in relation to the Court of Appeal's decision in *IIG* , his firm conclusion was that the deeds of indemnity imposed primary rather than secondary obligations on the defendant. He said this:

> "Quite apart from the use of words of indemnification, which, whilst not conclusive, are indicative of assumption of a primary liability, it is clear that clause 3 is imposing a primary liability. The words 'I shall be bound by any acknowledgement or admission by the Company and by any judgment in your favour against the Company' indicate that an acknowledgment or admission of liability by the company will suffice to establish liability, even if, on detailed examination, there was no liability. Furthermore, the reference in clause 3 to a reasonable estimate of contingent liability seems to me to demonstrate very clearly that the liability of the defendants under the deeds of indemnity is not

> dependent upon any conclusive determination of liability of the company to the claimant, a compelling indication that the defendants' liability under the deeds of indemnity is primary rather than secondary."

To the extent that I have not already done so, I rely on both of those observations as applying equally to this case and supporting my conclusion that the obligation under clause 3 is one of primary liability.

44 At paragraph 43, the learned judge considered the effect of the acknowledgement of the administrators of the company (then in administration) and a certificate of indebtedness. On the basis of his analysis of the matters that had arisen, he had concluded that it was not strictly necessary to rely on any such acknowledgement or certificate of indebtedness but he said this:

> "If necessary I would conclude that, once the administrators acknowledged the company's indebtedness to the claimant [as they had done in a letter] that was conclusive as to the company's liability, subject to any question of 'manifest error', not alleged to arise in this case in relation to liability as opposed to quantum."

45 Finally, I quote paragraph 59:

> "In any event, in circumstances where the company through its administrators has acknowledged the overall indebtedness and a director of the claimant has certified the amount payable under clause 3, in the absence of a manifest error (which I have concluded there was not and the defendants have no real prospect of successfully establishing there was), that clause precludes any argument which the defendants seek to put forward to the effect that the claimant has caused its own loss".

46 From those authorities, I take the following. Firstly, *IIG* makes it clear, perhaps unsurprisingly, that the meaning of such a conclusive evidence clause is a matter of construction in each case, and that a clause that determines both liability and quantum is not to be ruled out. The terms of the clause in *McGinn* were, as I have said, very similar to those in the present case and seem to me to have been construed by Flaux J in the way which Mr Mills argues for. It is right that the decision appears to turn on the acknowledgement and admission, but the judge's reference to "manifest error", which is a matter that only arose in the context of the certificate of indebtedness, at least implies that he would have reached the same conclusion on the basis of the certificate of indebtedness.

47 It is submitted on behalf of Mr Tuckwell, nonetheless, that clause 5 is ambiguous as to whether it is conclusive evidence as to both liability and quantum, and that that ambiguity should be resolved at a full hearing, and not before on a summary basis. The ambiguity is said to arise from the words "for the purpose of determining my liability hereunder" which could, it is submitted, refer either to liability (in principle) or to the amount of liability. I reject that argument for two reasons. Firstly, the first part of the clause is concerned with "determining my liability". The second part then sets out what Catalyst is entitled to take into account "in arriving at the amount payable to you hereunder". Thus, the first part of the clause is expressly concerned with liability, including liability in principle, and the second part with quantification. The words "determining my liability" are specifically linked to the certificate of indebtedness, which carries with it the concept that the amount is owed as a debt, and therefore that there is a liability to pay it, not just that it is the quantification of a sum that might be owed subject to establishing liability.

48 It is then argued that the certificates issued were themselves not valid. That argument has two limbs. Firstly, that the first certificate failed to identify the liability of the Guarantor, and, secondly, that all the certificates lacked some degree of formality or precision and were not in some sense served on the second defendant. This is a matter that turns on the wording of the clause. The clause does not specify whose indebtedness it is a certificate of (if I can be forgiven for ending my sentence with a preposition). In the context of the acceptance that the Guarantor will be bound by any acknowledgement or admission by the Borrower, a certificate of the Borrower's indebtedness would be sufficient. To avoid any argument, all but the first certificate referred to both VTTL's and the Guarantor's indebtedness, but that does not seem to me to invalidate the

first certificate. Secondly, the clause provides no formal requirements whatsoever, other than that it is signed by "any of your directors". Each of the certificates has been. The penultimate certificate did not have the director's name in type, but that is not a requirement of the clause. Thirdly, accordingly, any one of the certificates, subject to the arguments as to error, is capable of being a valid certificate under the clause. For completeness, I should make it clear, if there is any dispute about this, that the existence of a certificate of indebtedness is not the basis of liability but is conclusive evidence as to liability and quantum.

## Manifest error

49 That brings me to manifest error or error of law. Mr Tuckwell argues that he still has a real prospect of success in his defence because all of the certificates are flawed by an error of law. The first issue that arises is the construction of the clause. The words used are "manifest error or error of law". In my judgment, it is not arguable that that means that there must be a manifest error of law, as Catalyst has contended. The clause must be read disjunctively as referring to a manifest error or an error of law. "Manifest error" is broad enough to encompass an error of law and in referring distinctly to an "error of law" a distinction must be being drawn. Is there therefore a real prospect of success on Mr Tuckwell's defence that the certificate contained an error of law? That could only be the case if there was any prospect of success on the arguments that there was no obligation to pay, either because the sums were not advanced under the Loan Agreement or because no obligation to repay arose until the whole of the £500,000 had been advanced. The former point is arguably a matter of fact and not law but, in any event, I have already explained why I do not consider that either argument has any real prospect of success.

50 VTTL of course has a somewhat different case. It argues in its defence and counterclaim that Catalyst was obliged to, and failed to, lend the entire £500,000. Catalyst, it says, was in breach of the agreement in failing to do so, and that has given rise to a claim in damages. That case seems to me to face a number of difficulties. The Agreement contemplated that the Loan would be drawn down. Even if paid in a single sum, that involves a request by VTTL for the entire sum. It appears on the evidence I have set out above that there was on at least one occasion such a request but it was all qualified by Mr Tuckwell's recognition that the Catalyst Board's approval was required. Secondly, it appears to me that the Loan agreement construed as a whole makes the payment of the sums of £175,000 and £275,000 conditional on the satisfaction of Catalyst with certain documentation, and that there was little evidence that that was achieved. I make those observations but I do not decide those matters. They are matters for the full trial. The point on this application is that they do not avail the second defendant. If they did, it would have the effect of converting his primary liability into a secondary liability. In any event, if that were the case, I would still have concluded that clause 5 operated as a conclusive evidence clause, both as to liability and quantum.

## Some other reason for trial

51 That brings me to Mr Tuckwell's final argument that summary judgment should not be entered against him because there is some other reason why there should be a trial involving him. Mr Patterson contends that Catalyst has adopted a tactical approach - my expression, not his - of isolating Mr Tuckwell, the individual, and seeking judgment against him when it knows that there is to be a full trial of all issues, other than causation and quantum, in the next few months. A tactic it may be, but it is not, in my view, an illegitimate one. The application was first made in January, well in advance of any trial date. The terms of the Loan Agreement and the Corporate Guarantee and Mr Tuckwell's Guarantee are different, and the claimant is entitled to rely on those differences. Mr Mills has made it clear that if judgment is obtained against Mr Tuckwell, the claim for repayment will not be pursued against D1 and D3. The trial will then only be concerned with the counterclaim. That may raise some of the issues that have been raised on this application, but there is not complete commonality, and no reason why the determination of Mr Tuckwell's liability should await that outcome. There may be less or no saving in the scope of the trial than there might otherwise be, but that is not the sole factor determining whether summary judgment should be granted.

52 Because of the overlapping issues, Mr Patterson also argues that there may be an absurd outcome. My decision on this application, in favour of Catalyst would not bind the other parties,

and in particular VTTL. It would still be open to VTTL to argue that (contrary to my view) it has not only a defence to the claim against it, but a counterclaim for £7.6 million, which raises some of the same issues. Mr Patterson therefore submits that an absurd situation could arise in which Mr Tuckwell has been found liable to Catalyst, VTTL is not then found liable to Catalyst, but VTTL is entitled to substantial sums of money from Catalyst.

53 In this context, he has drawn my attention to the decision and observations of Jackson LJ in *Iliffe v. Feltham Contractors [2015] EWCA (Civ) 715* . In that case, Jackson LJ expressed unease about upholding summary judgment on liability in favour of one party when very similar issues were to be the subject of a full trial with other parties. Although that broad statement might seem applicable to this case, in my view, this case is wholly different from *Iliffe v Feltham* . In that case, the issue was causation of a fire. At first instance the judge had considered that Feltham had no real prospect of success on its defence on causation. Summary judgment was not sought or entered against the other defendants who were either in the contractual chain or against whom Feltham might have a claim for contribution. Jackson LJ considered that the evidence as to causation of the fire was far less clear than it would need to be to grant summary judgment. That was a case in which there was a commonplace contractual chain in which liability would normally be expected to be passed down the line, or where there might be claims for contribution from those in direct contract with the employer. All those claims would turn largely or wholly on the same findings of fact. It was clear that there would be a full trial involving other parties with extensive factual and expert evidence, and it plainly made sense for all parties to be involved in and bound by the decision that followed after trial. This case does not involve any sort of similar contractual chain with similar factual and expert issues.

54 The answer to Mr Patterson's concern also seems to me to be found in the decision of the Court of Appeal in *IIG v van Der Merwe* . In that case, as I have said, the defendants had guaranteed a loan to a company of which they were directors. Under the terms of the guarantee they were held to be liable to pay the amount stated in a certificate. One of the arguments advanced on their behalf was that if they were so held liable, they would have no right to recover the monies paid by them from the company if in due course, in the dispute between IIG and the company, there was found to be no liability. I do not intend to quote in detail from paragraphs.25 to 28 of the decision of the Court of Appeal in that matter, but, in short, the Court of Appeal expressed the clear view that in such circumstances there would be an implied indemnity and/or that the Van Der Merwes ought to have taken appropriate steps to protect their own position in that respect. If in due course it is held that VTTL is not liable to make any payment to Catalyst, and indeed that Catalyst is liable to VTTL, it will be open to Mr Tuckwell to seek to be indemnified by VTTL, the company through which he has conducted his business, against the monies he has paid. That is wholly different from the position in the *Iliffe* case, which was not concerned with a guarantee or contract of indemnity, and where Feltham would have had no right to recover from anyone, even if, on the facts as found at trial, Feltham would not have been liable. I therefore reject the argument that there is some other reason why there should be a trial of the claim against Mr Tuckwell, and I will enter summary judgment for Catalyst for £142,936, plus interest in the sum of £8,747.78.