Neutral Citation Number: [2022] EWHC 101 (Ch)

Case No: CH-2021-000111

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
ON APPEAL FROM THE ORDER OF MASTER KAYE ON 19 APRIL 2021

Rolls Building, Royal Courts of Justice

Fetter Lane, London, EC4A 1NL

Date: 19/01/2022

Before:

MRS JUSTICE FALK

- -

Between:

VNESHPROMBANK LLC **(a company registered and in liquidation in the Russian Federation)**	**App** **Cla**
- and –	
GEORGY IVANOVICH BEDZHAMOV	**Respondent** **Defe**

- -
- -

Alan Gourgey QC (instructed by **Keystone Law**) for the **Appellant**

Justin Fenwick QC and Mark Cullen (instructed by **Greenberg Traurig LLP**) for the **Respondent**

Hearing date: 12 January 2022

- -

APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 2pm on Wednesday 19 January 2022.

Mrs Justice Falk

Mrs Justice Falk:

Introduction

1.
This is an appeal by the claimant in these proceedings, Vneshprombank LLC ("VPB"), against an order of Master Kaye dated 19 April 2021 in which she dismissed an application for relief from sanctions and for the variation of an order dated 26 January 2021 (the "January order"), an order which had itself been varied by an order dated 17 February 2021 (the "February order"). Both the January order and the February order were made by consent. I will refer to the January order as varied by the February order as the "Consent Order".

2.
I granted permission to appeal following an oral hearing on 30 July 2021. The appeal was listed for hearing in November but was vacated by consent and relisted.

3.
Prior to the permission hearing VPB made an informal application to adduce additional evidence. That application is no longer pursued.

Background

4.
Master Kaye's decision related to a long-running debate about whether, or more particularly the terms on which, VPB should be permitted to convert security for costs that currently exists in the form of cash paid into court, into a bank guarantee.

5.
The underlying dispute between the parties relates to what VPB alleges is a massive fraud carried out by the First Defendant Georgy Bedzhamov ("GB") together with his sister, who was President of VPB. VPB was declared bankrupt in 2016. GB resists the claim and denies participation in any fraud. A 40 day trial of the action was listed to start in January 2022. However, under the terms of an order made on 20 September 2021 the proceedings are generally stayed pending resolution of an appeal to the Court of Appeal against an order of Snowden J relating to the recognition of GB's Russian bankruptcy trustee and the consequences of that recognition. The terms of the stay do not affect this appeal.

6.
The principle that security for costs should be provided in these proceedings was first determined in December 2019, and since then there have been further determinations as to the amount of security required. Master Kaye's decision records that approximately £4 million has been paid into court in relation to security for costs, together with an additional amount of around £1 million in respect of a freezing injunction cross-undertaking. Since at least April 2020 there has been ongoing correspondence about VPB's wish to convert the payments into court into a bank guarantee. An application to replace the security with such a guarantee was filed on 14 October 2020. VPB proposed that Standard Chartered Bank ("SCB") should provide the guarantee. GB, who is the only active defendant, has from an early stage of the correspondence not opposed the provision of a bank guarantee from a reputable UK bank in principle.

7.

The January order was made very shortly before a hearing listed to resolve the issues that had arisen in relation to the proposal. Paragraph 1 of that order provided that VPB would be permitted to provide security by way of a bank guarantee “substantially in the terms” set out in Schedule A to the order. That schedule included the following unnumbered paragraph, subsequently referred to as paragraph 12:

“The guarantee is irrevocable. We have considered whether any order made by the court seeking to prevent performance of the guarantee, in any jurisdiction, would cause a demand on the guarantee to be unsatisfied. We cannot envisage any such circumstances.”

8.
As recorded by Master Kaye at paragraph [11] of her ex tempore judgment, this provision reflected concerns raised by GB that any guarantee might not be honoured in the event that a question arose about the effect of sanctions on its performance.

9.
SCB required amendments to the guarantee which included the deletion of paragraph 12. A revised form of guarantee was agreed, which was reflected in paragraph 1 of the February order. That provided:

“The [January order] shall be varied so that:

i. the form of bank guarantee shall be in the terms set out in Schedule 1 to this order and not in the terms set out in Schedule A to the [January order];

ii. Paragraph 5 shall be varied so it provides as follows:

“In the event that such guarantee and copy of the register of authorised signatures has not been provided to the First Defendant’s solicitors by 12pm on 19 February 2021, the permission in paragraph 1 of this order shall cease to have effect and the form of security for costs in these proceedings shall remain as previously ordered.”

iii. Paragraph 9 shall be deleted.”

The previous version of paragraph 5 had contained a time limit of 21 days from the date of the January order. That expired on 16 February. The revised time limit of 19 February was two days after the date of the February order. The deleted paragraph 9 of the January order was a provision conferring liberty to apply.

10.
The form of guarantee attached to the February order reflected the deletion of paragraph 12 but included (as the earlier version also did) a provision for payment into court rather than to the beneficiary if the relevant order so required. Master Kaye noted that this appears partially to have alleviated GB’s concerns about the deletion.

11.
The signed guarantee was provided to GB’s solicitors (then Mishcon de Reya) on 19 February, but at 1.53pm rather than by noon, with screen shots from the online register of signatories following at 4.50pm. This was followed on 22 February by a certified copy of a printout from the online register. (The order did not expressly require provision of a certified copy, although it had also not been appreciated that the register was held online.) I will refer to the delay in providing the guarantee and a copy of the register as the “timing breaches”.

12.
There were two other issues. First, unlike the form of the guarantee attached to the February order, the executed version included the following text immediately before the operative part of the guarantee:

“At the request of our client Credit Suisse AG and under a counter-guarantee issued in our favour from Credit Suisse AG…”

13.
I will refer to this as the “Credit Suisse wording”. The background to this wording was the absence of a banking relationship between SCB and VPB (or more particularly VPB’s litigation funder A1, which is referred to in the guarantee as the “applicant” for the guarantee), resulting in Credit Suisse being involved both as an intermediary and counter-guarantor.

14.
The second issue was that the guarantee was accompanied by a covering document, referred to in the Master’s judgment as an “Advisory Note”. The document was addressed to Mishcon de Reya, and was headed with the guarantee reference number. The material parts of it stated:

“As requested by our customer, Credit Suisse AG please find enclosed the original above guarantee, for onward transmission to Mishcon de Reya LLP.

All parties to this transaction are advised that banks may be unable to process a transaction that involves countries, regions, entities, vessels or individuals sanctioned by the United Nations, the United States, the European Union, the United Kingdom or any other relevant government and/or regulatory authority and that such authorities may require disclosure of information.

SCB is not liable if it, or any other person, fails or delays to perform the transaction or discloses information as a result of actual or potential breach of such sanctions.”

15.
There followed contact details and an invitation to contact in the event of any enquiries, and this further statement:

“This is a computer generated advice that requires no signature.”

16.
It is not disputed that GB’s advisers had not been pre-warned about the Credit Suisse wording, the Advisory Note or the timing delays.

17.
On receipt of the guarantee and related documentation GB’s solicitors asserted that VPB was in breach of the Consent Order. Following an enquiry to it, SCB indicated that it was not prepared to remove or alter the Advisory Note. Its position, according to an email sent to Credit Suisse on 22 February 2021, was as follows:

“With refence to the sentence on Sanctions, please note that this is standard sanctions wording that goes into every guarantee we issue. It means that if, during the lifetime of the guarantee it turns out that sanctions are relevant due to sanctioned countries, regions, parties, vessels or individuals, we are unlikely to be in a position to pay under the guarantee if there is a claim. That should be the same for all banks – we would not and cannot be expected to breach Sanctions.”

18.
VPB applied on 24 February 2021 for relief from sanctions and for a further variation of the January order.

19.
SCB was subsequently asked what assurances could be provided to GB that, should sanctions become relevant, SCB would honour the terms of the guarantee, and in particular the provision for payment into court, in the light of the Advisory Note. The text of SCB's response to this on 1 April 2021 (forwarded on 2 April by Credit Suisse) was:

"Standard Chartered Bank is required to adhere to applicable sanctions laws at all times. If a beneficiary of any guarantee issued by Standard Chartered Bank becomes the subject of sanctions, Standard Chartered will take appropriate action as required by relevant sanctions laws at such point in time. As such Standard Chartered Bank is unable to provide any prior assurances in that regard."

Master Kaye's decision

20.
The key elements of Master Kaye's decision can be summarised as follows:

a)
The Master recognised that the key issue was whether the Advisory Note substantially changed the effect of the guarantee (para [28] of the judgment).

b)
She took into account the history of the case and conduct to date, including among other things that the February order was by consent, that the terms of the guarantee had been negotiated over months with difficulties and delays in trying to agree it, that GB had significant concerns about the changes made (noting the "very obvious concern" raised about sanctions in correspondence, the inclusion of paragraph 12 in an earlier version and GB's reluctance to accept its removal but agreement to the negotiated version annexed to the February order), and the amendments made by the February order including the deletion of liberty to apply (paras [46] and [47]).

c)
The Master expressed concerns that the correspondence after 19 February 2021 exhibited a lack of certainty about the effect of the Advisory Note and did not assist in persuading her that there was no risk attached to it (para [48]).

d)
The Master noted that when SCB was asked to remove the Advisory Note and about its effect on their obligations, its representative stated that they were unable to provide any prior assurance that the guarantee would be honoured (para [49]).

e)
She decided that there was "some doubt about the effectiveness of this guarantee". The correspondence just referred to made it clear that SCB themselves saw the Advisory Note as being an integral part of the guarantee, and the third paragraph of the Advisory Note appeared to qualify or dilute SCB's obligations by providing an element of discretion, a view reinforced by SCB's failure to provide any assurance (para [50]).

f)

The Master found at [51] as follows:

“It seems clear to me that the Advisory Note is an integral part of the executed guarantee and is intended to be by Standard Chartered and cannot be read in isolation from it. I simply do not accept that [the] Advisory Note and guarantee together provide a guarantee that is an unconditional guarantee as sought by the first defendant nor is it as good as cash. On that basis it seems to me that the guarantee in its executed form would be a significant variation to the form of guarantee annexed to the 17 February order and a significant dilution of the effect of that guarantee. Even if Mr Mold were right in his argument on the construction of the 17 February order the proposed variation to include the Advisory Note would not provide a guarantee in substantially the same form as that annexed to 17 February Order.”

(Mr Mold was counsel for VPB before the Master, and the submission referred to was that the requirement in the January order that the guarantee was “substantially” in the terms set out in the schedule remained following the February order, rather than that order requiring the guarantee to be precisely in the form set out in the schedule.)

g)
The Master refused relief from sanctions and the application to vary the order, applying CPR 3.9 and the test in Denton v White [2014] 1 WLR 3296. It was uncontentious that the timing breaches were immaterial. However, the Advisory Note (in combination with the addition of the Credit Suisse wording) meant that the breach was serious and significant (para [56]). She considered whether there was a good reason for the breach but queried why a draft guarantee had not been produced (para [57]). In considering all the circumstances, the Master commented that the guarantee with the Advisory Note was not as good as payment into court (para [58]). VPB’s argument that it would be prejudiced by GB having double security could be addressed by agreeing to take steps to release the guarantee, and was far outweighed by the prejudice to GB (para [60]). She also considered CPR 3.9(1)(a) and (b) (the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, practice directions and orders), noted the extensive negotiations that led to the January and February orders, both of which were consent orders, and concluded that the balance weighed against VPB.

h)
Having considered the matter in the round, and taking account of the overriding objective and all the circumstances, VPB was refused relief from sanctions and permission to vary the form of the permitted guarantee (para [64]).

Grounds of appeal

21.
There are four grounds of appeal. The first is that the Master was wrong to conclude that the provision of the Advisory Note and/or inclusion of the Credit Suisse wording were sufficient to constitute departures from the Consent Order. The second is that, if they were, the Master was wrong to conclude that the breaches were serious or significant, because the Advisory Note was not part or an integral part of the guarantee, and did not qualify or materially qualify SCB’s obligations or provide it with a discretion. (Other parts of this ground of appeal were not pursued at the hearing.)

22.
Grounds 3 and 4 relate to the second and third limbs of the Denton test. They are that the Master failed to reach a clear conclusion as to whether there was a good reason for the breaches (or if she

did conclude that there was no sufficiently good reason wrongly penalised VPB for acts of SCB which were beyond VPB's control), and reached the wrong conclusion in considering all the circumstances, in particular as to prejudice.

Respondent's Notice

23.
GB has filed a Respondent's notice which provides additional grounds to uphold the Master's decision. In summary, these are as follows:

a)
Even if it did not form an integral part of the executed guarantee, the Advisory Note was clearly intended to be read with it and formed part of the same transaction, such that the documents should be interpreted together.

b)
The inclusion of the Advisory Note in a covering letter with the guarantee, together with SCB's subsequent communications, sufficiently indicated that it considered that it may have a discretion, such that the guarantee was not in the terms previously agreed or sufficiently close to them.

c)
SCB would not be bound by any ruling that the Advisory Note did not qualify its obligations, and the resultant uncertainty meant that relief from sanctions should not be granted.

d)
Even if it did not form an integral part of the guarantee, the provision of the Advisory Note alongside the guarantee, and the terms of that note in the context of the subsequent correspondence, meant that a guarantee had not been provided in the terms reflected in the February order, or in substantially the same terms.

e)
Because it qualified or purported to qualify SCB's obligations and created a real risk that the guarantee would not be honoured or enforcement readily obtained, the effect of the Advisory Note was that adequate security was not provided.

f)
The proper interpretation of the February order was that security was agreed to be provided exactly in the form set out in Schedule 1 (rather than substantially so), and there were no exceptional circumstances justifying the court varying the agreed form.

Submissions for VPB

24.
In making his submissions, Mr Gourgey relied primarily on a supplemental skeleton argument filed in response to the Respondent's Notice and Mr Fenwick's skeleton argument for GB.

25.
Mr Gourgey submitted that the Advisory Note did not affect the guarantee obligation. It was contained in an automated covering letter in the form of an "advice" and was not incorporated into the guarantee, which was in unequivocal language. The Advisory Note could only affect the guarantee obligation if either the terms of the guarantee were to be found in a combination of the guarantee and Advisory Note, or (as it is a contemporaneous document) it is admissible evidence in construing the

guarantee. The guarantee was a self-contained, signed, document which expressly incorporated the 2010 revision of the ICC Uniform Rules for Demand Guarantees ("URDG"), ICC publication no. 758, Articles 2 and 12 of which made it clear that the terms of the guarantee did not extend to the Advisory Note. It was accepted that the Advisory Note is admissible in interpreting the guarantee, but that did not have the effect that the statement of non-liability in the Advisory Note was imported into the guarantee. There was no relevant ambiguity or exclusion of liability in the terms of the guarantee, and the meaning of the words used in it was plain.

26.
The Credit Suisse wording was additional to that provided in Schedule 1 to the February order, and did no more than record a fact. It did not alter the terms of the guarantee. Article 5 of the URDG makes clear that the existence of a counter-guarantee has no consequence as to the performance of the guarantee.

27.
In addition, although the Master did not reach a conclusion on the point, the February order did not affect the provision of the January order which required the guarantee to be in "substantially" the same terms as those in the schedule rather than, as GB asserted, requiring it to be precisely in that form. In any event, because the Credit Suisse wording was an addition there was no alteration. Alternatively, the variation was immaterial and trivial, and there was no prejudice. The timing breaches were also immaterial.

28.
Because of the error in treating the Advisory Note as integral to the guarantee, the Master applied the Denton test on the wrong footing. The breaches were not serious and significant.

Submissions for GB

29.
Mr Fenwick's written submissions were obviously filed before Mr Gourgey's supplemental skeleton argument. I will summarise them before referring to points that were the focus of Mr Fenwick's oral submissions.

30.
The written submissions reflected the Master's decision and Respondent's notice, as well as making the point that the decision being appealed was a case management decision with which the court should not lightly interfere.

31.
The Advisory Note was broadly worded and purported to qualify SCB's obligations by excluding liability, including by reference to other persons and by reference to a "potential" breach of sanctions. It was part of the guarantee, or the guarantee should be read with it. SCB certainly intended to qualify its obligations under the guarantee.

32.
The January and February orders were consent orders and the court should only vary the agreement they reflected in exceptional circumstances: Republic of Kazakhstan v Istil[2006] 1 WLR 596 ("Istil") at [32] to [35].

33.

The context was important. Paragraph 12 had been included to address some of GB's concerns as to the potential impact of sanctions. SCB had refused to withdraw the Advisory Note or provide confirmation that it was non-binding, or that there was any matter known to it which would prevent payment.

34.
Further, as regards Credit Suisse, GB had previously refused to agree a back-to-back guarantee involving Credit Suisse, in part because that bank had made a report to the Swiss regulatory authorities about GB which led to his Swiss assets being frozen. GB was unaware that Credit Suisse would be named as the client or provide a counter-guarantee, and it was not what was reflected in the February order. It was also unclear whether the reference to "any other person" in the third paragraph of the Advisory Note could extend to Credit Suisse as counter-guarantor, and there was a greater risk that its involvement, recognised on the face of the guarantee, meant that persons who could plausibly be subject to sanctions (such as A1 or other associated persons) would be more likely to be considered "involved" for the purposes of the second paragraph of the Advisory Note.

35.
The provision for payment into court did not provide adequate protection because the Advisory Note excluded liability, and SCB had refused to provide any prior assurance, including by reference to the provision for payment into court.

36.
Further, there was no good reason for the breaches. The problems rested with VPB, who had agreed to the terms of the orders. GB had consistently emphasised the importance of knowing what would be in the executed version of the guarantee.

37.
In considering all the circumstances of the case for the purposes of relief from sanctions, the court should apply the test of whether there were exceptional circumstances to justify varying the form of security set out in the February order (Istil), whereas the question whether to extend time under a consent order should be determined by reference to the normal criteria for relief, Pannone LLP v Aardvark Digital Ltd[2011] 1 WLR 2275 ("Pannone") at [33].

38.
An argument raised in VPB's skeleton argument that the court should generally permit security in the manner least onerous to the party providing it was not raised before the Master, but in any event the key question was whether the security was adequate: Rosengrens v Safe Deposit Ltd [1984] 1 WLR 1334. Further, the Master was correct to have regard to the broader procedural history, with which she was very familiar, as well as the failure to comply with the January and February orders. The timing breaches could properly be taken into account as part of all the circumstances.

39.
In his oral submissions, Mr Fenwick argued that on a fair reading of the judgment the Master properly applied the Denton test and did not in fact make her decision on the basis that the Advisory Note was an integral part of the guarantee as a matter of law, but rather (as Mr Fenwick had submitted before her) it was arguably so, or at least that it was sent with the guarantee and that it conveyed an intention on the part of SCB to qualify its liability.

40.

The resultant uncertainty meant that GB had not got what he had expected, and the departure from the Consent Order was serious and significant. The wording of the Advisory Note, and that wording combined with the Credit Suisse wording (including the language stating that the guarantee was issued “under” the counter guarantee), meant there was considerable uncertainty about whether SCB would in fact make payment on demand unless genuinely prevented from doing so under English law, or would instead refuse to do so at least without GB having to engage in a further substantial legal dispute for which he would not have funds. SCB was at least purporting to exclude liability, and in unclear terms which extended to the impact of sanctions on a range of persons. It might, for example, refuse to pay if Credit Suisse did not pay under its counter-guarantee for sanctions-related reasons. Any such dispute would not be determined summarily. The guarantee would need to be construed in a factual matrix which included the negotiations between SCB and Credit Suisse, which was the contract pursuant to which it was issued, and about which there was no visibility. VPB had also claimed litigation privilege in respect of most of the relevant communications between A1 and Credit Suisse.

41.
As to prejudice, it was A1, not VPB, that would benefit from the release of funds from court. GB would in contrast be materially prejudiced.

42.
The context and negotiations that led to the February order were relevant to the exercise of discretion. VPB had been given a last chance (and an extension of time) to provide a guarantee in what GB believed would be precisely in the form attached to the February order. The February order was not a mere procedural step but compromised a dispute.

Discussion

The real issue

43.
The starting point is that this was a case management decision, and an exercise of discretion by the Master. Judges making such decisions are accorded a generous ambit of discretion, and appellate courts will not lightly interfere. They will do, however, if there has been an error of principle, or if matters have been taken into account which should not have been, or relevant matters have been left out of account.

44.
I do not agree with Mr Fenwick’s submission that the Master did not base her decision on a conclusion that the Advisory Note was an integral part of the guarantee. The Master said at paragraph [28] of her judgment that both parties “accept that the real question for the court is whether or not [the] Advisory Note substantially changes the effect of the guarantee”. She reached a conclusion on that point at [51], set out at [20] above. The conclusion that there was a significant variation is repeated at [56] and also alluded to at [58] and [59]. If the Master erred in that conclusion, then there was error of principle and I must revisit the decision.

45.
The key question on this appeal is therefore the effect of the Advisory Note, and whether it resulted in GB being provided with something which was not “in the terms”, or (if that is the test) “substantially in the terms”, set out in the Consent Order.

46.
Mr Fenwick accepts, based on Pannone, that relief from sanctions criteria should be applied in respect of the timing breaches. VPB does not disagree. Mr Fenwick also accepts that, by themselves, the timing breaches would not justify refusal of relief from sanction. As discussed further below, I agree. In reality, the failures to meet the time limit were immaterial and did not cause prejudice to GB, bearing in mind that funds remained in court.

47.
Further, Mr Fenwick accepts that, by itself, the inclusion of the Credit Suisse wording would at least arguably not be sufficient to justify VPB being prevented from using the guarantee as substitute security. As discussed further below, in my view that argument is also correct.

Departure, not breach

48.
There is a further point that it is worth clarifying at the outset. Strictly, VPB was not in any respect in breach of the Consent Order. The order was permissive in terms. It allowed VPB to provide security by way of a bank guarantee but did not require it. That permission fell away, in respect of security already ordered by the court, if the guarantee and a copy of the register of authorised signatories was not provided by the specified date. However, the January order also included, at paragraph 7, a general permission for any further security that the court might order to be provided by way of a guarantee.

49.
Strictly, therefore, VPB is seeking the permission of the court, whether by variation of the Consent Order or otherwise, to permit it to provide a guarantee in respect of security already ordered after the time permitted, and (potentially) on terms that include the Credit Suisse wording (its position being that it requires no permission in respect of the Advisory Note). There was no dispute that, in principle, the criteria for relief from sanctions should be applied (the sanction being, of course, that without the court's assistance the guarantee cannot be used as substitute security).

The effect of the Advisory Note

50.
I have concluded that, despite the wording of the Advisory Note, it does not affect the terms of the guarantee.

51.
The key operative part of the guarantee states:

"We, Standard Chartered Bank, 1 Basinghall Avenue, London, EC2V 5DD, United Kingdom hereby irrevocably undertake to pay the Beneficiary any sum or sums not exceeding in total an amount of GBP 4,086,484.24 (British pounds four million eighty-six thousand four hundred eighty-four 24/100 only) upon receipt by us of the Beneficiary's first demand in writing supported by a sealed copy of an order of the court (whether such order may be subject to any appeal or not) providing for payment to the Beneficiary of specified sums in respect of costs ordered to be paid by VPB to the Beneficiary in claim number BL-2018-002691.

In the event that the order shall require payment into court rather than to the Beneficiary, the said sum shall be paid to the Court Funds Office."

(The Beneficiary is defined as GB.)

52.
As can be seen from this, the guarantee contains an unequivocal undertaking to pay on written demand accompanied by the relevant court order. Further, the guarantee document is self-standing and makes no reference to the Advisory Note. It is expressly governed by English law, and exclusive jurisdiction is conferred on the English courts.

53.
Importantly, the guarantee is also expressly subject to the URDG, to which I understand that the Master was not referred. Article 12 of the URDG provides:

“A guarantor is liable to a beneficiary only in accordance with, first, the terms and conditions of the guarantee and, second, these rules so far as consistent with those terms and conditions, up to the guarantee amount.”

54.
Article 2 of the URDG defines “guarantee” for the purposes of the rules as “any signed undertaking … providing for payment on presentation of a complying demand”. That definition clearly covers the guarantee but not the (unsigned) Advisory Note, to which the guarantee makes no reference. The Advisory Note also treats the guarantee as a separate document, referring to the “enclosed” guarantee.

55.
The published commentary on the URDG explains that Article 12 spells out the “four-corner” rule, namely that parties must look at the guarantee itself, rather then beyond it. That is also self-evident from the terms of Article 12.

56.
I agree with Mr Gourgey that the effect of these provisions is that the guarantee comprises the signed guarantee, read with the URDG, and that the Advisory Note does not form part of it.

57.
However, VPB rightly accepts that the Advisory Note is admissible in interpretation of the guarantee.

58.
Mr Fenwick relied on Cherry Tree Investments Ltd v Landmain[2013] Ch 305 (“Cherry Tree”) for the proposition that documents constituting a single transaction should be read and construed as one document. That case related to a facility agreement and charge executed on the same day. The facility agreement purported to vary the statutory power of sale, but that provision needed to be included in the charge in order to be effective.

59.
Mr Fenwick’s written submissions referred to Arden LJ’s dissenting judgment at [80] and [81], which refers to the decision in Smith v Chadwick(1882) 20 Ch D 27. In that section of her judgment Arden LJ was considering, and rejecting, an argument that the facility agreement and charge constituted in law a single document. I agree with Mr Gourgey that it is clear from paragraphs [81]-[84] that Arden LJ regarded the point as one of interpretation:

“81. In my judgment, this principle, or doctrine as Jessel MR puts it [in Smith v Chadwick], is not a self-standing principle separate from [the principles of interpretation set out by Lord Hoffmann in

Investors Compensation Scheme Ltd v West Bromwich Building Society[1998] 1 WLR 896]. It should be regarded in future as now subsumed within those principles. The background referred to in those principles is plainly to be interpreted as including other documents executed as part of the same transaction, whether they happen to be executed before, at the same time as, or after the document requiring to be interpreted.

82. However, the point that Mr Pickering makes is in effect that the principle of interpreting as one all the documents arising from a single transaction means more than simply that each of such documents is admissible as an aid to the interpretation of every other. On his submission it leads to the conclusion that the separate documents are in law a single document.

83. In my judgment, however, the fact that in the present case the charge may be treated as one with the facility agreement for the purposes of interpretation does not mean that the charge and the facility agreement are in law one document. That would be to take a legal fiction as fact when it is simply a construct for the purposes of a legal rule.

84. I would reject Mr Pickering's argument on this point…"

60.
I note that this is consistent with the approach in Lewison on the Interpretation of Contracts, 7th ed. at 3.06-3.12. In Cherry Tree at [97] Lewison LJ also agreed with Arden LJ's conclusion that the charge and facility were not one document.

61.
Whilst the Advisory Note is admissible as relevant evidence in construing the guarantee, that does not mean that it in fact affects the meaning of the guarantee. This was made clear by Lewison LJ in Cherry Tree at [104]. Admissibility is not decisive.

62.
The principles of interpretation are well settled and do not require any detailed repetition (see Rainy Sky v Kookmin Bank[2011] 1 W.L.R. 2900, Arnold v Britton[2015] A.C. 1619 and Wood v Capita Insurance Services Limited[2017] 2 WLR 1095). As explained by Lord Neuberger in Arnold v Britton at [15]:

"15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd[2009] AC 1101, para 14…"

63.
Lord Neuberger went on to explain that the meaning has to be assessed in the light of, among other things, the natural and ordinary meaning of the words used, other relevant provisions of the document, overall purpose, the facts and circumstances known to the parties and commercial common sense. In discussing the role of commercial common sense he emphasised again at [17] the importance of the language used, saying:

"The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision."

64.
The terms of the guarantee, and their objective meaning to the hypothetical reasonable person, are clear. It is a highly formal document. Those terms do not exclude liability in the way apparently contemplated by the Advisory Note.

65.
I am very conscious that the terms of the Advisory Note appear to indicate that SCB might take a different view. In particular it states in terms that “SCB is not liable” in the event of a failure or delay in performance as a result of an “actual or potential” breach of sanctions. As I remarked when ordering an oral permission hearing, the Advisory Note appears to contain an exclusion of liability which is not on its terms subject to the legal terms or effect of the guarantee, and which is not precisely worded. While it could be intended to do no more than convey a warning that the guarantor might be legally prohibited from making a payment due to the effect of sanctions legislation (while not excluding any legal consequences that follow from that as a result of the terms of the guarantee), it appears to seek to go further than that and to purport to exclude liability in circumstances where liability would otherwise exist under the guarantee, including where there is a “potential” breach of sanctions (a concept that is particularly unclear).

66.
However, the terms of the guarantee are clear and for the reasons already given I do not consider that the Advisory Note has any legal effect on the extent of SCB’s liability under the guarantee.

67.
Mr Fenwick referred to a concern that the guarantee might be interpreted by reference to a factual matrix involving Credit Suisse and/or its client A1, of which GB was unaware. But the wording of the guarantee is clear. It would be extraordinary if the rights of the recipient of a clearly written guarantee, to which the “four-corner” rule in Article 12 of the URDG applies, were affected by such matters. The Advisory Note, although itself part of the factual matrix, does not affect this.

68.
I should add one further point. To the extent that GB has sought to rely on the content of negotiations leading up to the January or February orders (in particular earlier draft guarantees), or on later events such as subsequent correspondence, they are not admissible aids to construction: see Chitty on Contracts, 34th ed., at 15-059 and 15-060. Mr Fenwick fairly accepted this in oral submissions, but argued that they were relevant to the third stage of the Denton test (all the circumstances), which is considered below.

69.
Accordingly, I conclude that the Master erred in determining that the Advisory Note was an integral part of the guarantee. I must therefore allow the appeal and set aside her order. Given that, as the docketed judge, I am also familiar with the proceedings it is appropriate for me to remake the decision rather than remit the matter.

Should VPB be permitted to substitute the guarantee?

70.
Having missed the deadline, and (potentially) the Credit Suisse wording having been included in a way not contemplated by the Consent Order, VPB requires assistance from the court to be able to substitute the guarantee for the existing security.

71.
As already indicated, GB accepts that relief from sanctions criteria should be applied in respect of the timing breaches, based on Pannone. In that decision, having concluded at [32] that “unusual circumstances” were not required to extend time under a consent order and that instead appropriate weight should be given to the parties’ agreement, Tomlinson LJ said this at [33]:

“33. In my view the weight to be given to the consideration that an order is agreed will vary according to the nature of the order and thus the agreement. Where the agreement is the compromise of a substantive dispute or the settlement of proceedings, that factor will have very great and perhaps ordinarily decisive weight, as it did in Weston v Dayman[2008] 1 BCLC 250 , which was not in any event concerned with an application to extend time. Where however the agreement is no more than a procedural accommodation in relation to case management, the weight to be accorded to the fact of the parties' agreement as to the consequences of non-compliance whilst still real and substantial will nonetheless ordinarily be correspondingly less, and rarely decisive. Everything must depend on the circumstances, and CPR r 3.9(1) prescribes that on an application for relief from a sanction for a failure to comply with a court order the court will consider all the circumstances, including those enumerated in the following sub-paragraphs. Beyond noting that where an order is made by consent, that is one of the circumstances which the court will take into account, it is not I think necessary to impose any further gloss on the Rules, which are already adequately drafted so as to ensure that all proper considerations must be taken into account.”

72.
The application of CPR 3.9 and the Denton criteria in this case would in my view lead to relief being granted if the timing breaches were the only issue: see further below.

73.
In his written submissions Mr Fenwick relied on Istil in respect of the Credit Suisse wording, as well as in respect of the Advisory Note. The passage he referred to in the judgment of Sir Anthony Clarke MR, with whom Rix LJ and Richards LJ agreed, reflects the well known principle that an interim order (in that case, as in this, an order relating to security for costs) will not ordinarily be revisited in the absence of a material change of circumstances. The Master of the Rolls was addressing a situation where the parties had agreed that security should be provided in a particular amount. He pointed out that the court should determine, as a matter of construction, whether the agreement is simply that security would be provided in that sum, in which case the court should not order more security unless there had been a material change of circumstances, or whether the parties had gone further and agreed that the amount of security would not be increased even if there was a material change of circumstances. In the latter case the Master of the Rolls concluded that the approach taken by the judge below was correct, namely that the court should not “save perhaps in wholly exceptional circumstances” order further security (absent mistake or misrepresentation). He said the following at [35]:

“35. Since the court retains a discretion to do what is just in all the circumstances, it retains a residual discretion to vary the security even if the parties have made an agreement that the security will not be varied even if there is a material change of circumstances. But the court should only exercise that residual discretion in, as the judge put it, wholly exceptional circumstances.”

74.
Istil obviously concerned an increase an security, which is not this case. However, the relevant orders in this case were made by consent, and the underlying principle that the court should be extremely

cautious in exercising any discretion to vary an order made by consent applies. It is also notable that the February order deleted the liberty to apply provision that had been included in the January order.

75.
Nevertheless, I agree with Mr Gourgey's submission that the principle set out in Istil should not prevent the guarantee being substituted for the existing security as a result of the inclusion of the Credit Suisse wording. My reasons are as follows.

76.
I have concluded that the Advisory Note does not legally affect the terms of the guarantee. Given that conclusion, the Credit Suisse wording does not create the additional issues relied on by Mr Fenwick, which relied on the combination of that wording and the Advisory Note.

77.
In my judgment, the Credit Suisse wording does not affect the operation of the guarantee. Leaving to one side the Advisory Note, it is clear that SCB's liability under the guarantee is not dependent on performance by Credit Suisse under its counter-guarantee, or otherwise affected by it. Article 5(a) of the URDG states that a guarantee is "independent of the underlying relationship" and that the undertaking to pay under it "is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary". (Article 5(b) contains a similar provision in respect of counter-guarantees, stating that they are independent of the guarantee as well as other matters.) This provides significant comfort to GB that SCB would not be entitled to rely on any aspect of its relationship with Credit Suisse (or, indirectly, Credit Suisse's client) to refuse payment.

78.
The Credit Suisse wording is in the nature of a factual recital rather than being an operative provision. It also adds to the text of the guarantee rather than alters its text. If the addition of that wording had been the only difference from the terms of the guarantee scheduled to the Consent Order, then it seems to me that it would not be just to permit GB to resile from his agreement to allow substitute security on that ground. I do not see this as the court identifying exceptional circumstances to permit the revisiting of a consent order, but rather requiring that the bargain reached is adhered to. The addition of the Credit Suisse wording is in truth immaterial and has no legal effect.

79.
If necessary to my decision, I would also conclude that the February order did not have the effect of removing the provision in paragraph 1 of the January order that the bank guarantee should be "substantially" in the terms set out in the schedule (as opposed to requiring it to be precisely the same). The February order does not in terms amend paragraph 1 of the January order, whereas it does amend paragraph 5 (see [9] above). GB's advisers may have thought that the effect of the February order was that the guarantee needed to be in precisely the form scheduled to it, but I must construe the Consent Order objectively. Taking account of the failure to amend paragraph 1 of the January order, and in addition the unamended paragraph 7 of the January order, which permits any further security for costs to be provided by way of a bank guarantee "substantially" in the terms set out in the schedule, I consider that VPB has the better of the argument on the point.

80.
However, that is not the end of the matter. My conclusion about the effect of the Advisory Note does not bind SCB, which is not a party to these proceedings. The terms of that note appear to indicate that SCB may adopt a different view. GB has some reason to complain that, in reality, the guarantee that

was provided was not what he anticipated, and what he had given VPB a final chance to provide. GB thought he was getting what was scheduled to the February order, no more and no less. The guarantor appears to be saying that it might not perform under the guarantee in certain circumstances, and indeed in precisely the circumstances that GB has been concerned about and that originally led to the inclusion of the (since deleted) paragraph 12. This, together with SCB's unwillingness to withdraw the Advisory Note or give any assurance, has in fact led to uncertainty.

81.
Further, GB has a fair point that his advisers had emphasised the importance of knowing what would be in the executed version of the guarantee. If VPB was able, as it was, to procure further communication from SCB about the guarantee following its provision, it appears unlikely that it would have been unable to do more to avoid the surprises that accompanied the final version, as well as ensuring that it only agreed a deadline that it was properly satisfied would be met. The Master was justified in taking account of the timing breaches as part of all the circumstances, and in referring more generally to the "long history" between the parties in respect of compliance with rules etc. and the proportionate conduct of litigation. She correctly considered matters in the round.

82.
Ultimately, however, I do not consider that these points are sufficient to preclude VPB from substituting the guarantee as security. My conclusions about the effect of the Advisory Note and the Credit Suisse wording mean that GB has in fact been provided with the guarantee contemplated by the Consent Order, objectively interpreted. The fact that SCB provided an additional document which does not legally affect the terms of the guarantee cannot mean that the guarantee does not comply with the terms of the Consent Order.

83.
That leaves the timing breaches, to which it is accepted that CPR 3.9 and Denton principles should be applied. The existence of those immaterial and unprejudicial breaches should not, it seems to me, provide a means by which GB should be entitled to resile from the agreement he has reached by reference to GB's broader concerns, in circumstances where, if those timing breaches had not occurred, he would have been required to accept the guarantee provided under the terms of the Consent Order.

84.
The last point is an important one. In determining whether to grant relief from sanctions, a proportionate approach is required.

85.
The first stage of the Denton test is whether the failure was serious or significant. That must focus on the breach in question rather than broader circumstances (which come in at the third stage). As explained in Denton at [28]:

"If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages."

In this case the timing breaches were neither serious nor significant.

86.
As to whether there was a good reason for the breach, VPB's advisers expected the guarantee to be provided on time and were unaware that there was an unexpected delay. I am prepared to assume in

GB’s favour that this is an insufficient answer given the history, and that more could have been done. However, it is also important not to lose sight of the fact that the breach was not serious or significant.

87.
Turning to the third stage, all the circumstances of the case, the breach has not in reality affected the efficiency or cost of the litigation (CPR 3.9(1)(a) and Denton at [34]). CPR 3.9(1)(b) emphasises the importance of compliance with orders, and I take that into account. But Denton also emphasises the need to consider whether the sanction imposed is proportionate to the breach in question. It will be recalled that the context of the decision in Denton was a concern that following Mitchell v News Group Newspapers[2014] 1 WLR 795 disproportionate penalties were being imposed for breaches that had little practical effect on the litigation: Denton at [21] and [38]. In my view it would be disproportionate for the timing breaches to have the effect of preventing VPB from substituting the guarantee as security, in circumstances where if they had not occurred then GB’s concerns about the Advisory Note and/or Credit Suisse wording would not have entitled him to insist on security remaining in cash form.

88.
I do not consider that any of the other circumstances relied on by Mr Fenwick outweigh this point. I take into account that GB suffered no prejudice as a result of the timing breaches, and that VPB applied for relief promptly. Considering the matter in the round as the Master did, but in the light of my conclusion about the effect of the Advisory Note, relief from sanctions is appropriate.

89.
Whilst SCB is not bound by my decision, I trust that it will accord appropriate respect to what I consider to be a clear conclusion about the legal effect of the guarantee. If the point arose in practice and SCB did seek to take a different view, then that would have to be resolved in the normal way. But I do not consider that the existence of that possibility should lead me to determine the appeal in GB’s favour.

Conclusion

90.
In conclusion, I allow the appeal and remake the decision to permit VPB to substitute the guarantee for the existing security.