Neutral Citation Number: [2022] EWHC 138 (QB)

Case No: QB-2020-003195

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 17/01/2022

Before :

SENIOR MASTER FONTAINE

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Between :

Travis Perkins Trading Company Limited	**Cla**
- and -	
Harjit Bambhra	**Defe**

- -

- -

Simon Bradshaw (instructed by **Freeths LLP**) for the **Claimant**

Stephen Boyd (instructed by **Setfords Solicitors**) for the **Defendant**

Hearing date: 22 June 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SENIOR MASTER FONTAINE

Senior Master Fontaine :

1.
This was the hearing of applications by:

i)
The Claimant dated 26 February 2021 to strike out and/or for summary judgment in respect of certain paragraphs of the Defendant’s Defence on the basis that they disclose no basis for defending the claim and/or have no reasonable prospect of success; and

ii)

The Defendant dated 8 April 2021 for permission to amend his Defence and add a counterclaim.

Neither party relied on witness evidence, although certain documents included in the hearing bundle were referred to in the course of the hearing. References in this judgment to documents in the hearing bundle are to the electronic pagination as follows: [HB 1], and references to authorities in the joint authorities bundle are as follows: [AB 1].

The Applicable Law on the Applications

2.
I heard both applications together, with the agreement of both parties, first, because the test for amendment is whether the amended claim passes similar thresholds to those for strike out and/or summary judgment; and secondly because in an application for strike out/summary judgment, where the court concludes that the statement of case is liable to strike out or summary judgment, it should consider whether the respondent to such application could remedy the defects in the statement of case by an opportunity to amend (In Soo Kim v Youg [2011] EWHC 1781 [AB 33] per Tugendhat J. at [40] [AB 39]. The Defendant accepts that there are defects in his defence which he seeks to correct in the draft Amended Defence ("AmDefence").

3.
Where strike out is sought the Claimant relies on CPR 3.4 (2) (a), namely that the matters pleaded disclose no reasonable basis for defending the claim. The Defendant referred me to principles outlined in Morgan Crucible plc v Hill Samuel & Co Ltd [1991] Ch. 295 [AB 2] per Slade J at 313 and 314 [AB 13,14]; Blackstone Civil Practice 2021 [AB 42] that in a strike out application it will be assumed that the facts alleged by the respondent are true. I accept the Claimant's submissions that this authority pre-dates the CPR and there is no authority to support this position in the CPR. The matter is academic as the issue has not been relevant to the matters determined on the basis of strike out. The Defendant also referred to Colin Richards & Co v Hughes [2004] EWCA Civ 266 [AB 24] per Gibson LJ at [2] and [22] [AB 29]: an application to strike out should not be granted unless the court is certain that the defence is bound to fail. It was also submitted that even a case "fraught with difficulty" will not be struck out: Blackstone Civil Practice 2021 The Commentary at 33.8 [AB 42].

4.
There was no dispute between the parties as to the legal principles relating to summary judgment applications under CPR Part 24. Where the case turns on construction of the term in a contract, as here, the court can often determine the point without the need for evidence, in particular where the disputed phrase can be readily construed applying the principles in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1WLR. Similarly, where a clear-cut cut issue of law is raised, the court should decide it immediately. It is inappropriate to subject a pleading to a close syntactical analysis on an application for summary judgment when it is clear from the pleadings what the real issues are, and where any defects in the respondent's pleaded case can be saved by amendment: Blackstone Civil Practice, the Commentary, 2021 at a 34.26 [AB 45].

The Factual Background

5.
I summarise the facts from the parties' statements of case. The Claimant is a builders' merchant supplying building materials to the construction industry. The Defendant was the in-house accountant and a director of Longcross Construction Limited ("the Company"), a company which went into administration on 16 June 2015 and is now dissolved. The claim is for the sum of £281,090.53 plus

interest from the Defendant as guarantor for the liabilities of the Company under the terms of a credit guarantee signed by the Defendant on or about 5 December 2008 (the handwritten date is unclear but nothing turns on the exact date) ("the credit guarantee") [HB 58]. The credit guarantee is part of the same document as the credit account application made by the Company on the Claimant's standard form ("the credit application form"), signed by a William Richardson for the Company on 22 December 2008. There is no dispute of fact as to how the guarantee arose, nor that a credit account was granted to the Company by the Claimant, on or about 22 December 2008.

6.
The credit application form included the following declaration by the Company;

"I/We make this application to open a credit account with Travis Perkins Trading Company Limited. I/ We understand that credit terms are that payment is due promptly at the end of the month following the date of invoice and that if granted credit. I/We agree to pay in accordance with these terms. I/We acknowledge and accept the Travis Perkins Trading Company Limited Terms and Conditions of Sale and Conditions of Hire." [HB 58]

7.
It is admitted in the AmDefence that such declaration was included and that the Claimant's Terms and Conditions of Sale ("the terms and conditions") [HB 57] were incorporated into each contract for the sale of goods by the Claimant to the Company. It is admitted that Paragraph 8.4 of the terms and conditions contained the following words:

"If you fail to pay us any sum due we may, in addition to our rights under 10.3, appropriate any payment made by you to such of the goods and/or services as we may think fit; and you shall be liable to pay us interest on such sum at the annual rate of 4% above the base lending rate from time to time of Royal Bank of Scotland Plc……from the due date for payment until payment is made in full… together with all costs and expenses incurred by us in recovering sums due or exercising our rights under this provision, including our debt recovery fees at a rate of 6% of the total amount outstanding" [HB 57]

8.
The wording of the credit guarantee on the credit application form was as follows:

"In consideration of your agreeing to supply goods to the applicant company on credit, we the undersigned being owner/ director/ directors of the applicant company jointly and severally guarantee payment of all the financial obligations to Travis Perkins Trading Company Limited and its subsidiaries and successors including financial obligations arising from any increase in the credit limit granted by Travis Perkins Trading Company Limited or its subsidiaries and successors from time to time following review of the applicant company's account"

[HB 58]

9.
The Claimant's case is that the balance outstanding from the Company to the Claimant totalled £281,090.53 at 4 June 2015 and that no further payments have been made. Thus the Claimant's case is a straightforward claim on a guarantee following the primary debtor's failure /inability to settle an undisputed debt.

10.
The AmDefence seeks to defend the claim on the following grounds:

i)
The scope of the credit guarantee changed in January 2010, when a new buying department of the Company was set up to buy materials in its Derby office, which purchases heavy materials directly and engaged labour only for fixing, in contrast to the period up to that point, where only minor miscellaneous items were purchased, such that the nature of the trade between the Company and the Claimant changed so significantly that the credit guarantee was discharged: AmDefence Paragraph 6.12 [HB 42] (the “Change in Scope” Defence); and or

ii)
On its true construction, liability under the guarantee was only incurred if the Claimant complied with the wording of the credit guarantee, namely to review the account of the Company before increasing its credit limit (the “Construction of Contract” Defence). The Defendant relies on the following submissions in support of this ground of defence:

a)
The credit guarantee is to be construed strictly, to be read contra preferentum, and in the event of ambiguity, to be construed in favour of the Defendant: AmDefence Paragraph 10.5 [HB 44];

b)
The factual matrix surrounding the entering into the guarantee should be taken into account in construing the contract of guarantee: AmDefence Paragraph 10.5 a) to e) [HB 44];

c)
The wording of the credit guarantee, in conjunction with the wording of the credit application and paragraph 8 of the terms and conditions, can only reasonably be interpreted to mean that the Claimant would not increase the Company’s credit limit unless the Company was paying for its purchases in accordance with the terms and conditions: AmDefence Paragraph 10.6 d) [HB 45];

d)
From the fact that the Claimant increased the credit limit several times over the period of the contract and continued to deliver goods to the Company despite the Company being in breach of paragraph 8 it is reasonable to infer that the Claimant failed to review the company account of the Company before increasing its credit limit;

e)
The adjacent boxes in the credit application form comprising the credit application by the Company and the guarantee by the Defendant are to be read together and the guarantee understood on the basis that it would not apply to sums due from the Company in circumstances where the Claimant had failed to enforce its credit terms: AmDefence Paragraph 10.6 e) [HB 45];

f)
Alternatively that it was an express term of the credit guarantee that the Claimant would not increase the Company’s credit limit unless and until it had reviewed its account: AmDefence Paragraph 10.6 f) [HB 45];

g)
The Defendant’s liability was co-extensive with the of the Company: AmDefence Paragraph 10.6 g) [HB 45];

iii)

Further or in the alternative, the last increase in the credit limit appears to have been from £150,000 to £200,000, so that if, contrary to the Defendant's case, he is liable under the guarantee, his liability cannot exceed £200,000 (The "Credit Limit" Defence): AmDefence Paragraph 10.12 [HB 46];

iv)
In the further alternative the Claimant was bound to review the Company's account for the Defendant's protection and the prejudice to his rights resulted in the discharge of the credit guarantee (the "Duty Owed to the Defendant" Defence): AmDefence Paragraph 12 [HB 46];

v)
Further or in the alternative the Claimant is not authorised to claim against the Defendant the value of any invoices rendered in respect of goods delivered following the date that the Company was placed into administration (the "Goods Delivered after Administration" Defence): AmDefence Paragraph 20 [HB 47];

vi)
Further or in the alternative the Defendant will seek to set off against the claim the damages claimed in the counterclaim, namely the amount of his liability to the Claimant if the guarantee is not discharged (the "Set-Off" Defence): AmDefence Paragraphs 23 -24[HB 47-48].

The "Change in Scope" Defence

11.
The Defendant submits that the scope of the credit guarantee had changed as set out in Paragraph 10 (i) above. The Claimant relies on the decision in Triodos v Dobbs [2005] EWCA Civ 630 to support its submission that paragraph 6.12 of the Defence has no real prospect of success. In that case, the defendant had agreed to guarantee the liabilities of a company of which he was director under loan agreements which were later replaced, on two occasions, by loan agreements which expressly stated that they replaced the earlier agreements, and that the security for the earlier loan agreements continued as security for the earlier agreements. The last loan agreement between the company and the bank substantially increased the amount of the loan facility. The Court of Appeal held that the last facility agreement was considerably more than an amendment or variation of either the original loan agreements and there was therefore a material variation such as would discharge the guarantor.

12.
I do not consider that there is a real prospect of success in the defence relying on this pleaded material variation to the underlying contract. The nature of that contract has not changed, which was the supply of materials from the Claimant. The credit agreement does not restrict the type or volume of goods purchased for which credit was advanced.

The " Construction of Contract" Defence

13.
I was referred to passages from Andrews and Millet the Law of Guarantees 7th edition, paragraphs 4-001 to 4-002, 4-014, 4-025, 6-002, 9-024 and 9-036; and Chitty on Contracts 33rd Edition at 13-041-13-053 and 13-061. I summarise the principles relevant to this case that can be gleaned from these authorities as follows:

i)
There is a strong prima facie rule that the liability of the surety is coextensive with that of the principal debtor and there is no liability on the guarantor unless and until the principal has failed to

perform an obligation: Andrews and Millett 4-014 [AB 73-74], so that, as a general rule, the surety's liability is no greater and no less than that of the principal, in terms of amount, time for payment and the conditions under which the principal is liable: Andrews and Millett 6-002 [AB 104];

ii)
With regard to construction of words or phrases in the contract of guarantee, the aim of the court is to give effect to the intention of the parties, objectively ascertained, reflected in the terms of the contract: Chitty 13-043, 13-047,13-048;

iii)
The context in which a phrase occurs in the wording of part of the contract and the factual matrix are important in construction of the contract Chitty 13-049. 13-050; Andrews and Millett [AB-50]

iv)
The contract is to be construed with reference to its object and the whole of its terms even though the immediate object of inquiry is the meaning of an isolated word or clause: Chitty 13-06;

v)
There is some distinction in the relevant authorities between those which indicate that contracts of guarantee are to be construed in the same way as any other contract, and those which suggest that guarantees are to be construed in favour of the surety, which latter approach may be a reflection of the effect usually produced by the strict construction approach coupled with the application of the contra preferentum rule in cases of ambiguity Andrews and Millett [AB-48, 52];

vi)
In general, judges are reluctant to interpret guarantees in a way which would result in an extension of the ambit of the guarantor's original obligations, particularly in a way which they might not have foreseen which makes their position more onerous; Andrews and Millett 4-025 [AB 91]

vii)
A variation to the contract between the creditor and debtor is material so as to entitle a surety to full discharge only if it is an act by the creditor which affects the risk of default by the principal and consequently the risk of the surety being called upon to honour the guarantee: e.g. Bank of Baroda v Patel [1996] 1 Lloyd's Rep. 391; Andrews and Millett 9-024; [AB 171]

viii)
It is common practice for guarantees to contain specific provisions which are designed to give the creditor the freedom to do or omit to do something which, in the absence of such provision, would automatically discharge the guarantor from liability, sometimes referred to as "indulgence clauses", example which stipulates that the creditor may agree to vary or amend the principal contract without further reference to the surety: Andrews and Millett 4-025; [AB90]

ix)
The doctrine of laches is an equitable defence available where a creditor omits to do something which they are bound to do for the protection of the surety, so that where that omission results in a variation of the terms of the principal contract, affecting the surety's rights, the surety will be discharged to the extent of the loss they have suffered as a consequence; Andrews and Millett 9-036 [AB 186].

14.
I summarise this head of defence as that, in applying these principles, the wording of paragraph 8 of the terms and conditions, in conjunction with the terms of the credit agreement, are part of the

factual matrix and the credit guarantee should be construed to take account of those terms in a way to reflect what may fairly be inferred to have been the objective intention and understanding of the parties. It is submitted that such a construction would recognise that the terms of the guarantee which refer to the Claimant carrying out a review of the Company's account before increasing the credit limit can only be interpreted to mean that no increase to the credit limit would be granted unless the Company was paying for its purchases in accordance with the sale terms, particularly given the reference to the terms and conditions in the box immediately under the guarantee box. The Defendant relies upon the fact that the Claimant continued to deliver goods to the Company notwithstanding the Company's breach of its credit terms, thus it may be inferred that there was a failure by the Claimant to review the Company's account before increasing its credit limit, which it is submitted would be a material variation by the Claimant of the terms of the credit guarantee, entitling the Defendant to discharge of his liability under the credit guarantee, save for the original £15,000 credit limit.

15.
The Claimant relies on the decision of the Court of Appeal in National Merchant Buying Society Ltd v Bellamy [2013] EWCA Civ 452, where the guarantor's defence that a substantial credit limit increase had discharged his guarantee by variation was rejected, because the guarantee in question had been an "all monies" guarantee so that variation of the underlying credit limit was immaterial. It held that if the parties had intended that the liability under the guarantee was so limited the guarantee would have said so and it did not: at [40] per Rimer LJ. [AB 214].

16.
The Defendant submits that the circumstances of this claim can be distinguished from that in National Merchant because the factual matrix is different. Here the Defendant relies upon the terms of the guarantee itself, which states that it covered "any increase in the credit limit… following review of the applicant company's account", whereas in National Merchant the defendant Mr Mallett relied on his entering into the guarantee on the faith of the separate contract between the Society and the company. Further, the guarantee in National Merchant was entered into when the company and the claimant had been trading for some time and the company was in some financial difficulty. In this case the guarantee was entered into at the outset of the relationship before trading started and there was no financial difficulty. In National Merchant there was also an indulgence clause and there is no such clause in this case.

17.
I note that although the Company was at the commencement of its trading relationship with the Claimant when the guarantee was entered into, that there was an existing trading relationship between the Claimant with another Longcross group company, Longcross Building Services Limited, with a credit facility, which trading account ceased to be used in 2009: Defence Paragraphs 6.3-6.9 [HB 11].

18.
The wording of the credit guarantee in this case expressly provided that it included "all financial obligations arising from any increase in the credit limit granted by Travis Perkins Trading Company Limited or its subsidiaries and successors from time to time", so on the basis of the judgment in National Merchant, and on the recognised principles of construction, the credit guarantee extends to all such increases. The question is the effect of the succeeding words "following review of the applicant company's account". The questions that arise, in my judgment, are:

i)
Is there a real prospect of success in these words being construed as submitted by the Defendant, as an obligation upon the Claimant to review the account of the Company before increasing its credit limit; and

ii)
If such an interpretation is possible, what is the effect of such obligation?

19.
I accept that the fact that the credit application and the credit guarantee are in adjacent boxes of the same document, forms part of the factual matrix relevant to the construction of the contract, albeit they are separate and distinct contracts, signed by different people on different dates, although I do not conclude, for the reasons set out below, that this part of the surrounding circumstances assists the Defendant's interpretation of the credit guarantee.

20.
The credit application agreement records the terms that payment by the Company to the Claimant must be "promptly at the end of the month following the date of invoice", that the Company agrees to pay in accordance with these terms and in accordance with the terms and conditions, which in Clause 8.1 also impose such obligation on the Company.

21.
Even if the Defendant could succeed in demonstrating that the incorporation of the terms and conditions expressly incorporated in the credit application contract could by implication also be incorporated in the credit guarantee contract, Clause 8.4 gives the Claimant a discretion to apply the sanctions there set out for failure to pay in accordance with the payment terms, but does not impose any obligation on the Claimant to do so. Similarly Clause 10.3 provides that the Claimant is "entitled" to cancel or suspend a sales contract with the Company if they fail to pay pursuant to the contract, but does not oblige it to do so. There is also a 'no waiver' clause at 14.3.

22.
The object of construction of a contractual term is to identify the intention of the parties, on an objective basis. In a contract drafted by the Claimant the words in the credit guarantee: "following review of the applicant company's account" can in my judgment only reasonably be construed as meaning that it was a matter for the Claimant to decide whether or not it would increase the Company's credit limit when it had reviewed its account. The construction put forward by the Defendant would be inconsistent with a commercial trading relationship, in my view.

23.
The Defendant's case assumes that when the account of the Company was considerably in arrears, and/or where it had failed to comply with its obligation to pay in accordance with the terms of the credit agreement, a review would inevitably mean that the credit limit would not be extended. It may be that the Defendant assumed that these words meant that the Claimant was obliged to review the Company's account before the credit limit was increased, but he has not provided any evidence to that effect, and in any event that would be his subjective interpretation.

24.
The Claimant's defence invites an inference that because the Claimant increased the Company's credit limit when it was in arrears with its payments and was failing to pay invoices in accordance with the time limit imposed by the credit agreement, that the Claimant made a material variation to

the credit guarantee contract. But a “review” means simply to look at the account, consider it and take a decision. It does not mean that the decision made would inevitably be to not extend the credit limit where the Company had not paid by the contractual date. Such an interpretation would mean that even if the Claimant took a commercial decision to allow the Company further time to pay its indebtedness, because it took the view that it was likely that the Company could trade out of its financial difficulties, it could not then rely on the guarantee for any indebtedness after that date. Sometimes an increased credit limit means that a business is growing.

25.
I note the summary of the principles to be applied to the construction of commercial contracts by Popplewell J. (as he then was) in Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The “Ocean Neptune”) [2018] EWHC 163 (Comm), [2018] 1 Lloyd’s Rep. 654 (Chitty 13-047):

“The court’s task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest…… …..”

26.
In my judgment, of the two possible constructions of the words: (i) that it was a matter for the Claimant to decide whether or not it would increase the Company’s credit limit, a decision that it would take after review of the Company’s account; or (ii) that the Claimant was contractually bound to review the Company’s account before taking a decision whether or not to increase the Company’s credit limit, and if a review revealed that the Company’s account was not being paid in accordance with the terms and conditions it was obliged to refuse an increase in the credit limit, only the former is consistent with business common sense.

27.
The authorities are to the effect that a contract must be construed by reference to its object and the whole of its terms. The object of the credit guarantee contract was to secure “all the financial obligations” of the Company to the Claimant, including any increase in the credit limit. There was no limit put on that obligation. In my judgment if the words “following review of the applicant company’s account” had been intended to limit the obligations under the credit guarantee as submitted by the Defendant, there would have been express words to provide for such limitation. It was accepted in Coghlan v Lock (1987) 8 N.S.W.L.R 88, an authority relied on by the Defendant, that “where the parties have deliberately chosen to adopt wording of the widest possible import” that wording should not be ignored, per Lord Oliver: Andrews and Millett 4-002 [AB 50].

28.

I have concluded that the contra preferentum rule is of no application here where there is no ambiguity in construction that cannot be resolved in accordance with the approved principles of construction. Accordingly the conclusion that I have reached is that the construction contended for by the Defendant has no real prospect of success.

29.
The same reasoning applies to the Defence paragraph 10.6 f, namely that “it was an express term of the contract of guarantee that the Claimant would not increase the Company’s credit limit unless and until it had reviewed the Company’s account”. That is not the wording used in the credit guarantee, and this was not an express term of the contract.

30.
Notwithstanding my conclusion, I have considerable sympathy with the Defendant’s plight. After signing a guarantee of the Company’s debts to the Claimant when the credit limit was at a modest figure (the Defence states £15,000) in 2008, the credit limit and the indebtedness had increased substantially by 2015, the date when the Company went into administration, so that the liability the Defendant now faces is many times that initial amount. The Defendant’s Counsel in oral submissions referred to the unfairness of the situation to the Defendant and urged the court to strain to find a resolution to such unfairness in accordance with legal principles. I regret that I have not been able to find a resolution which assists the Defendant. A creditor is not bound to act with a duty of care towards a surety, and the fact that it may have been unwise to enter into a guarantee does not mean it is not binding. This was a short and simple guarantee and the wording was not complex. I note that at Paragraph 10.5 of the Defence it is pleaded that the Defendant was not aware that the Company sought increases in its credit limit and never saw letters from the Claimant addressed to the Company confirming such increases. The Claimant has provided no evidence as to how this situation came about when as the in-house accountant he would be thought to be in a position to keep a close eye on the ever increasing indebtedness of the Company to the Claimant. He was also a director of the Company and had the duties of a director imposed by the Companies Act 2006, including a duty to exercise reasonable care, skill and diligence.

31.
Accordingly, in my judgment the Construction of Contract Defence has no real prospect of success, no permission to amend to include it, or amend it will be given, and summary judgment will be entered in favour of the Claimant in respect of the relevant paragraphs.

The “Credit Limit” Defence

32.
Paragraph 10.12 of the AmDefence reads as follows:

“Further or in the alternative, the last increase in the credit limit appears to have been from £150,000 to £200,000 notified to the Company by the Claimant’s letter dated 2 May 2012. Accordingly, if, contrary to the Defendant’s case, he is liable under the guarantee, his liability does not exceed £200,000.”

33.
In my judgment, this alternative argument for limiting the amount of the guarantee also has no real prospect of success because of the express wording of the credit guarantee, namely an agreement to “guarantee payment of all the financial obligations to [the Claimant]” and “including [my emphasis] financial obligations arising from any increase in the credit limit granted by [the Claimant]…”. That

wording could only be construed as referring to all indebtedness owed by the Company to the Claimant, even if it exceeded the amount of the credit limit.

The "Duty Owed to the Defendant" Defence

34.
The second paragraph of Paragraph 12 of the AmDefence reads as follows:

"Further or in the alternative, the Claimant's failure to review the Company's account was something the Claimant was bound to do for the Defendant's protection and the prejudice to his rights resulted in the discharge of the guarantee." [HB 45]

(See also Paragraph 19 of the Defence [HB 16]).

35.
This claim relies on the equitable doctrine of laches, as set out in the first paragraph of Paragraph 12 of the AmDefence. This claim has no real prospect of success. It is well established in law that a creditor has no duty to act to protect a guarantor in respect of the obligations of the debtor: Wright v Simpson (1802) 31 ER 1272 per Lord Eldon @1282 [AB 270]; Barclays Bank v Quincecare (1988) QBD (Comm) 363 at 383-384 [AB 293-294].

36.
In so far as this defence relies on an alleged contractual obligation to the Defendant, rather than a duty of care, not to increase the Company's credit limit when it was in breach of the terms of the credit agreement, I have addressed this above.

The "Goods Delivered after Administration" Defence

37.
Paragraph 14 of the AmDefence provides the factual details of the Company going into administration on 16 June 2015. This head of defence relates to unpaid invoices totalling £76,058.41, The Claimant seeks to strike out / enter summary judgment in respect of Paragraph 20, which pleads that the Claimant is not entitled to claim against the Defendant for the value of any invoices rendered in respect of goods delivered following the date that the company was placed into administration. (Although paragraph 14.4 refers to invoices being rendered following the Company going into administration, I assume this is intended to read "deliver goods" to be consistent with Paragraph 20).

38.
Neither party addressed this head of defence in written or oral submissions. However, it appears that the issue can be determined on the pleadings. Paragraph 8 of the Particulars of Claim states that by 4 June 2015 the balance outstanding from the Company to the Claimant was £281,090.53, the sum that is claimed in these proceedings. The Defence at paragraph 13 admits this. That date was before the Company went into administration. I can see no basis on which the Claimant is not liable for this sum, nor any basis why the terms of the credit guarantee would not include it. I therefore consider that this head of defence shows no reasonable grounds for being made and has no real prospect of success.

The "Set-Off of Amount Claimed in the Counterclaim" Defence.

39.
The counterclaim at paragraph 24 of the AmDefence repeats paragraphs 6.13, 10.4, 10.6, 11, 12 and 12A of the AmDefence. I have concluded that most of the defences in those paragraphs should either

be struck out or have no real prospect of success, save for Paragraph 11, which was not the subject of the Claimant's application.

40.
But in any event, the only basis for such a set-off or counterclaim would be a separate cause of action against the Claimant arising from the Claimant's dealings with the Defendant, which could only be the purported duty relied upon by the Claimant in amended paragraph 12 and new paragraph 12A of the AmDefence, which I have concluded no prospect of success. If there is no duty owed by the Claimant to the Defendant no loss would be suffered by reason of the Defendant complying with his obligation under the credit guarantee, and there is no basis therefore for a set-off or counterclaim. Accordingly permission to add a counterclaim is refused.

Conclusion

41.
I have considered whether the Defendant should be given another opportunity to amend his statement of case, in accordance with Kim v Youg, but I have concluded that this would not assist the Defendant. He has now had two opportunities to plead a defence, on both occasion represented by solicitors and experienced Counsel, but on neither occasion has a defence been pleaded which, in my view, will assist him at trial. To take the matter further will only incur further unnecessary costs, and I have concluded that there is no compelling reason for the matter to proceed to trial.

42.
The paragraphs which I consider should be struck out are Paragraphs 5, 6.2 – 6.10, 6.13, 10.3, 10.4, 10.6a, 10.6b 6.13, 19 and 20 as showing no reasonable grounds for being made and have no real prospect of success so summary judgment is also granted in respect of them and/or no permission to amend is granted to the Claimant. I consider that the defences in paragraphs 6.12, 10.3, 10.4, 10.5, 10.6c - f, 10.9, 10.10, 10.11, 10.12, 12, 12A and 21 – 24 of the Defence/AmDefence have no real prospect of success and summary judgment is granted in respect of such paragraphs in favour of the Claimant and/or no permission to amend is granted to the Claimant. In respect of any other paragraphs of the Defence which the Defendant sought to delete in the AmDefence, summary judgment is granted, such paragraphs having no real prospect of success.

43.
The parties should attempt to agree the sum for which judgment should be entered, and the discrepancy highlighted in paragraph 11 of the AmDefence resolved if possible, so that any sum remaining at issue can be identified, and directions given as to how to deal with that remaining claim.