Neutral Citation Number: [2012] EWHC 3090 (QB)

Claim No.: HQ11X01826

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8th November 2012

Before :

MR. ROGER TER HAAR Q.C.
Sitting as a Deputy Judge of The Queen's Bench Division

- - - - - - - - - - - - - - -

Between :

CLOSE BROTHERS LIMITED **Claimant**
- and-
(1) ESTHER LOUISE RIDSDALE
(2) MARTIN RIDSDALE
(3) ST. GEORGES KEEP LIMITED **Defendants**

- - - - - - - - - - - - - - -

- - - - - - - - - - - - - - -

Mr. Max Thorowgood (instructed by Awb Partnership) for the Claimant
Mr. Gavin Hamilton (instructed by Lawrenson Solicitors) for the First and Second Defendants
The Third Defendant did not appear and was not represented

Hearing dates: 17, 18, 19 and 23 October 2012

Judgment

Roger ter Haar Q.C.:

1. In these proceedings the Claimant ("Close"), a well known merchant bank, seeks to recover on guarantees given by each of the Defendants in respect of sums advanced by Close to St Georges Keep (Southern) Limited ("Southern"), a subsidiary of the Third Defendant.

2. The Third Defendant has taken no part in these proceedings - accordingly this judgment is solely concerned with what, if any, liability each of the First and Second Defendants has to Close.

The Ridsdales

3. The First and Second Defendants are wife and husband.

4. The Third Defendant company is a company set up by Mr. Ridsdale for his personal development projects. It is either wholly owned or majority owned by him. Mrs. Ridsdale was the company secretary.

5. Mr. Ridsdale is in his early fifties. Early in his career he worked in pubs and restaurants before becoming an insurance broker. He started acting as a developer in the late 1980's. He had a track record of success which impressed Close, as I explain further below. He gave evidence before me. He struck me as intelligent and shrewd. I also formed the view that he was substantially honest, although as I set out below, his witness statement went somewhat further than was accurate.

6. Mrs. Ridsdale has been married to Mr. Ridsdale for about 9 years and had been together with him for a number of years prior to that. She also was patently honest, and it was clear that in business matters she deferred to his judgment without questioning him as to the details of those matters or being given much information about them. Before giving up work to devote herself to her husband and children as wife and mother, she had worked as a counter clerk in a building society. Nothing in that employment trained her to understand the intricacies of the transactions with which this case is concerned.

Close's Relationship with the Defendants

7. Close is, as I have said, a well-known merchant bank. It is independent of the High Street banks which found themselves in difficulty in late 2008.

8. I had the benefit of a witness statement and oral evidence from Mr. Robert Orr, who was until 31st July 2012 a Director of Close Brothers Property Finance, which is a trading division of Close. He also was an honest witness.

9. In his witness statement he set out this record of the relationship between the Defendants and Close, which I accept as accurate:

The Claimant's relationship with Mr. Ridsdale began in September 2006 when he approached us in respect of his vehicle, Inntown Properties Limited. At that stage Mr. Ridsdale told us that he was a relatively experienced property developer having 'fallen into' property development in about 1987.

The second project he undertook with the Claimant, through the Third Defendant, concerned land in Cattistock. Mr. Ridsdale approached Mr. Jason Haigh of Close Property Finance Limited and explained his need for a facility of about £2m. The Gross Development Value ("GDV") of the project was valued at £3,200,000.00

Negotiations were successful and the Third Defendant entered into a Loan Facility on 19 September 2006. The loan facility was similar in form and terms to that used in the current proceedings .... in that it was a condition of the facility that the Defendants, Martin and Esther Ridsdale, gave personal guarantees for the indebtedness of their company and that an extension of the terms of the facility was required by the Third Defendant in order to complete the project...

Again in September 2006 the Third Defendant, through Mr. Ridsdale, approached Mr. Haigh in respect of another project, 'Frome'. This time the request was for £396,000.00 . . . . A facility was offered which was in similar terms to those in the Cattistock project and to those in the current proceedings... Again, it was a condition of the facility that the First and Second Defendants give personal guarantees for approximately 10% of the value of the facility....

A further facility in the total sum of £630,000.00 for the development by the Third Defendant, of 'Stella Maris, Bransmore' was granted by the Claimant on 21st January 2008. Again the First and Second Defendants signed as personal guarantors....

The summary above shows, I believe, that by the time they came to enter into the agreements with which the Court is concerned in these proceedings the First and Second Defendants were accustomed to dealing with the Claimant and more specifically with the terms of the facility documents as to the requirement for personal guarantees to be given by the directors of the special purpose vehicles undertaking the developments.

As I have said, I accept this as a description of the relationship of the parties before the transaction with which I am concerned, but that acceptance does not extend to accepting the implication in that evidence of full understanding on Mrs. Ridsdale's part of the transactions and the nature and terms of the guarantees given.

10. Mr. Jason Haigh, who was involved with at least two of the earlier transactions as subordinate to Mr. Orr, left Close and joined a "mezzanine" financier, Shelly Oak. When Mr. Haigh was at Close, he was assisted by Mr. Fergus O'Connell. When Mr. Haigh left Close, Mr. O'Connell worked directly with Mr. Orr.

11. Mr. O'Connell still works for Close, but did not provide a witness statement and was not called to give evidence.

12. In January 2009 Mr. Christopher Birch joined Close. In May 2010 he took over responsibility for the accounts held by Mr. Ridsdale's companies with Close.

The Development

13. Puddletown is a small rural village just under 6 miles from Dorchester in Dorset. It has now been by-passed by the A35. This resulted in withdrawal of business from a garage in the village, Olds Garage.

14. By the beginning of 2008 planning permission had been obtained to redevelop the garage site. The development project with which I am concerned was for the redevelopment of the garage site and for works to three semi-detached cottages adjacent to the garage site.

15. The proposed development is shown on a plan dated September 2008 which was placed before me. The site fronts onto a road known as the Moor which runs roughly from South West to North East along the side of the site. Alongside the road, and forming one boundary to the site, is the River Piddle.

16. Standing on the road and looking in a North Westerly direction, the river would run from right to left in front of the viewer. A bridge crossed the small river. Over the bridge an access road was to be constructed running directly across the site leaving the garage site to the left and an area which had been covered in a hardstanding to the right. This area on the right was described at times as "the brownfield site". The planning authorities wanted it to remain as open, grassed space. Mr. Ridsdale was hopeful that at some point in the future permission would be obtained to develop that space.

17. At the end of the new access road it was to turn rightwards in front of the first two of three semi-detached cottages. The first two cottages were described in later documents as plots 3 and 4. The access road went in front of these two cottages in order to give access to garages to be built between plots 3 and 4 and the third cottage, plot 5. Plot 5's partner cottage, to the North of the northern boundary of the development, remained outside the scheme at all times.

18. The three cottages were all Grade II listed. One, plot 3, had already been extended to provide 4 bedrooms. The intention was that the other two would be similarly extended, which would require listed building consent and planning permission. Plot 4 had a sitting tenant. All three were in need of extensive refurbishment.

19. Returning to the view of a person standing on the road, the area to the left of the site was what had been occupied by the garage premises. Permission was obtained to build 6 houses - two semi-detached and the rest detached. In addition to these there was permission to construct B1 commercial premises on part of the site fronting the road. In a rural location such as this, the demand for such premises was limited if non-existent. Mr. Ridsdale's hope was that eventually a consent for a substitute residential development would be obtained. The garage site came to be referred to as the "newbuild site".

20. Because of the previous use of the newbuild site, it was known that the site might be contaminated to a greater or lesser extent by leakage of petroleum products. It was also anticipated that specialist foundation works might be necessary. A further problem was environmental sensitivity associated with the River Piddle which was and is the home of a protected species, white- clawed crayfish.

21. After the owners of the proposed site had obtained planning permission for the development of the scheme, Mr. Ridsdale on behalf of St Georges Keep Ltd had obtained an option to purchase the site. The option was to expire at the end of March 2008. The purchase price of the site was £1,300,000 of which Close agreed to lend £850,000. The balance of £450,000 was to be lent by Shelly Oak.

The development of and agreement to Close's Original Facility

22. By letter dated 7th March 2008, Close offered the Third Defendant finance for the development[1]. The letter contained the following provisions:

At your request we are pleased to offer you a loan facility of £2,925,000 (two million two hundred and ninety five thousand pounds) on the following terms and conditions (the "Facility").

1. Purpose

[1] TB 2/216

To assist, as detailed below, with the finance of approved costs incurred in connection with the purchase of the freehold property known as Former Olds Garage Site, The Moors, Puddletown, Dorset (the "Property") together with the Building Works thereon:

a) To provide £850,000 towards the purchase of the Property. We understand that the purchase price is £1,300,000.

b) To provide £1,310,000 towards the Building Works, net of VAT, as described below. The total cost of the works is estimated at £1,310,000. These monies will be released in accordance with the terms of clause 2.b).

The Property comprises 3 x semi detached cottages and a former garage building which we understand has now been demolished. It benefits from detailed planning permission to construct 4x4 bedroom and 2x3 bedroom houses, two of which will have live/work facilities; construction of 2 B1 use commercial units and the refurbishment of the existing cottages (the "Building Works").

By accepting this Facility Letter you undertake to ensure that the Building Works are completed in accordance with all necessary consents and regulations within the term of the Facility. We shall arrange for the progress and quality of the Building Works to be monitored and reported to us by our project monitoring surveyors.

c) To provide £135,000 towards interest payments on the Facility.

....

2. ...

3. Expiry and Repayment

The Facility will remain available to you until 31 March 2009, at which date we shall be pleased to consider (at our absolute discretion) the renewal of the Facility for a further period.

Notwithstanding the above or any other provision of this Facility Letter the Facility is repayable on demand.

4. Security

The Facility will be secured by the following documents (together the "Security Documents") which are to be in a form and content satisfactory to us and our solicitors. The Security Documents will represent continuing security until you repay all amounts you owe to us, notwithstanding that the Facility may be varied or amended from time to time:

....

(c) The joint and several Personal Guarantees in the sum of £350,000 plus interest costs and fees, to be given by Martin Ridsdale and Esther Ridsdale (the "Personal Guarantors").

....

5. ....

6. ....

7. Fees

....

b) A release fee of 1%, calculated on the gross sale proceeds or estimated gross development value (as determined by us) of each of the units to be constructed, plus an additional fee of £30,750, will be payable by you (and which we may debit to your account) upon the sale or letting of each of the units or upon the repayment in full or expiry of the Facility, or if at any time, the Facility goes into default or is called in by us whichever shall first occur subject to a minimum aggregate release fee of £66,950.

....

23. Mr. Ridsdale sought advice from Mr. Lawrenson of Lawrenson Solicitors. As I have said, he struck me as intelligent and shrewd. I have no doubt at all (and he did not suggest otherwise) that he understood the terms of the facility letter. He had started property development in the late 1980s, and, as he accepted in cross-examination, he had lived through the property crash at the end of the 1980s/beginning of the 1990s. In my judgment, what he needed was a second opinion on the terms offered from an experienced solicitor who he trusted, rather than advice as to the fundamentals of what was being offered.

24. Mr. Lawrenson advised by email on the 11th March 2008[2]. His advice included this:

    Duration of the facility

    Clause 3 of the letter states that the facility is open until 31 March 2009. You tell me that you will probably need the facility until 30 September 2009. I would strongly advise you to agree this now with Close Bros and have them amend this clause. Otherwise, there is no guarantee that Close Bros will agree to extend the period, and certainly not at [no] *cost to you*[3]

25. Mr. Ridsdale referred Mr. Lawrenson's comments to Mr. O'Connell at Close. He responded on the 12th March[4] (the emphasis is mine):

    Duration of the Facility

    I can amend the expiry date as you request although I suggest we do this for 15 months to start with. There will not be a problem renewing it at this stage ***(providing all goes OK)*** *and the advantage is that* ***I*** *can do this for no arrangement fee. If we go to 18 months, it is likely the Credit Committee will want an additional pro-rata fee. When the time comes to renew, you may have sold the cottages, the commercial building or some of the new units and the limit you require may not be as high as it is now. By waiting I think you will save yourself a higher fee.*

26. Mr. Ridsdale forwarded this to Mr. Lawrenson who replied on the 12th March[5]:

    Duration of the facility

---

[2] 2/225

[3] I have inserted the word [No] as it is an obvious omission from the e mail.

[4] 2/227

[5] 2/228: I have corrected an obvious error as to the date given - 2009 rather than 2008

I can only repeat what I have already advised.... If you require the facility to last until 30 September [2009], *I strongly advise you to agree that now, and have the facility letter amended accordingly. Mr. O'Connell states that he will need to go back to his security committee. If you intend to pursue this point, then I suggest that Mr. O'Connell makes his approach now.*

27. In paragraph 7 of his witness statement, Mr. Ridsdale says:

If at any time prior to my entering into the personal guarantee the Claimant had indicated that it did not intend to fulfil its promise to the principal debtor to complete the building of the project, I would not have agreed to giving a personal guarantee, nor would I have encouraged my wife to do the same.

28. I return below to the legal analysis of Close's commitment (if any) as to completion of the project, but it is to be noted that Mr. Ridsdale's oral evidence did not fully support his written evidence. In cross-examination he accepted that he had understood at the time that the facility agreement was made that any extension of the period of the agreement would be at Close's absolute discretion. He said that he understood that that was the legal effect of the agreement but that in his previous experience Close would extend. He said that an initial period of 12 months for a facility was what Close normally provided - Close did not normally go above 12 months. In answer to questions from me, he emphasised not only Close's past track record in extending the periods of its facilities, but also that Close knew that unless the project went to completion as a whole, the developer would not earn the profit expected from the project. He did not suggest that Close had expressly agreed to keep the facility monies available until the project was complete, but pointed out that Close did not say anything to suggest that the monies would not be available until completion of the project.

29. Close carried out the normal range of checks and research into the proposed transaction, which included obtaining a report from a firm of Chartered Quantity Surveyors, Hills, which reported amongst other matters[6]:

5.0 PROPOSED CONSTRUCTION PERIOD

5.01 The applicant anticipates a contract period of 14 months. This programme appears to be reasonable for this type of development and therefore should be achievable, if no major delays or variations are encountered.

30. Mr. Ridsdale had estimated the construction cost as £1,310,000. Hills cast some doubt upon this, but in the event this was the figure upon which lender and borrower proceeded.

31. On the 9th June 2008, Close sent a revised Facility Letter[7]. The material differences between this and that sent in March were:

    a. This was addressed to Southern, which had been incorporated as a "Special Purpose Vehicle" for this project;

    b. The period of the facility was until the 30th June 2009;

    c. The Third Defendant was to give an unlimited Corporate Guarantee.

---

[6] 2/258

[7] 2/364

32. This Facility Letter was signed by Mr. and Mrs. Ridsdale on their own behalves as guarantors and by Mrs. Ridsdale as company secretary of Southern and the Third Defendant.

33. By a Guarantee dated 1st July 2008[8], the Ridsdales entered into a Guarantee as required by the facility agreement. I refer to certain of the terms of that Guarantee in respect of Issue 3 below.

34. In her witness statement, Mrs. Ridsdale describes the advice given to her, and her reaction:

In late June 2008, or thereabouts, my husband told me that he intended to borrow some money from Close Brothers in order to build some houses in Puddletown. He told me that Close Brothers were insisting that I stand as personal guarantor with him for the borrowing. He told me that I would have to take independent legal advice from a solicitor before Close Brothers would lend the money.

Shortly thereafter, I went to see Mr. Peter Durrant, of Truman Moore Solicitors, in Bransgore, in order to take his advice regarding the personal guarantee that had been submitted to me by Close Brothers, and which I was being asked to sign. As well as the personal guarantee, I took with me a copy of the loan facility agreement that had been made available to St Georges Keep (Southern) Limited. Mr Durrant explained to me that Close Brothers was lending money to St Georges Keep Southern Limited in order to build a property development, and that I was being asked to guarantee the repayment of those monies. Mr. Durrant went into a lot of detail about the terms of the loan agreement and the personal guarantee, but I confess that I cannot now recall what he said, other than that the main reason that Close Brothers wanted me to be a guarantor (along with my husband) was so that they would be able to get their hands on the matrimonial home. I also recall that he advised me not to sign the personal guarantee.

I told my husband that I had been advised not to sign the personal guarantee. My husband reassured me that the finished development would be worth far in excess of the amount of money that had to be paid back, and he convinced me that the risk was worth taking.

Shortly thereafter, I returned to Mr. Durrant's office and told him that, despite his advice, I had decided to sign the guarantee, which I did, and Mr Durrant witnessed my signature.

35. In cross-examination, Mrs. Ridsdale accepted that she was aware that she was exposing herself to a substantial liability. As I have already said, Mrs. Ridsdale was a patently honest witness, and I accept her evidence.

Progress between June 2008 and March 2009

36. Although the period of the facility was in effect for twelve months, Mr. Ridsdale said in evidence that he thought the project might take between 14 and 17 months. Close appointed Mr. Dodge of Hills as monitoring surveyor. He operated on the assumption that 14 months was reasonable and should be achievable[9].

---

[8] 1/17

[9] 2/374 and elsewhere

37. In his witness statement at paragraphs 5 and 8, Mr. Ridsdale says that Close was aware that the building works would take a period of at least 17 months. On the basis of the contemporaneous documents, particularly Hills' reports, I am satisfied that this overstates the position. In my judgment Close and its advisers were operating on the basis that 14 months was a reasonable period, but I am also sure that as experienced lenders in respect of development projects it would have come as no surprise to Mr. Orr or his team that the construction period might be as long as 17 months.

38. On the basis of a 14 month construction period, and with an estimated construction cost of £1,310,000, the average monthly expenditure would have been about £93,500. On the basis of a 17 month period, the average monthly expenditure would have been about £77,000. Of course, such average figures are misleading as any construction project starts with preliminary works and then moves into full construction phase before the work tapers off towards the end. However, in my judgment, on a project as short as this, it is reasonable to have regard to the total expenditure after some months have passed.

39. In paragraph 3 of his witness statement, Mr. Ridsdale explains that of the £1,310,000, £954,000 related to the newbuild part of the project, and £356,000 to refurbishment of the cottages and for contingencies.

40. In a report dated the 24th December 2008, Hills reported that cumulative expenditure was £160,719.07[10]. A report dated 4th February 2009 showed cumulative expenditure of £181,979.50 as at 28th January 2009[11]. Hills summarised the position as follows[12]:

    Building regulations for plots 3, 4 & 5 has now been approved a copy has been obtained. A meaning full start to these units has been made. A proposed 14 month construction program is still thought to be reasonable and should be achievable. Minor delays have been experienced due to the recent temperature falls. The developer has made a start to the refurbishment of the existing plots 3, 4 & 5 with the foundations for the extensions being laid for plots 4 & 5. Construction of the new dwellings is due to start on site within the next 3 to 4 months,

41. Thus half way through a 14 month construction period, only 14% of the expected value of work had been carried out. Even if a period of 17 months is taken, something approaching a third of the expenditure might reasonably be expected to have been incurred. These figures suggest that the project was falling behind, and in cross-examination Mr. Ridsdale confirmed that this was so. So far as the refurbishment works were concerned the explanations included that there were delays in obtaining planning permission and listed building consent for the extensions to plots 4 and 5. So far as the newbuild part of the project was concerned, contamination beyond that anticipated was discovered causing delays because of additional ground investigations and removal of contaminated soil. There were also environmental problems associated with the river works necessitating consultation with a number of governmental authorities.

42. None of these problems were the "fault" of the developer, but rather were the sort of problems which can afflict a development project. However delay of this nature is liable to cause cost overruns, not least in respect of financing costs, but also in this instance because of additional professional fees being incurred.

The 24th March 2009 Meeting

[10] 2/416
[11] 2/424
[12] 2/426

43. In order to understand the significance of this meeting, it is convenient to set out paragraphs 8 to 12 and 16 of the Defence of the First and Second Defendants:

On 24 March 2009 a meeting took place at the Claimant's offices at 10 Crown Place, London EC2A 4FT between Mr. Robert Orr and Mr. Fergus O'Connell of the Claimant, the Second Defendant and Mr. Julian Wood, a business colleague of the Second Defendant, at the request of the Claimant ("the March 2009 meeting").

The purpose of the March 2009 meeting was to discuss the re-structuring of the Facility in advance of the expiry of the Facility on 30 June 2009.

The Second Defendant was concerned about the First and Second Defendants' potential liability to the Claimant under the Guarantee, in the event that the Facility was not continued so as to permit the completion of the whole of the development by Southern and the realisation of the gross development value of the Property.

The Second Defendant therefore sought an assurance from Mr. Orr and Mr. O'Connell that, if the Facility were to be re-structured on its renewal, the Claimant would not seek repayment of the Facility from Southern before orderly completion of the whole of the development and sale of the Property. This was in order to achieve the realisation of the maximum sum from the development of the Property and thereby to reduce the risk of there being a shortfall between the amount due to the Claimant under the Facility and the sale proceeds of the Property.

Mr. Orr and Mr. O'Connell both assured the Second Defendant at the March 2009 meeting that:

.1 the purpose of the re-structuring was to allow the phasing of the development with the first phase being the sale of the 3 existing cottages on the Property, in order to reduce the loan to value ratio of the Facility below 65%; and

.2 there was no intention on the Claimant's part to demand repayment of the Facility before orderly completion of the other phases of the development;

.3 the Claimant would not demand repayment of the Facility before completion of the other phases of the development and sale of the Property, ("the Assurances ").

....

In reliance on the Assurances and believing that the Claimant stood by them, the First and Second Defendants thereafter agreed to variations of the Facility proposed by the Claimant....

44. Accordingly, what was said at this meeting on the 24th March 2009 is of great significance to one of the defences to Close's claims against the Ridsdales.

45. Between June 2008 and March 2009 the world economic climate, and the English economic climate, had changed dramatically. In the Autumn of 2008 not only had some of the principal Icelandic Banks collapsed, and some of the biggest names in the U.S. banking industry gone under or been rescued by the Federal Government of the USA, but a number of the biggest names in the United Kingdom banking system had been bailed out by the British taxpayer.

46. The result of this, as confirmed to me by Mr. Julian Wood, who was called as a witness by the Ridsdales, and to whose evidence I refer farther below, was that in the early months of 2009 there were few lenders willing to take on financing a project such as the Puddletown project with which I am concerned.

47. The evidence before me, from Mr. Orr and Mr. Birch in particular, reveals that Close was not as badly affected by the "credit crunch" as the High Street banks. However it was not unaffected. The Loan to Value ratio on which it was willing to lend money fell from 60-65% to 50-55%. The market conditions also meant that the value of real estate in many cases had fallen from the levels of a year earlier, so that the gross development value of projects to which the Loan to Value Ratio was applied was likely to be less than a year previously.

48. Mr. Ridsdale was suffering problems not only because of delays to the Puddletown project, but also with the project being carried out by Inntown Properties, which was the first project which Close had agreed to finance - Inntown had been the recipient of a winding up petition.

49. There is no dispute as to the attendees at the meeting on the 24th March. I have heard evidence from Mr. Ridsdale and Mr. Orr. Mr. O'Connell, as I have said, has not given written or oral evidence. The fourth attendee was Mr. Julian Wood, a friend of Mr. Ridsdale's who had long experience in business including corporate recovery, although the precise nature of his experience in corporate recovery was not explored in the written or oral evidence before me.

50. Mr. Orr gave no evidence as to how or why the meeting was convened, but both Mr. Ridsdale and Mr. Wood did. In paragraph 10 of his witness statement, Mr. Ridsdale said:

    In early March 2009, I received a telephone call from Robert Orr of the Claimant, informing me that the Claimant was not happy with the speed at which the works were progressing, and that he wished to re-assess the loan facility, as well as discuss the progress of other projects that the Claimant was funding. No suggestion was being made by the Claimant, at this stage, that it wished to call-in the loan, and the Claimant merely wished to re-evaluate its risk. I suggested that we meet to discuss the matter further, and a meeting was set-up at their offices in London....

    In cross-examination, it was put to Mr. Ridsdale that the main purpose of the meeting was to discuss the position concerning Inntown Properties. He did not accept this: his evidence was the main purpose of the meeting was to discuss the Puddletown project.

51. Mr. Wood gave evidence of his memory of the background to the meeting. I do not have a transcript of his evidence, but my note is as follows:

    The meeting was called by Martin Ridsdale on my advice because Close Brothers had approached him, not at the renewal date but months before the date for renewal. Martin came to me and said they've asked me to phase Puddletown. 20 years in insolvency has made me cynical. My professional alarm bells went off. I tried to analyse why, what's the motive?

    I laid out a number of possibilities — these concerned me. If the bank was going into phasing my number 1 concern would be that whilst Martin currently had a commitment to the whole development, what would be the motivation in wanting to phase?

    The concern I put to Martin was that phasing could be (1) to get to a point and they want out. By phasing they can get out at the end of, say, phase 1, cutting you off at the knees but keeping you sweet in the meantime. I explained that to Martin Ridsdale.

I had to alert Martin to that risk. If they were to do that, it could have ramifications. There were other possibilities....

I had alarm bells ringing - these prompted me to say to Martin that we need you to go and have a meeting with them. I told him that my biggest concern was the bank's motivation - you are opening yourself up to being cut off at the knees. I was alive to the fact that if he was to agree to phasing he would have to be comfortable that he had the ongoing support of the bank.

52. I accept Mr. Wood's evidence as to the concerns which he had shared with Mr. Ridsdale and as to the reason for the meeting from his and Mr. Ridsdale's viewpoint. I also accept that from Close's viewpoint, the fact that one of the companies with which Mr. Ridsdale was associated faced a winding up petition was a matter of concern as were the delays to the Puddletown project.

53. There is only one note of the meeting, made by Mr. O'Connell[13]. If, as seems likely, Mr. O'Connell made contemporaneous notes, they do not appear to have survived. Parts of the note are said by Mr. Ridsdale and Mr. Wood to be inaccurate.

54. The note records that the meeting started with a discussion about the problems with Inntown Properties. There is no dispute that there was such a discussion, but the detail is irrelevant.

55. There was also discussion about another project at Yeovil.

56. The discussion then moved on to the Puddletown development. Mr. O'Connell's note records this as follows:

Olds Garage Puddletown

The scheme here comprises the renovation of three cottages, construction of six new build houses (4 x 4 bed and 2 x 3 bed) and a B1 commercial unit.

MR advised that the three cottages should be finished by the end of May and will go straight on to the market. He opined that the market in Puddletown seems fairly resilient and expects to achieve £300,000 per unit. He provided us with information on a scheme in Tolpuddle, the next village where new build cottages are selling for up to £450,000.

This structure should allow an element of phasing which would probably be more comfortable for us. In terms of the new build, the pad has gone in, piling is being undertaken this week and the foundations should be going in next week. We have suggested to MR that he should be concentrating on getting the cottages finished and on the market before pressing much further ahead with the new units. He agreed with this saying he intended to get hoardings up and the access road in to the cottages which would negate the effect of the ongoing new build on any potential purchasers.

We raised the possibility of selling the new build site as is but MR states he had looked into this but no developers in the area had the cash or inclination to take this on at present. Saying this, our facility does provide for the whole scheme and a sale or two of the cottages would alleviate some cash flow pressures. They are paying expensive rates of interest to Shelleyoak, the mezzanine funder and on the basis of successful sales would like us to consider reducing their debt.

[13] 3/439.

57. As I have said, Mr. Ridsdale and Mr. Wood challenge the accuracy of this note, and in particular Mr. Ridsdale denies that anything was said about selling the new build site. As to that, I am satisfied that such a sale was mentioned: I find it improbable that the note of the meeting produced for the bank's internal records within days of the meeting would record this were it not so.

58.1 I have already set out at paragraph 43 above the parts of the Points of Defence relating to this meeting. The assurances said to have been given are in paragraphs 12.1 to 12.3 of the Defence. I refer to these below as assurances 12.1, 12.2 and 12.3.

59. The pleaded case was supported by Mr. Ridsdale's witness statement in paragraph 10 of which he said:

Mr. Orr assured me that if I complied with the Claimant's request that the loan facility be altered to phase the development program in this manner, it would not call-in the loan until the project had been completed.

It was also supported by paragraph 6 of Mr. Wood's statement:

Mr. Ridsdale and I both asked Mr. Orr to confirm that Close Brothers remained committed to completing the whole of the building project, and Mr. Orr promised Mr. Ridsdale that Close Brothers would build-out the remainder of the development following the completion of phase 1.

60. Mr. Orr in his witness statement accepted "assurance" 12.1 was given (although it is not an assurance), but denied that assurances 12.2 or 12.3 were given.

61. In the course of oral evidence the parties' positions moved significantly closer. In his oral evidence, Mr. Orr firmly and consistently denied giving any assurance in the terms of assurance 12.3, but he did say that the bank was a supportive bank (in contrast to other banks at that time) and that the bank was prepared to bear with Mr. Ridsdale despite the delays and cost overruns. He said that Mr. Ridsdale would not have left the meeting upset.

62. In his oral evidence Mr. Ridsdale told me:

I came away with the impression that the bank would not call in the loan until the project was completed. I cannot on oath say that that was actually said although it may have been said by Mr. 0'Connell.

63. For his part, Mr. Wood told me:

They actually said that Mr. Ridsdale could count on their support and it was not their intention to do anything but see the project through — Mr. Orr would not say that they would not withdraw the facility under any circumstances.

They didn't say "we wouldn't withdraw the facilities under any circumstances". A lasting and genuine impression was given that satisfied me within my limits of reasonable expectation that their intention was to see the project through as if funded as a block fund....

I pushed it as far as I could and I came away as satisfied as one ever could be with bankers. They were keen to leave us with comfort.

[Having been shown the passage from his witness statement which I have recited above]: *I would think, looking at it, listening to the arguments, that it is too strong to say they promised.*

64. In my judgment Mr. Wood's oral evidence accurately reflects the essence of what was said and implied by the Close representatives at the meeting. I do not believe for a moment that Mr. Orr or Mr. O'Connell would have gone as far as to give assurance 12.3. For his part, with all his experience, Mr. Wood knew that no such assurance was likely to be given - his aim was to move Close as far in that direction as he could without producing a counterproductive response. However, Close was being supportive to its clients, and my assessment was that Mr. Orr was keen to assist Mr. Ridsdale (for whom he clearly had a high regard, as evidenced by his reports to the Credit Committee) in difficult circumstances - if he could, he would persuade the bank to support the Puddletown project through to completion. That said, it was also sensible financially (and sensible politics within Close) to take things one step at a time. If the borrowing could be reduced by relatively early sales of the cottages, this would be to everyone's advantage. Accordingly, even if assurance 12.2 was not given expressly, I am sure that Mr. Ridsdale and Mr. Wood came away with the well-based impression that that was the bank's intent - as at that date. Importantly, the bank had not committed itself as to what would happen if circumstances changed.

The First Extension of the Facility

65. On the 25th March 2009 Mr. Ridsdale wrote to Mr. Orr as follows[14]:

I have been giving considerable thought to your comments regarding your preference to see the remainder of the Puddletown site being undertaken as a phased development. I can see the advantages of such a strategy in the current economic climate to both Close and ourselves and, subject to a few points being ironed out, am happy to consider structuring the continuance of the development in this way.

My belief is that if the development is restructured in this way, we should, as I said in our meeting, finish the refurbishment of the cottages and then concentrate on getting the back 4 houses underway, with their separate access road. We can then market and phase the remainder of the development in a prudent and logical way.

I am, naturally, whilst willing to cooperate with your suggested route, keen to be assured that in so doing, I am not going to be penalised in respect of additional fees from yourselves, for the extended time that such "prudent phasing" would entail. Whilst I do accept that interest would continue to run for the whole of the period over which the money is outstanding. I trust that in my complying with your suggestion, you would not be burdening me with additional arrangement/variation/extension fees or interest rate hikes. As I am sure you will agree, the phasing is intended to benefit both of us in limiting exposure.

As I made clear in our meeting, I am looking for a long term and mutually beneficial relationship between us and I trust that you are looking for the same. Accordingly I would appreciate some comfort that you will be fair and reasonable in the view you take in relation to the above assurances that I am seeking.

[14] 3/442

66. Close makes the valid point that this letter does not refer to the assurances allegedly given - for the reasons set out above, this is not surprising in respect of assurance 12.3 as it was not given, but in my view the letter is consistent with Mr. Ridsdale and Mr. Wood having come away from the meeting on the previous day with as much comfort as they could reasonably have expected.

67. On the 6th April Mr. Ridsdale met with Mr. Dodge of Hills to discuss the phasing of the works. After that meeting Mr. Dodge confirmed by e mail what had been agreed at that meeting as to the phases[15]. Phase 1 would be *"cottages, access road, bridge and site infrastructure".* This included work to the newbuild site which went beyond that which was strictly necessary for the completion of the cottages. The infrastructure work envisaged included carrying out "vibro compaction" - although this work was primarily necessary for the newbuild site, it made sense to carry out the full extent of this work both beneath the access road and on the newbuild site because if any part of it was deferred the execution of the work would be liable to damage the newly laid access road. On the other hand phase 1 included executing the foundations of the new houses up to block and beam level which was not necessary for the sale of the cottages.

68. On the 8th May there was an important exchange of emails[16]. Mr. Ridsdale wrote:

...Further to my recent letter regarding the restructuring of development 'phases' could you give me some indication of how the facility will be altered to allow for the duration of the development to be extended and thereby reducing bank exposure/asset ratios as sales occur.

Mr. Orr responded:

As for how we see the facility working on a phased basis, it is reasonably straightforward - finish the cottages and infra structure asap, sell the cottages, reduce our debt and then consider the future of the new build site. That future could be a straight sale, the full or phased build out or you entering into a jv with another party. Our own appetite will be determined by various factors including the speed and level at which the cottages sell, the outcome at Inntown/Daleswood as well as the market for new builds in Puddletown. As we agree with the phasing of the Puddletown site we will not penalise you for this approach.

It is clearly an important few months for your relationship with Close. Within the next 6 to 8 weeks we are looking for repayment at Inntown, completion at Yeovil and the finished Cottages on the market at Puddletown. If that happens then we will be well placed to take forward the new build element.

69. Even had an assurance in terms of assurance 12.3 been given on the 24th March, Mr. Orr's response would have set out Close's reservations in respect

of the continued facility very clearly. However, on my findings as to what was said at the meeting, his response was consistent with what had been said before.

70. On the 20th May 2009 Hills reported to Close in one of its regular monitoring reports. This recorded that progress had been hampered by contractors leaving site and that Building Regulation approval for the new build works had not yet been received[17].

[15] 3/454
[16] 3/468
[17] 3/475

71. Having received that report, on the 21st May Mr. Orr spoke to Mr. Ridsdale on the telephone. His note includes this[18]:

I highlighted to MR that it was vital that the cottages were completed and that the site was prepared in readiness for marketing. I would be looking for marketing by the end of June.

In his evidence before me, Mr. Orr confirmed that the reference to the site being prepared in readiness for marketing was not a reference to the new build site - he said that he was not considering selling that site at that stage. However he was clearly hoping for the cottages to be put on the market on a matter of weeks.

72. On the 10th July 2009 Close wrote to Southern offering to extend the Facility[19]. The letter included the following:

We refer to our letter dated 9 June 2008 (the "Facility Letter"). The terms defined in the Facility Letter shall have the same meaning when used herein. Following our discussions we confirm that the amount of the Facility is hereby decreased to £1,615,000 .... and the terms of the Facility Letter are amended as follows:

1. Purpose

To refinance your existing facility and continue to assist with the cost of the Building Works, as described below:

a) To provide £1,449,696 to refinance the outstanding balance on loan account number 1400070.

b) To provide £133,000 towards the Building Works, net of VAT, as detailed below. The total cost of the works is estimated at £133,000 ....

The development of the Property will now be phased; Phase I will comprise the completion of the refurbishment and extension of the existing cottages, the access road and bridge leading into the Property and construction of the new build element of the scheme to block and beam level (the "Building Works").

By accepting this amendment to the Facility Letter you undertake to ensure that the Building Works are completed in accordance with all necessary consents and regulations within the term of the Facility. We shall arrange for the progress and quality of the Building Works to be monitored and reported to us by our project monitoring surveyors.

c) To provide £32,304 towards interest payments on the Facility.

2. ...

3. Expiry and Repayment

The term of the Facility is hereby extended and the Facility will now remain available to you until 30 September 2009, at which date we shall be pleased to consider (at our absolute discretion) renewal for a further period.

---

[18] 3/483
[19] 3/515

Notwithstanding the above or any other provision of the Facility Letter, or this letter, the Facility is repayable on demand .....

73. The letter was signed by way of acceptance by Mr. and Mrs. Ridsdale. Mrs. Ridsdale said (and Mr. Ridsdale confirmed) that she simply signed where indicated by Mr. Ridsdale, without asking about or being told anything about the significance of what she was signing.

The Second Extension Letter

74. By early September 2009, the refurbishment of the cottages was still not complete, and therefore the cottages were not on the market (it had been hoped that they would have been on the market by the end of June).

75. The expiry of the extended facility was approaching. This led to discussions between Close and Mr. Ridsdale, culminating in a meeting at the Ridsdales' home on the 6th October. This was the subject of a file note produced by Mr. Orr[20]. During the meeting Mr. Ridsdale asked Mr. Orr to consider taking forward part of the new build scheme. Mr. Orr set out his view in the file note:

Conclusion

It is clear MR and JW do have cashflow difficulties. The next few months are a good test for them. If Inntown can be significantly reduced/repaid alongside Yeovil being concluded and sold/rented that would be good progress. At Puddletown, at least one cottage sale within the next two months would be reasonable and we can consider whether we do want to move on to the new build scheme. My initial view is that we would rather wait until the cottages are sold and we are completely de-geared.

76. In two e mails on the 9th October Mr. Orr made clear to Mr. Ridsdale that there was no facility in place for the new build at that time[21].

77. On 28th October 2009 Close sent Southern a second extended facility letter[22]. The facility was increased to £1,755,710. Of this £78,700 related to the "release fee" referred to in clause 7 .b) of the original Facility Letter. The extension was to the 31st December 2009. It was the subject of a covering letter wrongly dated 20th October 2009[23], which made it unequivocally clear that Close had not agreed to fund anything further than Phase 1, but would review the position once all three cottages had been sold (one was by now under offer). Both Mr. and Mrs. Ridsdale signed accepting the terms of the letter.

The Third Extension Letter

78. The end of December 2009 arrived. The sale of one cottage had proceeded to exchange of contracts - the other two remained unsold.

---

[20] 3/548
[21] 3/551 and 552
[22] 3/576
[23] 3/565

79. A report by Mr. Orr to the Credits Committee dated 3rd February 2010[24] proposed a short term extension of the facility until the 30th April 2010. This did not rule out proceeding to support further phases of the project, but this was looking increasingly difficult to justify, given falling property values generally (no updated valuation of the Puddletown site had been obtained).

80. On the 4th February 2010 Close wrote its third extended facility letter[25]. This, the last extended facility letter, extended the facility to the 30th April 2010. Again both Mr. and Mrs. Ridsdale signed accepting its terms.

81. Also on the 4th February Mr. Orr wrote to Mr. Ridsdale about all three outstanding facilities[26]. All three were problematical in different ways. As to the Puddletown project, Mr. Orr said:

    We look forward to receipt of the next cottage sale proceeds, hopefully followed by the final sale within the next 4-6 weeks. We have extended the facility to the end of April by which time we will review our appetite for progressing the development of the remainder of the site. That will be a decision for my Credit Committee colleagues but the sale of all the cottages will be a pre condition before such a proposal will be considered.

    Overall, with the absence of ongoing interest cover or additional security the next few months will be focused purely [on] *achieving sales in order to reduce the debt.*

    The Final Stages

82. The facility expired on the 30th April 2010 and was not renewed.

83. Mr. Birch took over responsibility for the facility in May 2010. My firm impression is that he was against any idea of supporting later phases of the Puddletown development from when he first took over - in my view it does not matter whether that impression is right or wrong.

84. Dissatisfied with Mr. Birch's attitude to the relationship, Mr. Ridsdale made contact with Mr. Frank Pennal, the managing director of Close Property Finance Ltd. By now Mr. Ridsdale was very concerned about the personal guarantees given by himself and his wife.

85. On the 15th October 2010 Mr. Pennal wrote to Mr. Ridsdale a letter said to found an estoppel[27]:

    I have previously expressed the Bank's preferred option (of the 4 that you have outlined, needless to say we continue to have our own possible actions), of receiving £750k in reduction of the loan facility now, with the residual loan balance secured by a second legal charge over the site in place of our existing first charge over the site in place of our existing first legal charge, together with your continued personal guarantee.

[24] 3/599
[25] 3/608
[26] 3/611
[27] 3/657

However, we could consider the release of your personal guarantee if your proposed sale of the site crystallised a £800k permanent capital reduction to the loan account, provided that we could rely on your continued assistance and efforts in obtaining repayments of the existing facilities made available to Daleswood Development Ltd and Inntown Properties (in liquidation) Ltd. We would require a firm timeframe for completion of this sale to be adhered to in order to release the recourse outlined. I note that the purchaser has cash available, therefore 2 weeks is achievable and would be acceptable (certainly no more than 4 weeks).

86. On the evidence before me, achieving a sale of the site within 2 or even 4 weeks was ambitious. It did not happen. Mr. Birch on behalf of Close became impatient as shown by chasing e mails on 4th[28], 16th[29], and 25th[30] November and a letter of 3rd December[31].

87. On the 15th December Close made formal demand upon St. Georges Keep Ltd on its guarantee[32].

88. On the same day (15th December) Mr. Birch wrote an e mail to Mr. Ridsdale which is relied upon together with the letter of the 15th October and an e mail on the 4th March 2011 as creating an estoppel[33]:

    The agreement regarding St. George's was for the £800k in sales proceeds to be received before 11th November in order to release recourse (also conditional upon your assistance in obtaining sales to repay the Daleswood and Inntown facilities).

    This deadline passed a month ago and the lack of performance, together with interest not being paid on the facilities, has resulted in formal demand for repayment of all 3 being issued today. Follow up demand will be made regarding your guarantee obligations personally to Daleswood and St Georges.

    You can confirm to the purchaser at Puddletown that we would release our charge if we received £800k in net funds (I can re-iter ate direct), however, the timing is an issue as we have been promised sales before that have subsequently failed to transpire. Setting dates and deadlines which are not adhered to has only resulted in a build up of exposure across the loans (nearly 9 weeks from our 4 week deadline and contracts have not been exchanged for a cash purchaser).

    I think assistance is required and I will be liaising with Matthew Samuel Camps at Vail Williams for him to take on the burden of achieving sales with you. He will be formally appointed as an LPA receiver specifically to deal with the completed properties in Yeovil and Twyford and initially in a pre appointment advisory capacity to try to get this Puddletown sale across the line.

    If we can achieve the sale at Puddletown, I am sure the directors here would appreciate your efforts and look favourably upon the release of your guarantee — however, this has been promised before and has not been forthcoming.

---

[28] 3/668
[29] 3/666
[30] 3/669
[31] 3/673
[32] 4/677
[33] 4/674

89. On the 23rd December Close made formal demands upon each of the Ridsdales on their respective guarantees[34].

90. Thereafter it was agreed that the newbuild site would be sold to a company owned by Mr. Ridsdale, Bellacre Developments Limited. The transaction was funded by another developer.

91. On the 4th March, as that transaction was close to conclusion, Mr. Lawrenson, the solicitor acting for the Ridsdales and Bellacre, sent an e mail to Mr. Birch saying[35]:

    I am waiting for the following:

    ....

    Agreement as to the wording of the letter from either you or your solicitor that is to be dated no later than the date of the TR2, and which will record the fact that you are selling the property to Bellacre under your power of sale, and that you are in receipt of the purchase monies. The letter is also to contain confirmation that the sale is in full and final settlement of all debts and claims owed by St Georges Keep and all personal liabilities owed by Mr. and Mrs. Ridsdale in respect of their personal guarantees to you (your solicitor has a form of words that I have prepared).

Mr. Birch responded 2 minutes later[36]:

The sale of this asset certainly does not settle all debts owed by St Georges Keep.

Martin is well aware of this.

We have never stated otherwise.

92. On the 19th April 2010 the newbuild site was transferred to Bellacre[37]. The cottages had previously been sold. No wording such as suggested by Mr. Lawrenson in his e mail of the 4th March was agreed: there was no agreement for sale, simply a transfer.

93. After that lengthy recital of the facts, I turn now to the legal issues in the cases, pausing to record the abandonment of some issues by the Ridsdales.

Abandoned Issues

94. Paragraph 4 of the Defence pleads two implied terms. Mr. Hamilton on behalf of the Ridsdales abandoned any suggestion that such terms were to be implied.

95. Paragraph 19.3 of the Defence raises an allegation of economic duress. That case has not been pursued before me.

96. I should also make it clear that Mr. Hamilton expressly disavowed any case of misrepresentation or estoppel based upon the assurances said to have been given at the meeting on the 24th March 2009. There is an extant case of estoppel raised in respect of Mr. Pennal's letter of the 15th October 2010.

---

[34] 4/683 and 685
[35] 4/715
[36] 4/715
[37] 4/723

The Issues

97. Mr. Hamilton helpfully produced a list of 5 issues for my determination. Mr. Thorowgood added a sixth issue, which is the issue which is numbered 4 in the list I now set out:

(1) Was a fundamental change made to the original facility letter dated 9.6.2008 from Close to Southern by the facility letter dated 10.7.2009, such that it materially affected the risk assumed by Mr. and Mrs. Ridsdale under the Guarantee dated 1.7.2008 of the original letter?

(2) Given that Mr. & Mrs. Ridsdale signed the facility letter dated 10.7.2009 on 20.7.2009 as guarantors (and that dated 28.10.2009 on 2.11.2009 & 4.2.10 on 8.2.10), is it inequitable for them now to assert that they were discharged from liability under the Guarantee by reason of the fundamental change identified in Issue 1, having regard to:

2.1 the fact, if established by the evidence, that the apparent consent indicated by their signatures was vitiated by Mr. Ridsdale's belief, arising from Mr. Orr having said at the meeting on 24.3.2009 that notwithstanding the reduction in the term and the amount of the facility, Close would support the continuation of the development and would not call in the loan until the development was completed;

2.2 the fact that Mr. and Mrs. Ridsdale were not advised to, and did not, take any legal advice before signing the facility letter on 20.07.2009;

2.3 any other material circumstance?

(3) Was the change identified in Issue 1, a variation, within the contemplation of clause 3.2(a) and/or 3.2(c) of the Guarantee, or was it a new and different contract, that was outwith the contemplation of clause 3.2(a) and/or 3.2(c)?

(4) Did the signatures by Mr. and Mrs. Ridsdale on the extended facility letters create fresh contracts supported by consideration?[38]

(5) Was Close entitled to debit the release fee of £78,700 on 28.10.2009?

(6) If relevant, what, if anything, was the effect of Mr. Pennal's letter of 15.10.2010 [3/657] or (b) Mr. Birch's e-mail of 15.12.2010 [4/674] or (c) Mr. Birch's e-mail of 4.3.2011 [4/715] on Close's entitlement to enforce the Guarantee against Mr. and Mrs. Ridsdale?

Issue 1

98. As set out above, this issue raises the question whether a fundamental change was made to the original facility letter by the first extended facility letter such that it materially affected the risk assumed by the Ridsdales under their guarantees.

99. The legal relevance of this question can be traced back at least to *Rees* v *Berrington*[39] in which Lord Loughborough said:

[38] This is the issue added by Mr. Thorowgood to Mr. Hamilton's list of issues
[39] (1795) 2 Ves. 540

It is the clearest and most evident equity not to carry on any transaction without the knowledge of him [the surety], *who must necessarily, have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him.*

100. Modem discussion of this area of the law usually starts with the Court of Appeal decision in *Holme* v *Brunskill*[40]. In that case Cotton L.J. said[41]:

The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.

Brett L.J. said[42]:

Where there is a suretyship bond, and there are some alterations in the contract or relation of the parties under the bond as to guaranteeing its performance, the question is whether the alteration is not material or substantial, and whether the surety is released. I cannot bring my mind to think that he is, for the law takes no notice of alterations that are neither material nor specific. The proposition of law as to suretyship to which I assent is this, if there is a material alteration of the relation in a contract, the observance of which is necessary, and if a man makes himself surety by an instrument reciting the principal relation or contract, in such specific terms as to make the observance of such terms the condition of his liability, then any alteration that happens is material; but where the surety makes himself responsible in general terms for the observance of certain relations between parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract.

101. The authorities since *Holme v Brunskill* have recently been reviewed by Edwards-Stuart J. in *Hackney Empire Ltd.* v *Aviva Insurance UK Ltd*[43].

102. The principle is clear and of long authority, that a surety will be released from liability under a guarantee if there is a material (or "not unsubstantial") change to the underlying or primary agreement in respect of which the guarantee has been given, unless the surety has had notice of the change and has consented to it.

---

[40] (1877) 3 QBD 495
[41] At p. 505
[42] At p. 508
[43] [2011] EWHC 2378 (TCC)

103. Issue 1 raises the question, was there a material change to the agreement between Close and Southern as a result of the first extended facility letter? Issue 2 encompasses the question, if there was such a change, did the Ridsdales consent to it?

104. On behalf of the Ridsdales, Mr. Hamilton says that the extended facility was very different from the original facility. Under the extended facility, Close only committed itself to funding Phase 1 of the project, whereas under the original facility Close committed itself to funding the whole of the project. The changed facility, it is said, was fundamentally different because unless the project was completed Southern lost the possibility of making a profit, committed itself to expenditure not related to refurbishment of the cottages (expenditure which might or might not be recovered depending upon the amount for which the newbuild site might be sold for if sold separately) and, most importantly of all, might not realise a large enough sum from the project to discharge all of Southern's liability to Close, thus exposing the Ridsdales to an increased chance of being liable under their guarantees.

105. On behalf of Close, Mr. Thorowgood denies that there was any material or substantial change: the original facility would have expired in any event before the project could be completed (the original facility being for 12 months, and the projected construction period being between 14 and 17 months); the original facility could be cancelled by Close at any time at its absolute discretion; and the work was already concentrating on the three cottages by the 24th March 2009 and/or by the date of the first extended facility letter.

106. In my judgment there was a material change in the facility for the reasons given by Mr. Hamilton. However that is not an end of the matter: in the passage from the judgment of Cotton L.J. set out above, it is clear that a surety would not be discharged from liability if the change, whilst material, *"cannot be otherwise than beneficial to the surety".*

107. I do not understand Close to base its case upon this part of the authorities, but it seems to me at least well arguable that the change was beneficial to the Ridsdales since the alternative would be to allow the facility to expire in a market where it was improbable that the same facility would be available elsewhere, or, if available, only on less favourable terms. However, for the reasons given below, it is not necessary for me to reach a settled conclusion on this matter.

Issue 2

108. There is a fundamental divide between the parties as to whether this issue as formulated by Mr. Hamilton raises a legally relevant question.

109. Mr. Hamilton contends that the power of the court to relieve a surety from liability under a guarantee is an equitable remedy and therefore subject to the court's discretion as to whether it should be exercised. That submission is supported by express authority, starting from *Rees v Berrington*[44] and most recently in the judgment of Buxton L.J. in *Wittmann (UK) Limited v Willdav Engineering S.A.*[45]*:*

[44] Supra
[45] [2007] EWCA Civ. 824 at paragraph 33

The right of a surety to discharge if the terms of or obligations under the principal contract are altered is founded in equity: see per Blackburn J. in Polak v *Everett*[46]*. The surety therefore cannot assert that right in circumstances where it would be inequitable for him to do so: most obviously, where he has assented to the alteration.*

He also refers to paragraph 45-004 of the 32nd edition of Snell's Equity which states that holding a surety released from his liability in certain events is an example of the intervention of the Court of Chancery to protect sureties.

110. For his part, Mr. Thorowgood says that there is no separate equitable doctrine in play. He says this is a simple matter of contract: he refers to *L'Estrange* v *F. Graucob Ltd*[47] for the proposition that absent any plea of misrepresentation (or, in the light of the case law since 1934, any plea of estoppel) the Ridsdales are bound by the agreements which they signed, namely the first extended facility letter and its two successors, by each of which the Ridsdales affirmed their agreement to guarantee Southern's liabilities to Close.

111. It is not necessary for me to resolve this interesting debate. It is clear on the authorities that if the surety consents to the change to the underlying transaction to which the guarantee relates then the surety remains bound by his guarantee.

112. In this case there is no doubt that the Ridsdales consented to the change to the facility - the evidence of that is their respective signatures on each of the extended facility letters. This is not denied on behalf of the Ridsdales - what is contended is that they did not give informed consent, since they relied upon the assurance said to have been given by Mr. Orr at the meeting on the 24th March - namely assurance 12.3 that Close would support the continuation of the development and would not call in the loan until the development was completed. On this basis, it is said, there would have been no material difference between the original facility and the first extended facility, and that was what the Ridsdales believed to be the position.

113. When I refer to "the Ridsdales", I should make it clear that it is not suggested by Mr. Hamilton that Mrs. Ridsdale herself applied her mind to, or understood, the contents of the extended facility letter, but he accepts on behalf of both husband and wife that Mrs. Ridsdale is bound by the knowledge and understanding of her husband.

114. As I have set out above, when the oral evidence unfolded, it was clear that no assurance to the extent relied upon in assurance 12.3 was given by Mr. Orr, and I have so held. Accordingly, the factual basis for the suggestion that no informed consent was given falls away. In any event, on Mr. Wood's evidence, Mr. Ridsdale had been told by him before the meeting of the 24th March of the risk that the bank would cease to fund beyond Phase 1, and that risk was spelled out by Mr. Orr's e mail of the 8th May 2009[48], which made the position clear. Moreover the position was very clear from the terms of the first extended facility letter itself, which I am sure Mr. Ridsdale read and clearly understood.

---

46 (1876) 1 QBD 669 at p. 673
47 [1934] 2 K.B. 394
48 3/468

115. In so far as it is suggested that Mr. Ridsdale needed legal advice at this stage (i.e. when agreeing to the extended facility), I reject the suggestion. At the time that the original facility was negotiated, Mr. Lawrenson made clear to Mr. Ridsdale that the facility had a flaw in that it was limited to a shorter period than the projected construction period, and Mr. Ridsdale knowingly took the risk presented thereby - a perfectly realistic risk to take given his past relationship with Close. There was no need for any further advice now that, the original facility period having come to an end, Close was only willing to extend the facility on a restricted basis.

116. In so far as this issue raises issues of equity, I would resolve those in Close's favour. It was overwhelmingly in the Ridsdales' interests for the facility to continue even if on more restricted terms. Without Close's support, the likelihood was that the whole project would have been the subject of LPA receivership in June 2009. The extended facility kept open the possibility of the project proceeding to a full conclusion with both the cottages being refurbished and the newbuild site being completed as a housing development. Thus the extended facility was, as I have said above, in the Ridsdales' interests. To hold that they were relieved from the continuance of the guarantee which was an important part of the transaction from Close's viewpoint would be inequitable.

117. There is also a further point: each of the second and third extended facility letters was accompanied by correspondence spelling out Close's position. Thus the Ridsdales' agreement to the last two extensions was informed by Close. It would be very odd if an attack upon the first extended facility agreement vitiated the last two agreements to which consent was given.

118. Accordingly, I hold that the Ridsdales did consent to the change to the facility afforded by Close to Southern, and (subject to issue 6 below) remain bound by their guarantees.

Issue 3

119. The Guarantee entered into by the Ridsdales provides by Clause 3.2 as follows[49]:

The Guarantors acknowledge and [agree] *that none of their liabilities under this Guarantee shall be reduced, discharged or otherwise adversely affected by:*

(a) Any variation, extension, discharge, compromise, dealing with, exchange or renewal of any right or remedy which the Creditor may now or hereafter have from or against any of the Principal Debtor and any other person in respect of any of the obligations and liabilities of any of the Principal Debtor and any other person under and in respect of any of the Facility Documents;

(b) ....

(c) Any termination, amendment, variation, novation or supplement of or to any of the Facility Documents ....

120. A provision such as this is standard in guarantees drafted by or on behalf of banks, and will usually be effective to avoid a guarantee being held to have been rendered ineffective by a change in the agreement between the parties to the underlying transaction guaranteed.

[49] 1/19

121. Issue 3 reflects the argument upon behalf of the Ridsdales that the above provisions of the Guarantee are ineffective to preserve the validity of their guarantees in the face of the change represented by the first extended facility agreement. Mr. Hamilton relies upon the decision of the Court of Appeal in *Triodos Bank NV v Dobbs*[50]. In that case the Court of Appeal held that if a change was not in substance a variation or amendment to the original underlying transaction but was on the contrary a new agreement outside the general purview of the original guarantee then the guarantor would not be liable in respect of that new agreement.

122. In my view the extended facility was not outside the purview of the original guarantees given by the Ridsdales. Whilst I am required to look at the substance of the change, I am entitled to take into account that in form each of the extended facilities was a variation or amendment of what had gone before. It seems to me impossible to hold that the mere fact of extending the period of the facility would take the altered arrangement outside the purview of the original guarantee. Whilst I have held that the introduction of phasing was a material change to the underlying transaction such as to require the Ridsdales' consent, it was not such a fundamental change as to make the extended facility a new agreement. On the contrary, it remained in substance a facility to enable the Puddletown development to continue, if possible to a full conclusion in all its aspects, but in any event so far as was economically viable in the prevailing circumstances.

123. I have no hesitation in coming to this conclusion, since the extension to the facility and the introduction of phasing appear to me to be precisely the sort of changes to the facility which Clause 3 of the Guarantee was intended to anticipate.

Issue 4

124. This issue only arises if I am wrong in the conclusions reached thus far. Mr. Thorowgood says that even if the Ridsdales did not consent to the changes to the facility, or even if the extended facility was outside the purview of the original guarantee, there was fresh consideration flowing to the Ridsdales for each of the extended facility arrangements so that the Ridsdales remain liable under each of them. On this analysis, Close only has to establish the validity of the last in time.

125. This appears to be a novel argument not addressed in any authority. Whilst it is not necessary for my decision to decide this, having regard to the conclusions which I have reached on the other issues, it seems to me to be logically right, and also commercially right. Addressing the last extension, it was in the Ridsdales' interests for the facility to continue for as long as possible in order to see if the development could be rescued. The last extension was agreed with the full knowledge and informed consent of the Ridsdales. In those circumstances the argument that the Ridsdales agreed for good consideration to the continuance of the validity of their guarantees has much to commend it.

Issue 5

126. Very little money turns on issue 5. When Close agreed to the second extended facility, it charged Southern for the "release fee" in the sum of £78,700. This was the fee provided for in Clause 7 .b) of the original facility letter. That clause allows Close to charge the release fee upon, inter alia, the expiry of the facility. Close's argument is that when the original facility expired, it could have charged the release fee then, but chose not to do so; it says it had a fresh opportunity to do so when the first extension ended, the facility then expiring a second time.

[50] [2005] EWCA Civ 630; [2005] 2 Lloyd's Rep. 588

127. The Ridsdales contend that the facility did not then expire, but was extended, only expiring on the 30th April 2010. The difference goes to the date at which interest starts to run on the release fee. The interest figure in dispute is £2,817.62 in respect of the period between the 20th November 2009 and the 1st May 2010.

128. On this issue I find in favour of the Ridsdales. By agreeing to extend the facility, Close agreed that the facility would not and had not expired.

Issue 6

129. The final issue relates to a claim by the Ridsdales that Close is estopped from enforcing the guarantees. Reliance is placed upon Mr. Pennal's letter of the 15th October 2010 (set out at paragraph 85 above), Mr. Birch's e mail of 15th December 2010 (set out at paragraph 88 above), and Mr. Birch's e-mail of the 4th March 2011 (set out at paragraph 91 above).

130. It is said that by these communications, Close represented that it would not enforce the personal guarantees. This does not stand up to scrutiny.

131. In the letter of the 15th October, Mr. Pennal offered to consider release of the personal guarantees on certain conditions - it may be that those conditions were unrealistic, but the conditions were clear. They were not complied with, and therefore the basis upon which Close was willing to consider release of the guarantees fell away. In any event, an offer to "consider release" is a fragile basis for founding an estoppel.

132. The e mail of the 15th December is similarly highly conditional, and those conditions again were not satisfied. Nor do I think that the terms of the "offer" made in that communication were sufficiently certain to found an estoppel.

133. As to the e mail of the 4th March, what was sought was agreement to the inclusion in an agreement yet to be finalised of an express release. Whilst Mr. Birch's response did not expressly reject the idea of a release of the personal guarantees, nothing in it held out any such hope - and in the event no agreement of any sort was concluded.

134. Even were there not those various difficulties in the estoppel case, in order for the case to succeed, the Ridsdales would have to establish that they acted to their detriment in reliance upon the representations said to have been made. Pressed on this point, Mr. Hamilton was unable to point to any detriment, nor do I think there was any. The Ridsdales were in a difficult position. The development project was in serious difficulties, and the call on the personal guarantees was highly likely. It was in their interests to do everything they could to achieve sales of the elements of the Puddletown site and also to assist in reducing liabilities to Close of the other companies with which each of them was associated. Whatever the Ridsdales did between October 2010 and the eventual sale of the site to Bellacre would have been done by them in any event as a matter of self-preservation regardless of what was said in the communications relied upon.

135. For these reasons, in answer to issue 6 I hold that there was no estoppel as claimed.