Claim No HC 2016-002511

Neutral Citation Number: [2017] EWHC 2624 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Rolls Building
Fetter Lane, London EC4

Date: 19 October 2017

Before:
MR DANIEL ALEXANDER QC
Sitting as a Deputy Judge of the Chancery Division

- -

Between:

MYBARRISTER LIMITED

Claimant

- and -

(1) GUY CHARLES CORNELIUS HEWETSON
(2) MATTHEW JAMES KESBY
(3) ANIL SHAH
(4) CHRISTOPHER OWEN

Respondents/Defendants

- and -

RONALD MEYER DEKOVEN

Applicant/Third Party

- -

Mr Tom Smith QC and Mr Matthew Abraham (instructed by Reed Smith LLP) for the Applicant /Third Party
Mr John McLinden QC (instructed by Keystone Law) for the Respondents/ Defendants

Hearing date: 26 June 2017

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Judgment

MR DANIEL ALEXANDER QC

Introduction

1. By an application notice dated 10 March 2017, the third party to these proceedings Ronald Meyer DeKoven ("Mr DeKoven") applies to strike out the Particulars of Additional Claim dated 8 December 2016. That claim is said to disclose no reasonable cause of action, alternatively that it should be decided against the Defendants by summary judgment under CPR 24.2(a) on the basis that the claim stands no real prospects of success and that there is no other compelling reason for the case to be disposed of at a trial.

2. Evidence was served by both parties in the form of witness statements from Mr Nicholas Brocklesby of Reed Smith (solicitors for the Claimant and the third party, Mr De Koven) and Mr Matthew Reach of Keystone Law (solicitor for the Defendants).

3. The application arises in a claim originally advanced by the Claimant for a negative declaration of non-liability and entitlement to terminate certain contractual relations with the Defendants which is now, by counterclaim, in substance largely a claim for alleged breach of them as said to have been varied.

Background

4. The Claimant, MyBarrister Limited is a company incorporated in England and Wales. Although it has been operating since April 2013, it is fairly described as a "start-up" company. The Claimant was set up by Mr DeKoven, who is a practicing barrister and who previously had a career as a lawyer in the United States. The idea behind the establishment of the Claimant was to allow clients seeking legal services to search for barristers via an online access portal at www.myBarrister.co.uk.

5. The Defendants were at all material times partners in a recruitment business, Hewetson Shah, which focuses on the legal sector. Following discussions between the parties, an arrangement was made that the Defendants would be engaged by the Claimant to assist in attracting barristers to become members of "MyBarrister" in exchange for commission. These arrangements are referred to as the Recruitment Arrangements. These led to a formal written agreement ("the Recruitment Agreement") dated 16 April 2014, which is said by the Claimant exclusively to govern the terms of the parties' relationship.

The relevant terms of the Recruitment Agreement

6. The central terms of the Recruitment Agreement provided for the Defendants to recruit barristers ("Barrister Members" as defined) and that they would be paid by way of shares in the capital of the Claimant upon reaching certain recruitment targets defined by reference to two periods. Clause 2 is the most relevant provision. It states:

> **"2. Payment of Commission**

> 2.1 The Company [i.e. the Claimant] agrees that it shall as soon as reasonably possible after the [sic]
>
> (a) the First Commission Target being achieved (and in any event within 30 Business Days of the First Commission Target being achieved), pay to the Partners the Commission set out in Part 1 of the Schedule; and
>
> (b) the Second Commission Target being achieved (and in any event within 30 Business Days of Second Commission Target being achieved), pay to the Partners the Commission set out in Part 2 of the Schedule".

7. The Schedule set out for each of the Partners (i.e. each of the Defendants) how many Ordinary Shares were to be allotted to them respectively when the targets were reached. The First Defendant was to receive twice as many shares as the other Defendants in each period. The First Commission Target was 1000 new Barrister Members. The Second Commission Target was an additional 1500 Barrister Members. These were, as things turned out, demanding targets.

8. Clause 2.2 provided that the Partners shall each use their best endeavours to encourage barristers and others to participate in the fundraising of the Company. Clause 2.3 provided for a lapse of rights in the event that the Commission Targets were not reached. Clause 2.4 related to the allotment of shares and provided:

> "Subject to achieving the relevant Target, the Company shall take all steps to
> (a) authorize allotment of the Commission Shares set out in the relevant part [of] the Schedule free of all pre-emption rights; and
> (b) allot the Commission Shares in the amounts set out in the relevant part of the Schedule credited as fully paid, enter the name of the relevant Partner…in the register of members of the Company as the holder of those shares ad deliver to the relevant Partner their relevant share certificates."

9. Clause 4 provided for rights attaching to the Commission Shares whereby the Company agreed that the shares would convey certain rights, including rights to dividends and other distributions.

Recruitment falls short

10. According to the Defence and Counterclaim, the Defendants duly sought to recruit barristers. They say (and that is borne out by the evidence on this application) that recruitment of Barrister Members was more difficult than the Claimant had envisaged. The First Commission Target, which under the agreement was to be achieved in the first year from the date of the Recruitment Agreement, running to 15 April 2015, was not nearly met. The Defendants say that they told the Claimant that the commission targets were not realistic or

achievable and that, in the circumstances, it did not make sense to keep going and attempt to recruit Barrister Members beyond the end of the First Commission Period. Whatever the position in detail, that led to a critical meeting or pair of meetings at which the obligations in issue in this case are said to have arisen.

The alleged Revised Recruitment Agreement

11. A strategy meeting was called on 21 April 2015. A number of topics were discussed including, in particular, the perception that in order to raise more investment in the Claimant, it would be necessary for the Claimant to have approximately 300 Barrister Members. The Defendants contend that it was said at a post-strategy meeting afterwards that, if they helped the Claimant to achieve that number by a given date in 2015, the Claimant would honour the requirements as to Commission due under the Recruitment Agreement, even though the original targets were not reached and that this gave rise to a Revised Recruitment Agreement of which breach is alleged by the Counterclaim by way of failure to pay the Commission. As to the formation of that alleged Revised Recruitment Agreement, the Defence and Counterclaim outlines the background and then states in paragraphs 29-30:

> "At the post strategy meeting the Claimant proposed a revision to the Recruitment Agreement that would satisfy the needs of both parties by:
>
> > 29.1 offering the Defendants the 5% of its share capital referred to in the Recruitment Agreement if they assisted the Claimant to achieve the revised Barrister Member target by September 2015; and
> > 29.2 assuring them that it would not terminate the Recruitment Agreement because the requisite number of Barrister Members had not been recruited as per the original terms of the Recruitment Agreement.
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> 30. The Defendants accepted the Claimant's offer of the Revised Recruitment Agreement, induced by the Third Party's conduct referred to hereinafter."

12. There is a fundamental dispute as to whether any such Revised Recruitment Agreement was made and those paragraphs have been denied by the Claimant. The Claimant additionally pleads that, had there been such a variation of the Recruitment Agreement it would have been recorded in writing "particularly in circumstances where the parties were commercial parties that had negotiated and entered into a formal agreement drafted by lawyers" and that it would fail anyway for want of consideration. Moreover, the alleged terms of the variation are disputed on the basis that any such variation would have been to require there to be at least 300 "active" Barrister Members registered on the website by 1 September 2015 or the date by which that target had to be achieved. It is also said that by 15 September 2015, when the Claimant contends that it terminated the Recruitment Agreement, there were only 282 Barrister Members active of the Claimant's web-site.

The Additional Claim

13. I now turn to the heart of this dispute relating to the Additional Claim.

14. As well as alleging that the Recruitment Agreement was varied, the Defendants contend that, at the same time, Mr DeKoven agreed/assumed a primary personal obligation to the Defendants to pay or arrange for the commission to be paid which was distinct from the obligations of the Claimant to them and that he did so in order to further his personal interests in preserving or increasing the value of his shareholding in the Claimant knowing that he would cause the Defendants to act to their financial detriment. It is said that it was only on that basis that the Defendants entered into the Revised Recruitment Agreement with the Claimant whose obligations they sought to perform. The Defendants contend that it is arguable both as a matter of pleading and as a matter of fact that a collateral contract arose, which gave rise to personal liability additional to the liability of the Claimant under the terms of the Revised Recruitment Agreement.

15. Mr DeKoven, in response, contends that he did not assume any personal liability and there is no basis for interpreting any of his words to that effect. Moreover, he contends that the agreement alleged by the Defendants would fall within the Statute of Frauds, rendering it impossible to rely on it because it was not in writing, signed by him or on his behalf.

Procedural history

16. The procedural history is relevant for what follows, especially relating to estoppel.

17. The Claim Form in these proceedings was issued on 30 August 2016 and it claimed a series of declarations to the effect that the Claimant was entitled to terminate the Recruitment Agreement and that the agreement and the Recruitment Relationship was validly terminated in November 2015. It also claimed (in summary) declarations that the Claimant was not liable to the Defendants for any sums and/or commission or any other relief.

18. That was met with a Defence and Counterclaim dated 29 September 2016 in which the entitlement to terminate and the termination were denied and a claim was made against the Claimant for breach of the Recruitment Agreement, the Revised Recruitment Agreement (and a further agreement not of relevance to this application known as the Augusta Agreement), namely by way of loss of the value of the shares equal to 5% of the share capital of the Claimant and loss of earnings in dividends in respect of those shares and certain other loss.

19. A Reply and Defence to Counterclaim was served on 10 November 2016 but no third party Additional Claim was made at the same time. However, as explained in a further witness statement of Mr Reach dated 21 June 2017, the Defendants sent a copy of the Additional Claim in draft to the Claimant and Mr DeKoven and it was issued at the same time as service of the Defence and Counterclaim. Mr Reach states that the Additional Claim would have been served at the same

time but that Mr DeKoven sought to complicate service by saying that permission to serve the claim was required owing to his residency in the United States. Since this process might have taken time, the Defendants reissued the Additional Claim and made an application to serve it separately from the Defence and Counterclaim. Mr Reach therefore rejects the suggestion made in Mr DeKoven's skeleton argument that the Additional Claim was only made after sight of the Reply and Defence to Counterclaim and was made for tactical reasons. That is not an issue which has a direct bearing on the present application.

20. In any event, the Additional Claim was ultimately served pursuant to the order of Master Bowles on 7 December 2016 granting permission to do so, following an application made on 2 December 2016. That application was made on the basis of written evidence and without a hearing. It provided both for service of the Additional Claim and for a case management conference to determine how that claim should be resolved in the context of the existing proceedings. That contemplated case management conference has not yet taken place because the present application has intervened. Master Bowles was not invited to consider any of the points advanced on the present application and it is not suggested that his order granting permission endorsed the viability of the Additional Claim or made it immune to strike out or summary determination.

The pleading of the Additional Claim

21. Two separate causes of action were asserted in the Additional Claim:

    a. A claim for damages for breach of an alleged oral collateral contract made between Mr DeKoven and the Defendants ("the oral collateral contract" as it was referred to at the hearing) (Particulars of Additional Claim, paragraphs 4-9);

    b. A (so-called) "proprietary estoppel" claim said to give rise to a personal equity over Mr DeKoven's shareholding in the Claimant (Particulars of Additional Claim, paragraphs 10-11).

22. Further particulars of that claim were given on 1 February 2017. The Defence to Additional Claim was served on 10 March 2017. This document denies the existence of the contract alleged for a number of reasons and denies breach. However, it also contains, in paragraph 10, the following contentions which are relevant to the present application:

> "…(c) further or alternatively, the Third Party was at all material times acting in his capacity as a director of the Claimant and not in his personal capacity;
> …
>
> (2) any contract between the Third Party and the Defendants on the terms alleged is in any case unenforceable due to section 4 of the Statute of Frauds 1677 as it would have been an oral contract for a guarantee."

23. That Defence to Additional Claim also contained denials of the claim based on proprietary estoppel and paragraph 11 (3) of that Defence made the same point as to the impact of the Statute of Frauds on that claim.

24. The application notice for the present application was served on the same day as the Defence to the Additional Claim. As a result, there has been no Reply to that Defence and the Defendant's responses to Mr DeKoven's contentions as to (a) the absence of an enforceable contract, (b) the Statute of Frauds and (c) breach are undeveloped save in so far as they are to be inferred from the Particulars of Additional Claim and were discussed at the hearing. The order of Master Bowles referred to above did not provide for any Reply to the Defence to Additional Claim. Accordingly, while it may be said that pleadings in the Additional Claim are formally closed, it would perhaps be more accurate to describe them as potentially not yet having been fully completed. That remained the case at the hearing of this application at the end of June.

25. Directions were made for a timetable (subsequently varied by consent) for evidence on this application referred to above and detailed skeleton arguments were provided albeit that, at the hearing, it became clear that these did not focus on the key issues and the central points required some reformulation.

The key arguments relating to the Additional Claim

26. On this application, both of the claims made in the Additional Claim are said on behalf of Mr DeKoven to be unsustainable as a matter of law or on the evidence. The principal reason is that the claims either are founded on actions based on an agreement to which the Statute of Frauds applies or are attempts to defeat that statute by framing the same point as one of proprietary estoppel. As can be seen from the pleading set out above, in substance, the application seeks a determination that there is no answer to the points made in paragraphs 10 (2) and 11 (3) of the Defence to Additional Claim either as matter of law in the light of the pleading or in the light of uncontestable evidence. However, there is a slight oddity in the application. The Defendants' primary position is that the application is directed at striking out or determining summarily an allegation which has not been made. Mr DeKoven's primary position is that the agreement which they contend is unenforceable as a result of the Statute of Frauds was not made at all. Moreover, although not framed as such, this application is akin to one that requests determination, on a preliminary basis of only one out of a number of issues of which the majority will go to trial. There is no dispute that the bulk of the claim would remain to be determined.

The nature of the estoppel points

27. There is a further complication. It became common ground at the hearing, following discussion, that notwithstanding what had been said in skeleton arguments beforehand, the critical arguments in so far as they touched the "proprietary estoppel" claim on this application stood or fell with the arguments

based on the oral collateral contract and that separate consideration of the alleged proprietary estoppel did not add anything. In my view, that was the correct stance. Apart from questions as to precisely how such an argument could found a claim at all against Mr DeKoven if there was no oral collateral contract, I cannot see how the argument on this application relating to the proprietary estoppel claim can be framed in such a way as to render the Statute of Frauds inapplicable to it, if it otherwise affects the oral collateral contract.

28. At the hearing, it also transpired that there may have been an element of confusion as to the sense in which "estoppel" was used in the case. As pleaded in paras 10-11 of the Particulars of Additional Claim, estoppel appeared to be primarily asserted as the basis for a free-standing cause of action, alternative to the contractual claim (the "proprietary estoppel"), in that it was said that even if there was no enforceable contract (regardless of the impact of the Statute of Frauds), it would be unconscionable for the Defendants not to ensure that they received commission by way of the shareholding.

29. However, the argument developed into a different contention of estoppel namely that, even if the Statute of Frauds rendered the oral collateral contract *prima facie* inadmissible in evidence, thus precluding the bringing of an action on it, Mr DeKoven was estopped from relying on that statute. That point has not been pleaded and, formally, arises if at all as a point to be made in response to raising the Statute of Frauds in the Defence to Additional Claim. Occasion to make the point has not yet arisen. It was not developed in the written skeletons but there was extended oral argument on this point in the light of the authorities, with the main point being that the Defendants had relied on Mr DeKoven not taking any point on the Statute of Frauds and could not do so now. I return to this point at the end of the judgment after dealing with the central issue of whether the Statute of Frauds applies to the alleged oral collateral contract at all.

The alleged oral collateral contract as pleaded

30. It is not necessary to set out the full pleading of the alleged oral collateral contract but reference must be made to the essential elements of the Particulars of Additional Claim which are the target of the application.

31. First, paragraph 5 of the pleading describes Mr DeKoven, his background and his involvement in the Claimant. Second, paragraph 6 is important in that it states the core facts said to form the basis of the plea. It is very brief and says:

> "When the Claimant proposed the Revised Recruitment Agreement at the post strategy meeting the first Defendant referred to the Recruitment Agreement (which he had brought to the meeting) and queried how the two fitted. The Third Party assured and promised the Defendants that notwithstanding the commission targets in the Recruitment Agreement if they assisted the Claimant to get 300 Barrister Members by September 2015 that he would ensure that they received the 5% of the shares in the Claimant referred to in the Recruitment Agreement saying "*I've got your back*"".

32. Paragraph 7 provides reason for why the Defendants trusted Mr DeKoven to make good his promises and states, *inter alia*, that he "assumed personal responsibility" for ensuring the Defendants would get the 5% of the Claimant's share capital if the revised Barrister Member target was reached with the assistance of the Defendants" by September 2015.

33. Paragraphs 8 and 9 allege that the Defendants relied on Mr DeKoven's statements and were thereby induced to enter into the Revised Recruitment Agreement. They allege breach of the "assurances and promises" by Mr DeKoven's failure to "use his authority over his own shareholding and/or his control of the Claimant to transfer 5% of the share capital of the Claimant to the Defendants" and it is said that the Defendants have accordingly suffered loss and damage.

34. The Defendants' estoppel claim, in paragraphs 10-11, alleges that the "assurances and promises" gave rise to an "equity over the Third Party's shareholding in the Claimant" for various reasons. As indicated, whether this plea has any prospect of success quite apart from the argument based on the Statute of Frauds is not the subject of this application, although on its face it has difficulties.

Further information about the alleged contract

35. The pleading of the alleged oral collateral contract set out above was somewhat cryptic. That prompted a request for further information in particular as to whether it was alleged that the "assurances and promises" referred to in the Particulars of Additional Claim gave rise to a binding contract between the Defendants and Mr DeKoven. In a response dated 1 February 2007, this was confirmed and further details were given of the claim. In para 2(b)(ii) of those Particulars, it was alleged that the terms of the agreement provided:

> "…the Third Party would personally ensure that the Defendants received the 5% of the Claimant's shareholding referred to in the Recruitment Agreement."

36. That is also important because it sets out the nature of the obligation which it is alleged was assumed by Mr DeKoven in reasonably precise terms. As to this, first, this pleading alleges that Mr DeKoven was obliged to ensure that the Claimant undertook performance of its obligations. Second, it alleges that the obligation in question was for the Claimant to provide the relevant share of the Claimant's shareholding referred to in the Recruitment Agreement. That obligation, as noted above, involved by clause 2.4 of that agreement, the authorisation of an allotment of shares in the relevant proportions.

The arguments as they developed on the application

37. Although wider points were addressed in the skeleton arguments (including questions of whether a director of a one-person company could be personally liable as a result of assurances given to, or an agreement with, a third party in

connection with that company), the nub of the case, stripped of issues which do not arise, comes down to two issues:

a. What is the scope of application of the Statute of Frauds and, in particular, its application to so-called "see to it" obligations?
b. How should the pleaded oral collateral contract in this case be characterised and, in particular, whether it should be characterised as providing for an obligation to which the Statute of Frauds applies at all?

38. The first issue requires an analysis of the effect of the law relating to the application of the Statute of Frauds to guarantees. The second requires analysis of the pleaded case and the law as to how that obligation is to be characterised.

39. Mr DeKoven's position, in summary, is that the Defendants' pleaded case against him is clearly one of a "see to it" obligation, which is a form of guarantee to which the Statute of Frauds applies. However, Mr DeKoven's primary position is that there is no obligation at all, whether under any underlying contract or anything else said to give rise to the Additional Claim. The Defendants' position, in summary, is that Mr DeKoven is seeking to foist on the Defendants a characterisation of the oral collateral contract which is not advanced by them and that it would be wrong to decide summarily that the pleaded case is one of guarantee to which the Statute of Frauds applies.

40. Counsel for Mr DeKoven submitted that the central issue of law in this respect was whether the Statute of Frauds applied to a so-called "see to it" obligation in that such an obligation was treated as one of guarantee. I did not take counsel for the Defendants seriously to dispute that characterisation of this issue directly. However, the way the Defendants' skeleton argument was formulated suggested that the central question was not to ask first whether the statute applied to "see to it" obligations and then to consider how the obligation pleaded in this case should be characterised, but to consider whether, taking all relevant factors into account, the obligation was one to which the Statute of Frauds applied. In this case, I do not think that matters.

41. As indicated above, the further point which emerged more fully at the hearing was that the Defendants may wish to advance an argument that Mr DeKoven was estopped from contending that the Stature of Frauds applied to which I return below.

LAW

(i) Approach to strike out/summary judgment

42. The approach to striking out a claim on the basis that the statement of case discloses no reasonable cause of action and dismissing a claim pursuant to CPR Part 24 are not the same but can often amount to the same thing in a case such as the present where the key issue is whether the claim has any prospect of success on assumed facts. As to the former, a claim should be struck out if a

claim is obviously ill-founded and does not constitute a valid claim as a matter of law (see *Price Meats Ltd. V. Barclays Bank Plc* [2000] 2 All ER (Comm) 346). As to the latter, the principles summarised by Lewison J in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] are applicable. These were stated thus and have been repeatedly approved:

> "15…The correct approach on applications by defendants is, in my judgment, as follows:
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> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
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> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
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> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
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> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
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> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence

> necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

43. Formally, the application is best seen as one for summary determination since defences based on the Statute of Frauds allege not so much that no obligation arose but that it is impossible to bring any action on such an obligation because it is not in writing and does not fulfill the requirements, rendering evidence of it inadmissible, giving rise to an unanswerable defence on the facts.

(ii) The Statute of Frauds - general

44. In *Associated British Ports v Ferryways NV & Anor* [2009] EWCA Civ 189, Lord Justice Maurice Kay said:

> "Guarantee or indemnity? That old chestnut was one of the issues that fell to be considered by Field J in this case and it is the only part of his decision which is challenged on appeal. The issue arises most often because the law treats the two concepts differentially when it comes to formality. A guarantee is subject to the formal requirement of section 4 of the Statute of Frauds 1677 but an indemnity is not. A guarantee is, in the words of the Statute, a promise "to answer for the debt default or miscarriage of another person". There must be another person who is primarily liable. The liability of the guarantor is secondary. By an indemnity, on the other hand, the surety assumes a primary liability."

45. That "old chestnut" arises once more in this case albeit in somewhat different guise.

46. So far as relevant, section 4 of the Statute of Frauds 1677 provides:

> "No action shall be brought whereby to charge the Defendant upon any special promise to answer for the debt default or miscarriage of another person unless the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writing and signed by

the party to be charged therewith or some other person thereunto by him lawfully authorised."

47. Lord Bingham of Cornhill outlined the purpose and continued justification for this provision in *Actionstrength Ltd (t/a Vital Resources) v. International Glass Engineering In.Gl.En. SpA & Ors* [2003] UKHL 17. In that case, the argument in the House of Lords focused on the question of whether an estoppel could be advanced to reliance on the statute but the case contains useful general observations and the discussion in the Court of Appeal ranged more widely in a manner relevant to the present case. Lord Bingham said:

> "1. Section 4 of the Statute of Frauds was enacted in 1677 to address a mischief facilitated, it seems, by the procedural deficiencies of the day (Holdsworth, *A History of English Law*, vol VI, pp 388-390): the calling of perjured evidence to prove spurious agreements said to have been made orally. The solution applied to the five classes of contract specified in section 4 was to require, as a condition of enforceability, some written memorandum or note of the agreement signed by the party to be charged under the agreement or his authorised agent.
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> 2. It quickly became evident that if the seventeenth century solution addressed one mischief it was capable of giving rise to another: that a party, making and acting on what was thought to be a binding oral agreement, would find his commercial expectations defeated when the time for enforcement came and the other party successfully relied on the lack of a written memorandum or note of the agreement.
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> 3. In one of the five specified classes of agreement, relating to contracts for the sale or other disposition of land, this second mischief was mitigated by the doctrine of part performance. Implementation of an agreement (even if partial) could be relied on to prove its existence. This doctrine was expressly preserved by section 40(2) of the Law of Property Act 1925, when section 4 of the Statute of Frauds (in its application to real property) was effectively re-enacted in section 40(1). A majority of the House gave the doctrine of part performance a broad interpretation in *Steadman v Steadman* [1976] AC 536. By section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, following a report by the Law Commission (*Transfer of Land: Formalities for Contracts for Sale Etc of Land*, HC2, June 1987, Law Com. No 164), section 40 of the 1925 Act was superseded by a requirement that contracts for the sale or other disposition of land should be made in writing.
>
> 4. By the Law Reform (Enforcement of Contracts) Act 1954, section 4 of the Statute of Frauds was repealed in its application to three of the five classes originally specified. Section 4 now applies only to the class of agreement which is at issue in this appeal, an agreement under which it is sought "to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person".

48. Lord Bingham outlined the facts and discussed the legislative history, noting that the 1937 the Law Revision Committee (in its Sixth Interim Report, *Statute of Frauds and the Doctrine of Consideration*) had recommended the repeal of so much as remained of section 4 and that, while no action was taken on that report, in 1953, the Law Reform Committee (First Report, *Statute of Frauds and Section 4 of the Sale of Goods Act 1893*, Cmd 8809) a recommendation was again made that section 4 of the Statute of Frauds should be largely repealed. However, the report unanimously recommended that the section should continue to apply to guarantees. Effect was given to this report by enactment of the 1954 Act. Lord Bingham continued:

> "6. …Whatever the strength of the reasons given by the dissenting minority for retaining the old rule in relation to conventional consumer guarantees, it will be apparent that those reasons have little bearing on cases where the facts are such as those to be assumed here. It was not a bargain struck between inexperienced people, liable to misunderstand what they were doing. St-Gobain, as surety, had a very clear incentive to keep the Actionstrength workforce on site and, on the assumed facts, had an opportunity to think again. There is assumed to be no issue about the terms of the guarantee. English contract law does not ordinarily require writing as a condition of enforceability. It is not obvious why judges are more fallible when ruling on guarantees than other forms of oral contract. These were not small men in need of paternalist protection. While the familiar form of bank guarantee is well understood, it must be at least doubtful whether those who made the assumed agreement in this case appreciated that it was in law a guarantee. The judge at first instance was doubtful whether it was or not. The Court of Appeal reached the view that it was, but regarded the point as interesting and not entirely easy: [2002] 1 WLR 566, 568, [2001] EWCA Civ 1477, paragraph 2. Two members of the court discussed the question at a little length, with detailed reference to authority.
>
> 7. It may be questionable whether, in relation to contracts of guarantee, the mischief at which section 4 was originally aimed, is not now outweighed, at least in some classes of case, by the mischief to which it can give rise in a case such as the present, however unusual such cases may be. But that is not a question for the House in its judicial capacity. Sitting judicially, the House must of course give effect to the law of the land of which (in England and Wales) section 4 is part. As Mr McGhee for Actionstrength correctly recognised, that section is fatal to his client's claim unless St-Gobain can be shown to be estopped from relying on the section."

49. He then considered the argument that an estoppel prevented reliance on the Statute of Frauds and said:

> "8. Neither party suggested, nor could it be suggested, that the ordinary rules of estoppel are inapplicable to guarantees. The well-known case of *Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 is one in which a party

was held to be estopped from disputing the assumed effect of a guarantee. But the same approach should be followed as in other cases. On the facts of this case that involves asking three questions: (1) What is the assumption which Actionstrength made? (2) Did St-Gobain induce or encourage the making of that assumption? (3) Is it in all the circumstances unconscionable for St-Gobain to place reliance on section 4? It would, as Mr Soole QC for St-Gobain submitted, be wrong in principle to ask the third question before both of the first two.

9. It is implicit in the assumed facts that Actionstrength believed itself to be the beneficiary of an effective guarantee. Its difficulty, in my view insuperable, arises with the second question. For in seeking to show inducement or encouragement Actionstrength can rely on nothing beyond the oral agreement of St-Gobain which, in the absence of writing, is rendered unenforceable by section 4. There was no respresentation by St-Gobain that it would honour the agreement despite the absence of writing, or that it was not a contract of guarantee, or that it would confirm the agreement in writing. Nor did St-Gobain make any payment direct to Actionstrength which could arguably be relied on as affirming the oral agreement or inducing Actionstrength to go on supplying labour. If St-Gobain were held to be estopped in this case it is hard to see why any oral guarantor, where credit was extended to a debtor on the strength of a guarantee, would not be similarly estopped. The result would be to render nugatory a provision which, despite its age, Parliament has deliberately chosen to retain.

10. For these reasons, and those given by Lord Hoffmann, Lord Clyde and Lord Walker of Gestingthorpe, with which I agree, I am of the reluctant but clear opinion that the appeal must be dismissed. I agree with the order which Lord Walker proposes."

50. The speeches of Lord Hoffmann, Lord Clyde and Lord Walker of Gestingthorpe were to similar effect or agreed with Lord Bingham, as did Lord Woolf. In particular, Lord Hoffmann said at paragraph [20] of his speech:-

> "The terms of the statute therefore show that Parliament, although obviously conscious that it would allow some people to break their promises, thought that this injustice was outweighed by the need to protect people from being held liable on the basis of oral utterances which were ill-considered, ambiguous or completely fictitious. This means that while normally one would approach the construction of a statute on the basis that Parliament was unlikely to have intended to cause injustice by allowing people to break promises which had been relied upon, no such assumption can be made about the statute."

51. The *Actionstrength* case, taken as a whole, including the judgments of the Court of Appeal, highlights a number of points of importance to the present application, relating to the application of the Statute of Frauds.

52. First, while the application of the statute to guarantees may be thought to be of questionable continuing value in current commercial circumstances, it represents the law and courts should not strive to find ways of getting round it by seeking somewhat artificial characterisations of obligations to take them outside its provisions (see also the references to *Motemtronic Ltd v. Autocar Equipment Ltd* judgment of Henry LJ Unreported 20 June 1996 CA cited in the judgment of Simon Brown LJ in the Court of Appeal in *Actionstrength* [2001] EWCA Civ 1477at paras. [19]-[20] referring to an "unreal and artificial construction which should not avoid the clear intention of the statute"). It should be noted that, by the time the case reached the House of Lords in *Actionstrength*, it was no longer in dispute that the contract was one of guarantee affected by the statute. The only outstanding point was whether the second defendant was estopped from so contending. Regardless of the 17th century justification for the Statute in avoiding injustice prompted by perjured evidence, it might be said that a valuable parallel purpose continues to this day in requiring writing to ensure that persons are not rendered liable for the failure to perform contracts unless they have clearly taken that obligation upon themselves, of which a document in writing signed by the person taking on the obligation is likely to be the best evidence. The Statute of Frauds promotes business certainty and avoids reliance on ambiguous utterances as much as avoiding frauds, as Lord Hoffmann recognised.

53. Second, determining whether a given obligation falls within the Statute of Frauds and, in particular, whether it is one of guarantee is not always straightforward. That emerges, again, most clearly from the judgments in the Court of Appeal in *Actionstrength*, where Peter Gibson LJ said that the law relating to section 4 was "overburdened with fine distinctions" (see also *Harburg India Rubber Comb Company v. Martin* [1902] 1 KB 778 at 783 where the discussion illustrates both the great number of cases in which the Court of Appeal had treated various transactions as being outside section 4 and the extent to which tribunals may differ as to characterization of them). The difficulties are additionally highlighted by the fact that Mitting J at first instance in *Actionstrength* held that, even though the characterization of the agreement in the witness statement read "remarkably like a guarantee" it was arguable that evidence at trial might show that the agreement was one in which the second defendant undertook a primary obligation to pay and that a trial was needed to determine the detailed facts (see judgment of Simon Brown LJ at [12]). The Court of Appeal in that case held that, to the contrary, in substance it was clear that the agreement imposed only a secondary liability upon the second defendant being contingent upon the first defendant defaulting on its primary obligation and that this constituted a guarantee.

54. Third, and related to the previous point, characterization of obligations of this kind is a question upon which reasonable tribunals can differ (see the division in the Court of Appeal in the *Motemtronic* case, cited in *Actionstrength*, where Staughton LJ dissented). That might be said to favour not making summary determinations, especially where the evidence as to what was said is not particularly clear. *Actionstrength* was, in some respects, similar to the present case in that the defendant to the contractual claim not only raised the Statute of Frauds but disputed that the alleged agreement had been made at all in part

responsible for the difference of approach between first instance and appeal. However, the Court of Appeal made the determination and, in my view, that should not stand in the way of making summary evaluations of the nature of the obligations in appropriate cases.

55. Fourth, the speeches in the House of Lords show that there is a high hurdle to be overcome to establish an estoppel to reliance on the Statute of Frauds. That is particularly relevant to the estoppel point as it developed at the hearing. Lord Walker of Gestingthorpe, whose approach was reflected in the other speeches in the House of Lords said:

> "52. That is the point which Mr Soole QC (for St-Gobain) rightly put in the forefront of his submissions as what he called the short answer to the appeal. He was willing to concede (in line with what Brooke J said in *Bank of Scotland v Wright*) that an explicit assurance that St-Gobain would not plead the Statute of Frauds (like an explicit assurance not to take a limitation point) could found an estoppel. But it would wholly frustrate the continued operation of section 4 in relation to contracts of guarantee if an oral promise were to be treated, without more, as somehow carrying in itself a representation that the promise would be treated as enforceable.
>
> 53. To treat the very same facts as creating ~~as~~ an unenforceable oral contract and as amounting to a representation (enforceable as soon as relied on) that the contract would be enforceable, despite section 4—and to do so while disavowing any reliance on the doctrine of part performance—would be to subvert the whole force of the section as it remains in operation, by Parliament's considered choice, in relation to contracts of guarantee. It would be comparable (in a non-statutory context) to treating the mere fact of a mistaken payment made by A to B as importing a representation by A that the money was indeed due to B, so as to create an estoppel if B (relying on the implicit assurance) acted to his detriment by spending even part of the money.
>
> 54. Mr Soole's submissions appear to me to be unanswerable, and I do not think it is necessary to go on to what he called his longer answer to the appeal. I quite see that the pleaded oral contract of guarantee is an unusual one, said to have been entered into by a company whose economic strength is no doubt much greater than that of most guarantors. St-Gobain does appear (again, on Actionstrength's pleaded case) to have obtained the benefit of about a month's work on its factory which might not otherwise have been performed. But in the absence of any assurance (other than the bare oral promise itself) the degree of detrimental reliance on the part of Actionstrength is irrelevant. I think that Simon Brown LJ was right in describing Actionstrength's case on estoppel as hopeless."

Lord Hoffmann, in particular, made similar observations at [26]-[28] on the impact of accepting the argument of estoppel in that case, although he declined to consider whether circumstances may arise in which a guarantor may be

estopped from relying on the Statute. Lord Clyde referred at [35] to the need for "something more, such as some additional encouragement, inducement or assurance" in addition to the promise. He referred to "some influence exerted…to lead the [alleged beneficiary of the guarantee] to assume that the promise would be honoured" although it is not clear that his specific approach was endorsed by the other members of the House of Lords. Lord Walker reviewed some of the authorities at [50]-[53] and referred to the fact that, for an estoppel to arise, that presupposed some sort of representation by the guarantor together with unconscionability, not unconscionability on its own.

(iii) Statute of Frauds – guarantees and "see to it" obligations

56. The question of whether an obligation is one of guarantee will always depend upon "the true construction of the actual words in which the promise is expressed" (*Moschi v Lep Air Services Ltd* [1973] AC 331, at page 349C, per Lord Diplock). The classic modern re-statement of the law relevant to categorisation of obligations of this genus and how to go about the task of construction is by Sir William Blackburne in *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd.* [2010] EWHC 2443 (Ch) who said:

> "The law
>
> 19. Before coming to the 2009 Guarantee I set out my understanding of the relevant law, starting with some general observations. In the summary that follows I have drawn from the section headed "In general" in chapter 44 (on suretyship) in volume 2 of Chitty on Contracts, 30th edition, and from chapter 1 of Andrews and Millett on the Law of Guarantees, 5th edition. The propositions which I set out accord with my experience of the law in this area and, in any event, are extensively supported by authority in the footnotes to both books. I am mindful of the fact that Ms Andrews is the co-author of the second of those textbooks.
>
> 20. Contracts of suretyship, of which the 2009 Guarantee is an example, are an area of law bedevilled by imprecise terminology and where therefore it is important not to confuse the label given by the parties to the surety's obligation (although the label may be indicative of what the parties intend) with the substance of that obligation. Because the parties are free to make any agreement they like, each case must depend upon the true construction of the actual words in which the surety's obligation is expressed. This involves "construing the instrument in its factual and contractual context having regard to its commercial purpose", a task which the court approaches "by looking at it as a whole without any preconception as to what it is." See Tuckey LJ in *Gold Coast Ltd v Caja de Ahorros Del Mediterraneo* [2002] EWCA Civ 1806, [2002] 1 Lloyd's Rep 231 at [10] and [15]. Further, as Ms Andrews observed, the court must endeavour to avoid a construction which renders a clause otiose or duplicative.
>
> 21. A contract of suretyship is in essence a contract by which one person,

the surety, agrees to answer for some existing or future liability of another, the principal (or principal debtor), to a third party, the creditor, and by which the surety's liability is in addition to, and not in substitution for, the liability of the principal. Even the use of the expressions "creditor" and "debtor" (as in "principal debtor") can be misleading: the liability which is "guaranteed" may consist of the performance of some obligation other than the payment of a debt, and it does not have to be a contractual liability.

22. Contracts of suretyship fall into two main categories: contracts of guarantee and contracts of indemnity. Because they have many similar characteristics, and similar rights and duties arise between the parties, it is not unusual to find the term "guarantee" used loosely to describe what is in reality an indemnity.

23. A contract of guarantee, in the true sense, is a contract whereby the surety (the guarantor) promises the creditor to be responsible for the due performance by the principal of his existing or future obligations to the creditor if the principal fails to perform them or any of them. Depending on its true construction, the obligation undertaken by the surety may be no more than to discharge a liability, for example a particular debt, if the principal does not discharge it so that if for any reason the principal ceases to be liable to pay that debt (it may have been discharged and replaced by some other debt or liability) the surety will not come under any liability to the creditor. The surety's liability in such a case is conditional upon the principal's failure to pay the particular debt so that if the condition is fulfilled the surety's liability will sound in debt. In contrast to that is the more usual case (sometimes referred to as a "see to it" guarantee) where, on the true construction of the contract, the surety undertakes that the principal will carry out his contract and will answer for his default. In such a case, if for any reason the principal fails to act as required by his contract he not only breaks his own contract, but he also puts the surety in breach of his contract with the creditor, thereby entitling the creditor to sue the surety, not for the unpaid debt, but for damages. The damages are for the loss suffered by the creditor due to the principal having failed to do what the surety undertook that he would do. See *Moschi v Lep Air Services Ltd.* [1973] AC 331 at 344 to 345 (Lord Reid).

24. An essential distinguishing feature of a true contract of guarantee – but not its only one - is that the liability of the surety (i.e. the guarantor) is always ancillary, or secondary, to that of the principal, who remains primarily liable to the creditor. There is no liability on the guarantor unless and until the principal has failed to perform his obligation. The guarantor is generally only liable to the same extent that the principal is liable to the creditor. This has the consequence that there is usually no liability on the part of the guarantor if the underlying obligation is void or unenforceable, or if the obligation ceases to exist (to which principle – the so-called principle of co-extensiveness - there are, however, a number of exceptions). It will depend upon the terms of the contract of

suretyship whether a demand must be made on the principal or on the guarantor (or on both) in order to trigger the guarantor's obligation to pay. Many modern guarantees expressly negative the need for the creditor to make a demand on the principal or on the guarantor or to take any other given step before enforcing the guarantee.

25. In contrast to the contract of guarantee is the contract of indemnity. In one sense all contracts of guarantee (strictly so called) are contracts of indemnity (as indeed are many contracts of insurance) since, in its widest sense, an indemnity is an obligation imposed by operation of law or by agreement of the parties. In the narrower sense in which, in the current context, the expression occurs, a contract of indemnity denotes a contract where the person who gives the indemnity undertakes his indemnity obligation by way of security for the performance of an obligation by another. Its essential distinguishing feature is that, unlike a contract of guarantee (strictly so called), a primary liability falls upon the giver of the indemnity. Unless (as is quite possible) he has undertaken his liability jointly with the principal, his liability is wholly independent of any liability which may arise as between the principal and the creditor. It will usually be implicit in such an arrangement that as between the principal and the giver of the indemnity, the principal is to be primarily liable, so that if the indemnifier has to pay first he has a right of recourse against the principal. (It will not be so if, for example, the indemnifier has not undertaken his indemnity obligation at the request of the principal.) It is this feature which leads ~~to~~ the person giving the indemnity to be described as a "surety" although, strictly, the contract of indemnity cannot itself be a contract of suretyship.

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

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

provision stating that the surety is to be liable in circumstances where the principal has ceased to be liable (for example, on the principal's release by the creditor) may be indicative either of a guarantee (because the provision would be unnecessary in the case of a contract of indemnity) or of an indemnity (because it makes clear that the liability of the surety was intended to continue regardless of the liability of the principal). See, for example, *Clement v Clement*, (unreported, Court of Appeal, 20 October 1995). Context is important in deciding what the nature is of the obligation under consideration as even minor variations in language, plus a different context, can produce different results. See *IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542, [2008] 2 Lloyd's Rep 187 ("*IIG*") at [20] (Waller LJ). But if, in a contract of guarantee (strictly so called), the parties are minded to exclude any one or more of the normal incidents of suretyship "clear and unambiguous language must be used to displace the normal legal consequence of the contract…" See *IIG* at [19] (Waller LJ).

57. In *Golstein v Bishop & Anor* [2016] EWHC 2187 (Ch) (02 September 2016), Warren J referred to that summary and distilled the principles from the full range of authorities (including *Moschi*, *Vossloh* and *McGuiness*) as follows (omitting repetition):

> **"Guarantees and indemnities**
>
> 23. In the light of some of the arguments presented to me, it is necessary to say something about the general nature of guarantees and indemnities, not least because the word "guaranteed" and "indemnify" both appear in clause 2 of the HoA. There is a helpful general description of contracts of suretyship, including the two main categories, namely contracts of guarantee and contracts of indemnity, in the judgment of Sir William Blackburne in *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch) [2011] 2 All ER (Comm) 301 ("***VAG***") at [19] to [25].
> ….Each case depends on a true construction of the agreement.
>
> ….
>
> 30. The decision of the Court of Appeal in *McGuinness* shows a slightly different use of language, emphasising the importance of establishing precisely what the contract under consideration, on its true construction, actually provides. Thus one finds under the heading "Liability under a guarantee" starting at [7] of Patten LJ's judgment, the identification of four types of "guarantee of a loan":
>
> i) A "see to it obligation", described as an undertaking by the guarantor that the principal debtor will perform his own contract with the creditor.
>
> ii) A conditional payment obligation, described as a promise by the guarantor to pay the instalments of principal and interest which fall

due if the principal debtor fails to make those payments.

iii) An indemnity.

iv) A concurrent liability with the debtor for what is due under the contract of loan.

31. Types i) and ii) fall within the types of guarantee described by Sir William Blackburne in *VAG*. Patten LJ saw an indemnity (in whatever sense he was using that word) as a type of guarantee, whereas Sir William had seen a guarantee as a type of indemnity. I do not think it matters at all what label is given to these different types of obligation provided that the obligation to which the label is attached is clearly identified. In that way, it is possible to avoid the error of treating features of an obligation described by one person as an indemnity as being features of a different obligation which another person also describes as an indemnity. The difficulty, of course, is in deciding the meaning of a contractual provision which itself uses the word "guarantee" or "indemnity" or the like since it will not always be clear in what sense the chosen word is being used.

32. Patten LJ identified types ii) and iv) as creating a liability in debt. Unless and until the principal defaults, however, there is under ii) only a contingent future debt. As to type i), he referred, like Sir William Blackburne in *VAG*, to *Moschi* to show that this creates a liability in damages.

33. As to type iii), Patten LJ stated that it is well established than an indemnity is enforceable by way of action for unliquidated damages, referring to *Firma C-Trade SA v Newcastle P&I Association* [1991] 2 AC 1 ("*Firma C-Trade*") where the defendant P&I Club had undertaken to protect and indemnify the claimant against certain liabilities. As he put it, the liability arises from the failure of the indemnifie[r] to prevent the person indemnified from suffering the type of loss specified in the contract. I have no difficulty with the proposition that an action for unliquidated damages is the appropriate course in the case of an indemnity, provided that the nature of the indemnity considered by the House of Lords is borne in mind (and must have been the type of indemnity which Patten LJ was referring to). As Lord Goff put it at p 35f-36A:

> "… I accept that, at common law, a contract of indemnity gives rise to an action for unliquidated damages, arising from the failure of the indemnifier to prevent the indemnified person from suffering damage, for example, by having to pay a third party. I also accept that, at common law, the cause of action does not (unless the contract provides otherwise) arise until the indemnified person can show actual loss: see *Collinge v. Heywood* (1839) 9 Ad. & E. 633. This is, as I understand it,

> because a promise of indemnity is simply a promise to hold the indemnified person harmless against a specified loss or expense. On this basis, no debt can arise before the loss is suffered or the expense incurred; however, once the loss is suffered or the expense incurred, the indemnifier is in breach of contract for having failed to hold the indemnified person harmless against the relevant loss or expense. ….."
>
> 34. If the contract, properly interpreted, creates an indemnity obligation of that sort, then the claim is only for unliquidated damages. But if, in spite of the use of the word "indemnify" in an agreement, the obligation falls into type ii) or type iv) of Patten LJ's categorisation, the claim will sound in debt. Even in the context of a loan or other obligation on the part of a principal, it is not always easy to determine which type of obligation is created. The cases which I have been referred to all concern obligations of a principal in relation to which a third party has entered into a surety obligation. Thus in *VAG*, *McGuinness* and *Firma C*-Trade, there was an obligation of a principal which a third party had guaranteed or indemnified. In *VAG*, the obligation was that of another group company under a master purchase agreement; in *McGuinness*, it was the mortgage liabilities of the appellant's brother; and in *Firma C-Trade* it was the obligation of the ship-owner to the cargo owners. "

58. The above analysis is of considerable assistance in seeking to determine whether a given contract should be treated as giving rise to a guarantee or not. Four points arising out of it merit comment in this case.

59. First, the question of how to characterise the obligation is one of substance and not of form or description and that parties who have used the term "guarantee" may not in fact have created such a relationship. Equally, failure to use the term "guarantee" does not mean that no such relationship has been created.

60. Second, it is not always easy to determine which type of relationship has been created and minor variations in language and different context can change the characterisation. Nor is it always easy to tell the difference between the different kinds of obligation.

61. Third, "see to it" obligations are classic kinds of guarantee.

62. Fourth, the analysis does not describe a further possibility arising out of a given set of facts, namely one in which the alleged guarantor or surety has not taken on any personal obligation whatsoever (primary or secondary) but has merely acted as an agent for the undertaking primarily liable in doing no more than (for example) communicating what that undertaking is itself to do to satisfy the primary liability. To take an example, where a company director says that he will see to it that the company performs a given task that is not necessarily to be construed as that director undertaking any obligation upon himself, whether sounding in damages upon default of performance by his company or otherwise. More specifically, where such a director says to a customer purchasing goods from it: "Your goods will be delivered on Tuesday" that would not ordinarily

create any kind of personal liability assuming that other necessary requirements for the creation of contractual relations were satisfied. If the same director said instead "I will see to it that your goods are delivered on Tuesday" although it is possible to see that such words might, in some very special contexts, be construed as the director assuming an obligation to ensure that the company performed in the manner contemplated (thereby assuming a personal liability in damages if it did not) it is not necessarily the case that such words have to be interpreted in that way. The opening words of Lord Justice Maurice Kay in *Associated British Ports* ("guarantee or indemnity?") has a potential riposte: "…or neither?". Just as the use of the word "guarantee" does not, of itself, guarantee that a guarantee has arisen, the use of the words "see to it" do, of themselves, see to it that a "see to it" obligation has arisen.

63. Moreover, it is necessary to take special care where the allegation is that an individual director may have taken on the obligation of guaranteeing his or her company's performance. The courts have, in general, taken a cautious approach to creating liability on the part of a director of a one-person company, requiring special circumstances to be shown (see, for example, *Williams & another v. Natural Life Health Foods Limited and another* [1998] UKHL 17: "whether the director…conveyed directly or indirectly to the prospective franchisees that the director assumed personal responsibility"…"whether the plaintiff could reasonably rely on an assumption of personal responsibility"). There is, in my judgment, a need for similar caution before a one-person company director is made indirectly liable on a guarantee by it being too readily assumed that he or she took on the additional obligation of guarantor of the company's performance rather than acting as agent for the company in creating legal obligations of the company alone. This is a point where the Statute of Frauds has particular contemporary value because, in requiring writing and acknowledgement by signature, it avoids the difficulties of determining whether enforceable obligations of this sort have been created by disputed and potentially ambiguous oral exchanges in situations of a kind where such personal liabilities do not otherwise lightly arise.

CHARACTERISATION OF THE PLEADED OBLIGATION

64. I bear the above points in mind in what follows and before turning to the issue of how the obligation in question in this case should be characterised, it is necessary to emphasise that this is a situation in which Mr DeKoven's primary argument is that there is no obligation of any kind. His central point on this application argument is therefore a conditional one which contends that if and in so far as the Defendants establish that the obligation is such as they *allege* exists, it would be unenforceable.

65. The only subject matter upon which the argument can bite is the Defendants' pleading. It is therefore important to focus on the precise obligation in question as pleaded. In order to resolve the question of whether that alleged obligation is within the Statute of Frauds, it is necessary first to construe it. I have set out the very brief pleading of the language used in paragraph 6 of the Defence and Counterclaim as supplemented by the further information and its alleged effect above.

Discussion

66. To recap, the pleading, so far as relevant to the present application, is that Mr DeKoven is said to have assured and promised the Defendants that "he would ensure that they received the 5% of the Shares in the Claimant referred to in the Recruitment Agreement". That is alleged to have given rise to an obligation on his part to use his authority over his own shareholding and/or his control of the Claimant to transfer 5% of the share capital of the Claimant to the Defendants.

67. The case law shows that in order for an obligation to be ~~a~~ characterised as a guarantee the guarantor must undertake that the principal will carry out his obligations and answer for the principal's default. Liability for failure to perform that obligation arises if for any reason the principal fails in his obligations as required by his own contract. He not only breaches that contract but puts the guarantor in breach of his contract of guarantee thus entitling the creditor to sue the guarantor, not for the debt but for damages for breach of his contract.

68. As a preliminary observation, I have real doubts as to whether the facts pleaded in the Particulars of Additional Claim give rise to any kind of liability on the part of Mr DeKoven, whether independent or conditional upon failure of the Claimant to perform its contractual obligations as regards allocation of shares. Although they were not discussed in detail at the hearing, I have considered the lengthy particulars given in paragraphs 6 and 7 of the response to the request for further information of the Additional Claim and they seem to be more consistent with Mr DeKoven acting as an agent for the Claimant rather than assuming any personal liability whether of guarantee or indemnity (or any other kind). That is not an issue for determination on this application and will need to be examined at trial. However, the situation seems to be more realistically viewed as one in which Mr DeKoven was simply saying that the same provisions as to allocation of shares would remain in place despite the fact that Commission Targets provided for in the Recruitment Agreement had not been met provided that the Defendants assisted the Claimant to get 300 Barrister Members by September 2015. The fact that, as pleaded, there was a personal relationship between Mr DeKoven and the Defendants does not seem to me to point to him assuming personal liability. The words "I've got your back", upon which much emphasis is placed, may well have been merely a colloquial shorthand for "Don't worry" and not an indication of any kind of assumption of personal responsibility for ensuring that the shareholding was allocated, whether on default by the Claimant or otherwise.

69. Second, the pleaded agreement as elaborated in the further information does not say more than that Mr DeKoven would personally ensure that the Defendants received the 5% of the Claimant's shareholding. That language is particularly apt for a "see to it" obligation and does not connote an independent liability regardless of whether the Claimant defaulted.

70. Third, this was not a situation in which potential default in the allocation of shares at the time was contemplated, giving rise to a particular need, which had not arisen before, to provide an additional legal person against whom there

would be recourse even if the obligation on the part of the Claimant was not fulfilled or a need to fortify the Claimant's obligations by providing an additional layer of protection.

71. Fourth, there is no reason to suppose from the factual matrix as pleaded (in which I include the matters set out in the further information in so far as known to both sides of the relationship) that Mr DeKoven was by the language used taking on an obligation any more onerous than a "see to it" obligation.

72. Fifth, although the facts are not the same, and in this area analogical reasoning carries risks, the case bears some similarities analytically to *Pitts v. Jones* [2007] EWCA 1301 (see especially at [34]-[38]) where the Court of Appeal held that the defendant's promise was not a guarantee partly on the basis that the defendant's undertaking was given solely to support the claimants' share options. In the present case, it is hard to see the words pleaded as anything more (if that at all) as guaranteeing the Claimant's performance with respect to the share transfer by way of commission.

73. In my judgment, on the assumption that Mr DeKoven assumed any obligations himself, which I doubt for the reasons given, I consider that they are as pleaded more properly characterised as "see to it" obligations which give rise to a claim in damages for breach in circumstances where the Claimant which has the primary liability for performance fails to perform its obligations. Although on the slender material put forward, distinguishing such a characterisation from one which provides a completely independent liability is not completely straightforward I consider this to be sufficiently clear and do not think the court is likely to be in a better position to do so at trial. This is a case in which alternative contentions which would take the obligation outside the Statute of Frauds carry no real conviction.

Summary of conclusions

74. Accordingly, I consider that the true position is as follows. First, that the alleged oral collateral obligation probably does not impose personal liability on Mr DeKoven in any case and that it is more likely that, if there was a new agreement created at all, there was only one agreement (namely the Revised Recruitment Agreement) rather than an additional oral collateral contract directly with Mr DeKoven. That is not a matter of which determination is invited at this stage. However, if any such oral collateral contract arose as pleaded, it constituted a "see to it" obligation which would fall within the scope of the Statute of Frauds. In the absence of fulfillment of the requisite conditions of that statute (which is not alleged) and subject to the estoppel point to which I shall come, no action may be brought upon it. For the reasons given, which are applicable to the "proprietary estoppel" claim as well, summary judgment in favour of Mr DeKoven should *prima facie* be given on the Additional Claim.

Estoppel

75. As noted above, there is no current pleading of an estoppel to reliance on the Statute of Frauds. Nor, in my view, albeit subject to further argument, is

anything said in the Particulars of Additional Claim or the further information sufficient, of itself, to raise an arguable estoppel in the light of the passages of *Actionstrength* referred to above. In particular, there is no allegation that there was any explicit assurance not to take a point on the Statute of Frauds (see Particulars, paragraph 7, and compare Lord Walker at [52]). Nor can any such assurance be clearly implied from any of the words or conduct pleaded in any of the Defendants' statements of case.

76. In the absence of any such pleading or evidence to the same effect, normally the appropriate course would be to strike out the claim in so far as affected by the Statute of Frauds unconditionally. However, as against that, the opportunity for pleading such a response to the Defence to Additional Claim has not yet arisen, for the reasons given above. In those circumstances, to strike the plea out or give judgment on it would be in effect to determine, in advance of formulation of a proper response to the point on the Statute of Frauds, that no such response could be made. In my judgment, that would not be right.

77. The better course to my mind is therefore to fix a case management conference shortly after hand down of this judgment and to provide an opportunity to the Defendants to make an application at that stage for permission to serve a Reply alleging that an estoppel to reliance on the Statute of Frauds had arisen. Any such pleading would need to raise an arguable case to that effect. In the light of the characterization of the allegation of estoppel in *Actionstrength* itself as "hopeless" (see at [54]) such an application faces formidable hurdles. However, to determine that issue pre-emptively does not seem appropriate.

Directions and future conduct of the action

78. This action has been delayed since March this year as a result of this application and, more generally, since December last year as a result of this alleged oral collateral contract issue being raised. It should be put on track for an early hearing, if possible, since it was originally commenced to provide reasonably rapid certainty that none of the contractual relationships continued to affect the Claimant. This case can and should be heard relatively soon and may be susceptible to determination using the Shorter or Flexible Trials schemes and may even be suited to a modicum of expedition. Although there will be a need for some oral evidence, this can be kept within strict bounds. Unless the parties have agreed directions, I propose to deal with directions for trial together with matters consequential on this judgment, before the end of this month if possible. The parties should exchange drafts to and seek to agree as much as possible.

79. For the reasons given, this course should not provide any encouragement to devote more resources to the oral collateral contract issue. The Additional Claim appears to add nothing of material value, given the nature of the case and the commercial situation, partly because the Defendants' claim is to be paid in shares in the Claimant and it is not clear that an additional claim in damages against Mr DeKoven for failure to secure that (on the assumption that the conditions for liability were established) would provide any further benefit.

80. Any application to plead an estoppel in response to the Statute of Frauds should be made forthwith and should be done with both a draft pleading and a short note stating why, with reference to authorities and, in particular, *Actionstrength* and any subsequent case law, the case of estoppel is arguable. Skeletons should be provided in advance of that hearing and the issue will be determined there and then at a combined case management conference and consequential matters hearing. If no application is made to introduce an estoppel pleading which, as can be seen, may well be the more prudent course, the Additional Claim will be dismissed. The court will communicate with the parties to fix an early date for all outstanding matters to be resolved.