IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No. 24 of 2022
(Formerly Cause No. FSD 242 of 2020 (MRHCJ))

BETWEEN

RABSCO INC

APPELLANT

-AND-

SURESH PRASAD

RESPONDENT

Before:	**The Rt. Hon Sir John Goldring, President** **The Hon. Sir Richard Field, Justice of Appeal** **The Hon. Sir Michael Birt, Justice of Appeal**
Appearances:	**Mr Ben Valentin KC instructed by Mr Ian Huskisson and Mr Bhavesh Patel of Travers Thorp Alberga for the Appellant** **Mr Nicholas Dixey of Nelsons for the Respondent**
Heard:	**4 May 2023**
Draft circulated:	**19 July 2023**
Judgment delivered:	**7 August 2023**

JUDGMENT

Birt, JA

1. This is an appeal by the Appellant ("Rabsco") from a judgment of Ramsay-Hale J (as she then was) ("the judge") dated 2 September 2022 ("the Judgment") whereby she dismissed

Rabsco's claim for the sum of US$35,017,406 plus interest pursuant to a guarantee issued by the Respondent ("Mr Prasad") in favour of Rabsco.

Factual Background

2. In what follows, I draw heavily upon the concise and clear summary of the factual background set out in the Judgment.

3. Midland Acres Ltd ("Midland Acres") was a Cayman Islands company engaged in the quarrying business. It had a significant landholding in the form of a quarry located at Midland Acres in Bodden Town and provided aggregate and other construction material to the construction industry. It was operated by Mr Prasad.

4. Midland Acres was a wholly-owned subsidiary of a British Virgin Islands company called Stratford Lakes and Gardens Ltd ("Stratford"). A major shareholder in Stratford was a Cayman Islands company called Brasco Ltd ("Brasco").

5. Brasco was controlled by Mr Ben Torchinsky, now deceased, a professional engineer who once owned one of the world's top engineering firms.

6. Mr Prasad and Mr Torchinsky had a close personal and business relationship. It was not disputed before the judge that they treated each other in their business relationship and dealings as partners with common ambitions and endeavours and that Midland Acres was only one of a number of business and investment opportunities upon which they collaborated.

7. At Mr Prasad's request, Mr Torchinsky had caused substantial sums of money to be loaned to Midland Acres to assist with developing its quarry business. The loans were made by Brasco. When the loans were made, the terms of the loan would be agreed in principle between Mr Torchinsky and Mr Prasad and reduced to writing by Mr Torchinsky. Mr Torchinsky would require Mr Prasad to sign a clause to the effect that Mr Prasad *"personally guaranteed"* the loan. These agreements would then be drawn up as promissory notes executed by Mr Torchinsky for Brasco, by Mr Prasad for Midland

Acres (of which he was the managing director) and by Mr Prasad in his personal capacity as guarantor.

8. Examples of these agreements are as follows:

(i) By letter dated 30 April 2008 from Mr Torchinsky on behalf of Brasco to Mr Prasad on behalf of Midland Acres, Brasco agreed to loan Midland Acres the sum of $1m and Mr Prasad agreed to *"personally guarantee repayment to Brasco for all its loans to Midland Acres"*. This agreement was then reflected in a promissory note dated 1 May 2008 which at clause 4 stated *"Suresh Prasad in his personal capacity....provides for surety a personal guarantee to Brasco for payment of the full amount of the Borrowing plus all outstanding interest charges"*.

(ii) By letter dated 3 July 2008 from Mr Torchinsky on behalf of Brasco to Midland Acres countersigned by Mr Prasad both on behalf of Midland Acres and in his personal capacity, Brasco agreed a further loan to Midland Acres in the sum of $250,000 and the guarantee provided by Mr Prasad stated *"I personally guarantee that the repayment agreement for this special loan will be honoured by Midland Acres and if not delivered by December 31 2008, will be paid personally by me"*.

9. The various loans made to Midland Acres by Brasco over the years were consolidated and assigned to Rabsco, a Cayman Islands company owned by a family trust created by Mr Torchinsky, by a written agreement made between Rabsco, Brasco, Stratford, Midland Acres and Mr Prasad dated 1 January 2009 ("the Agreement"). At that date, Midland Acres was indebted to Brasco in the sum of $9,204,355 in principal and interest. Under the Agreement, the indebtedness from time to time of Midland Acres to Rabsco was guaranteed by Mr Prasad in the terms set out below.

10. Mr Torchinsky died in 2013. Midland Acres failed to pay the sum due under the Agreement and the Grand Court ordered that it be wound up on 30 July 2020.

11. On 17 September 2020, Rabsco made formal demand of Mr Prasad pursuant to the guarantee he had given in the Agreement. Subsequently on 20 October 2020, Rabsco

commenced the present proceedings against Mr Prasad for the sum of $35,017,406 with interest compounding at 12% per annum pursuant to the Agreement.

The Proceedings

12. The Statement of Claim described the parties, the Agreement and the fact that Midland Acres had not paid its indebtedness to Rabsco under the Agreement and was now in liquidation. Having then set out the terms of Mr Prasad's guarantee under the Agreement, and the fact that Rabsco had made demand that he pay the debt owed by Midland Acres, the Statement of Claim concluded in the following terms:

> ***"13. Mr Prasad as Guarantor has failed to make payment to Rabsco in response to this demand.***
>
> ***AND THE PLAINTIFF CLAIMS;***
>
> 1. ***US$35,017,406 being the principal sum due as of 20 October 2020;***
> 2. ***Interest compounded at 12% until payment;***
> 3. ***Costs; and***
> 4. ***Further or other relief."***

13. The Defence filed by Mr Prasad raised essentially two defences. First he argued that before his death Mr Torchinsky had waived Mr Prasad's obligations under the Agreement and had agreed on behalf of Rabsco that, in the event of any shortfall realised by any sale of Midland Acres, Rabsco would not enforce the guarantee against Mr Prasad.

14. Secondly, at paragraph 6(c) of the Defence, it was pleaded that:

> ***".....[the guarantee] is limited to a guarantee of timely performance on the part of the Company. Therefore, if it is valid at all, then it is averred it would only sound in damages and unless and until the damage suffered by Rabsco as a result of that failure of the Company to pay has been quantified either by judgment or otherwise, the action is premature and there is no present liability."***

Relevant terms of the Agreement

15. The Recitals to the Agreement were as follows:

> ***"Whereas***
>
> ***A. On the date of this Agreement Midland Acres is indebted to BRASCO in the aggregate amount of $9,204,355, which indebtedness comprises advances heretofore made by BRASCO aggregating $6,055,000 in principal amount plus interest accrued thereon through December 31st 2008 at the rate of 12% per annum, compounded in arrears on each December 31st, which interest aggregates $3,149,355 as at 12:01am (Grand Cayman time) on the date of this Agreement;***
>
> ***B. Midland Acres is a wholly-owned subsidiary of Stratford;***
>
> ***C: BRASCO is the registered holder of 264, being 33%, of the 800 shares in the capital of Stratford which are outstanding;***
>
> ***D: Suresh has guaranteed payment to BRASCO of the said indebtedness, including all interest accrued and accruing thereon;***
>
> ***E: BRASCO wishes by this Agreement to assign the said indebtedness to RABSCO with the benefit of the said guarantee;***
>
> ***F: Midland Acres and Stratford have agreed with BRASCO that it shall be paid sums as provided in Section 6 hereof; and***
>
> ***G: The parties are entering into this Agreement so as to effect such assignment with the consent of Midland, Stratford and Suresh, and so as to provide for the other matters and things which hereinafter are provided for…"***

16. The proper law of the Agreement was expressed to be the law of the Cayman Islands (Section 8(d)). The terms of the guarantees were set out in Section 7 in the following terms:

> ***"7.1 <u>Guarantees</u>***
>
> ***(a) Stratford hereby absolutely and unconditionally guarantees to RABSCO the due and punctual payment by Midland Acres of the Indebtedness and all interest accruing thereon, and the due and punctual performance by Midland Acres of all covenants and agreements of Midland Acres in favour of RABSCO which are set forth in this Agreement.***
>
> ***(b) Suresh hereby absolutely and unconditionally guarantees to RABSCO the due and punctual payment by Midland Acres of the Indebtedness and all interest accruing thereon, and the due and punctual performance by Midland Acres of all covenants and agreements of Midland Acres in favour of RABSCO which are set forth in this Agreement.***
>
> ***(c) Midland Acres hereby absolutely and unconditionally guarantees to RABSCO the due and punctual performance by Stratford of all covenants and agreements of Stratford in favour of RABSCO which are set forth in this Agreement.***
>
> ***(d) Suresh hereby absolutely and unconditionally guarantees to BRASCO the due and punctual performance by each of Midland Acres and Stratford of all covenants and agreements of each of them, respectively, in favour of BRASCO which are set forth in this Agreement.***
>
> ***(e) Stratford and Midland Acres each hereby absolutely and unconditionally guarantees to BRASCO the due and punctual performance by the other of them of all covenants and agreements in favour of BRASCO of that other which are set forth in this Agreement.***

7.2 The liability of a guarantor under any guarantee set forth in Section 7.1 shall not be affected by any indulgence, whether of time for payment or otherwise, on the part of the one of RABSCO and BRASCO in whose favour such guarantee is provided (the "Indemnitee"), and shall remain in full force and of full effect notwithstanding that the Indemnitee may do any act or omit to do any act which otherwise would, as a result of the operation of law, partially or wholly relieve the guarantor from the liability of that guarantor under such guarantee or otherwise mitigate such liability. Without limiting the generality of the foregoing, the Indemnitee shall not be obliged to make any demand against, pursue any action against or exhaust its remedies against the party hereto (the "Principal") the obligations of which are guaranteed by the guarantee in question before making demand upon and taking any action against the guarantor in respect of that guarantee, and may take and give up security for the payment of and/or other guarantees of payment or performance of any of such obligations, or of any other obligations of the Principal, and may accept compositions from and may otherwise deal with the Principal or with any other guarantor without relieving the guarantor from the liability of that guarantor under the guarantee in question or otherwise mitigating such liability, and such guarantor shall remain liable under such guarantee notwithstanding any disability or lack of status or power of the Principal or any impediment whatsoever to the Indemnitee obtaining payment or performance of the sums or obligations, or any of them, the payment or performance of which are guaranteed by such guarantee.

7.3 In the event that any demand is made upon a guarantor to pay or perform under a guarantee of that guarantor which is set forth in Section 7.1, then the obligations in that regard of such guarantor shall be construed as if that guarantor had been a principal covenantor and not a surety."

The judge's decision

17. The judge dismissed Mr Prasad's defence summarised at para 13 above to the effect that Mr Torchinsky had waived Mr Prasad's obligations under the Agreement. There is no appeal against that finding.

18. As to the second limb of Mr Prasad's defence, summarised at para 14 above, the judge considered that the legal position was accurately summarised in the judgment of Sir William Blackburne in the English High Court in *Vossloh AG v Alpha Trains (UK) Limited* [2011] 2 All ER (Comm) 307 and quoted [20]-[24] of Sir William's judgment in full. For present purposes, I think it suffices to quote [23]-[24] of his judgment. Having observed at [20] that *"each case must depend upon the true construction of the actual words in which the surety's obligation is expressed"* and that *"...the court must endeavour to avoid a construction which renders a clause otiose or duplicative"*, Sir William said [as set out in the Judgment]:

> ***"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 Limited [1972] 2 All ER 393 at 398, [1973] AC 331 at 344-345 (per Lord Reid). [The judge's emphasis]

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…."

19. The judge found that clause 7.1(b) of the Agreement was a *'see to it'* guarantee and that any claim was therefore one for damages rather than in debt. She further considered that Rabsco's claim as set out in the Statement of Claim was a claim in debt and accordingly she dismissed the claim. Her reasons for reaching this conclusion were set out at [23]-[28] of her judgment which, for convenience, I set out in full:

"23. I consider that on a plain reading of clause 7.1(b) both parts are 'see to it' clauses and record Mr Prasad's undertaking to ensure that Midland Acres would pay the debt and that Midland Acres would perform the other covenants set out in the Agreement, a breach of which would sound in damages.

24. What clause 7.1(b) is <u>not</u> is a promise to pay Midland Acres' indebtedness if Midland Acres did not. [The judge's emphasis]

25. That the parties knew how to craft a clause fixing Mr Prasad with personally (sic) liability to pay a debt is clear, they having done so in many documents exhibited which demonstrated the course of conduct of these loans by Mr Torchinsky and Mr Prasad. On each of these agreements to lend, as already noted, it is recorded that Mr Prasad agreed, inter alia, to 'personally guarantee repayment' or to 'personally guarantee that the repayment agreement…will be honored by Midland Acres and if not, will be paid by me personally'.

26. Mr Huskisson also prays in aid clause 7.3, which states that where demand is made upon a guarantor then the obligations of the guarantor shall be construed as if that guarantor had been a principal covenanter and not a surety, but it adds nothing [to] the construction of clause 7.1 as it is operative only where the guarantor undertook to "pay or perform".

27. Mr Huskisson submitted that there was no essential difference whether the claim sounds in debt or damages, but there is a material difference. They are distinct remedies with their own elements. In a claim for damages, there is no existing obligation to pay any amount: there is no debt due. Damages become a debt due, not when the loss is quantified by the party complaining of breach, but when a competent Court determines that a party has committed a breach, assesses the quantum of loss and awards damages taking into account the various restrictions on recovery of damages, such as the requirement to mitigate loss.

28. Where the proper cause of action is a claim for damages, a claim for debt cannot be maintained. Rabsco's claim falls to be dismissed."

The nature of this appeal

20. Rabsco's appeal raises two main points for decision.

21. First, Rabsco submits that the judge erred in concluding that the relevant part of clause 7.1(b) was a *'see to it'* guarantee rather than a guarantee that Mr Prasad would pay if Midland Acres did not. I shall for convenience refer to this latter type of guarantee as a 'personal payment guarantee'.

22. Secondly, Rabsco submits that, even if this was a *'see to it'* guarantee, so that the claim lies in damages rather than debt, the damages are the same as the debt, namely the amount which Midland Acres should have paid but did not. The Statement of Claim did not specify whether the claim was brought in debt or damages and the judge was wrong to dismiss the claim on the basis that it was a claim in debt.

The law

23. Before turning to consider these two points, whilst there is no suggestion by either party that Sir William Blackburne's summary quoted by the judge was in any way inaccurate, we have been referred to a number of other authorities, some of which I think it is helpful to mention.

24. One begins with the House of Lords decision in *Moschi v Lep Air Services Limited* [1973] AC 33, which first authoritatively established the difference between claims in debt and claims in damages in relation to guarantees. The judgment most commonly referred to is that of Lord Reid who said as follows at 344:

> ***"…I would not proceed by saying this a contract of guarantee and there is a general rule applicable to all guarantees. Parties are free to make any agreement they like and we must I think determine just what this agreement means.***
>
> ***With regard to making good to the creditor payment of instalments by the principal debtor there are at least two possible forms of agreement. A person might undertake no more than that if the principal debtor fails to pay any instalment he will pay it. That would be a conditional agreement. There would be no prestable obligation unless and until the debtor failed to pay. There would then on the debtor's failure arise an obligation to pay. If for any reason the debtor ceased to have an obligation to pay the instalment on the due date then he could not fail to pay it on that date. The condition attached to the undertaking would never be purified and the subsidiary obligation would never arise.***
>
> ***On the other hand, the guarantor's obligation might be of a different kind. He might undertake that the principal debtor will carry out his contract. Then if at any time and for any reason the principal debtor acts or fails to act as required by his contract, he not only breaks his contract but he also puts the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid instalment but for damages. His contract being that the principal debtor would carry out the principal contract, the damages payable by the***

guarantor must then be the loss suffered by the creditor due to the principal debtor having failed to do what the guarantor undertook that he would do."

25. In *Sunbird Plaza Proprietary Limited v Maloney* [1988] HCA 11, in the High Court of Australia, Mason CJ, with whom Deane, Dawson and Toohey JJ agreed, whilst ultimately agreeing with the above statement by Lord Reid, was inclined to draw a distinction between a guarantee of payment of a sum of money and a guarantee of some other contractual obligation. Thus he said as follows at [5]-[6]:

"5. Because many guarantees are given in relation to the payment of debts, it is common to speak of the parties to the relationship as creditor, guarantor and principal debtor. However, the payment of a debt is but one instance of the wide range of obligations the performance of which may be made the subject of a guarantee. Just as I may guarantee the payment of a debt so I may guarantee the performance of a contractual obligation which does not involve the payment of money.

6. So it is that a creditor's rights against a guarantor depend on the terms of the guarantee and the nature of the obligation, performance of which is guaranteed. If the subject of the guarantee is payment of a debt or sum of money which has accrued due, the creditor may on default by the principal debtor, sue the guarantor instead of the principal debtor for the debt or sum of money, his claim being for a liquidated amount. If, on the other hand, the subject of the guarantee is the performance of some other obligation, then the person having the benefit of the guarantee may, upon default, sue the guarantor for damages for breach of contract."

26. Having referred to Lord Diplock's observation in *Moschi* to the effect that the obligation of a guarantor was to see to it that the debtor did something and that the remedy against the guarantor lay in damages for breach of contract, Mason CJ went on to say:

"8. It may be that as a matter of history the view that the guarantor has an obligation 'to see to it' that the debtor performs his obligation explains why the

guarantor is not entitled to notice of the debtor's default and why the creditor's cause of action arises on that default. But the view certainly does not accord with the nature of the guarantor's obligation as it is understood today. Rarely do guarantors have control of, or a capacity to influence, the principal debtor such that they would willingly assume an obligation to ensure that he performs his primary obligation. It is fictitious and quite unrealistic to suggest that this version of the guarantor's undertaking, rather than a promise to 'answer for' the debt or default of the debtor, is the true nature of the guarantor's obligation. And it may be doubted whether that view takes sufficient account of what has been said over the years in the long line of cases on s.4 of the Statute of Frauds.

9. The fact that at common law the creditor sued the guarantor in special assumpsit gives some support to the view that the guarantor's cause of action is for damages for breach of contract. However, the modern view that the guarantor promises to answer for the debtor's debt or default has led to the practice of suing the guarantor for the money sum which the debtor has failed to pay, a practice which may have well have been adopted on the introduction of the Judicature Acts."

27. Whilst there seems to me to be merit in the criticisms of Mason CJ of the current legal position and in the suggestion that a guarantee of payment of a sum of money may be distinguished from a guarantee of some other type of obligation, the position at English law would appear to remain clear, namely that if a guarantee is construed as a *'see to it'* guarantee, the claim against the guarantor lies in damages whereas if, properly construed, the guarantee is a personal payment guarantee, the claim lies in debt; see for example *McGuiness v Norwich and Peterborough Building Society* [2012] 2 All ER (Comm) 265 per Patten LJ at [7]-[8].

28. What is also clear is that, as stated in Andrews and Millett, The Law of Guarantees (7th edition) at para 6-002, *"The distinction between a guarantee of the principal's performance and the promise to pay a sum of money if the principal does not is a fine one and will depend on the precise words of the guarantee"*.

29. I turn therefore to consider the two issues raised on this appeal.

(i) The nature of Mr Prasad's guarantee

30. Mr Dixey submitted that the judge reached the correct conclusion for the reasons which she gave. Thus, Mr Prasad guaranteed the *'due and punctual payment by Midland Acres of the Indebtedness'* and *'the due and punctual performance by Midland Acres of the covenants and agreements…'*. This was a classic formulation for a *'see to it'* guarantee in that Mr Prasad was agreeing to see to it that Midland Acres performed its obligations under the Agreement, both the obligation to pay the Indebtedness and the obligation to perform the covenants and agreements. There was no distinction in the language between the first part of the guarantee relating to the payment of the Indebtedness and the second part relating to the performance of the covenants and agreements. Both parts were to the same effect, namely that Mr Prasad would see to it that Midland Acres performed its obligations, whether of payment or otherwise.

31. This, he submitted, was consistent with the factual matrix. Mr Torchinsky and Mr Prasad had a close personal and business relationship and had worked together on a number of business and investment opportunities. Mr Torchinsky knew that Mr Prasad was not worth $9m. The guarantee was intended to show personal commitment by Mr Prasad who was in charge of Midland Acres and therefore in a position to try and ensure that it met its commitment under the Agreement and repaid the Indebtedness. The letter of wishes from Mr Torchinsky to his trustees in respect of the family trust stated that most of his investments were made in partnership with friends and he would not want the trust to create problems for them. This had all changed following Mr Torchinsky's death.

32. He submitted that the judge was also correct to place no weight on section 7.3, as it could not alter the plain meaning of section 7.1(b). Furthermore, when construing section 7.1(b), the judge was entitled to take into account – as she did at [25] – that the parties knew how to draft a personal payment guarantee, as shown in the various documents dealing with the loans and guarantees prior to the Agreement, but had chosen to use different language in the Agreement.

33. I have considered the arguments put forward by Mr Dixey and in the Judgment but in my view the correct construction of section 7.1(b) is that it is a personal payment guarantee in respect of the Indebtedness and accordingly the claim lies in debt rather than for damages. I would summarise my reasons (which are essentially those put forward by Mr Valentin on behalf of Rabsco) as follows.

34. First, section 7.1(b) (and indeed 7.1(a)) is in two parts. In the first part, Mr Prasad guarantees the due and punctual payment by Midland Acres of the Indebtedness and in the second part, he guarantees the due and punctual performance by Midland Acres of all covenants and agreements in the Agreement. The fact that the guarantee is in two parts suggests that the parties intended to constitute separate guarantees, one for payment of the Indebtedness and one for performance of the covenants and agreements. Rabsco accepts that the second part is a 'see to it' guarantee as it includes obligations to do things other than pay money. However, payment of the Indebtedness is one of the covenants and agreements by Midland Acres under the Agreement and accordingly would in the ordinary way be covered by the second part of the sub-section. It follows that, on the judge's construction, the first part adds nothing to the obligations of Mr Prasad under the second part. It is redundant because Mr Prasad's obligation as guarantor in respect of the Indebtedness is already covered by the second part and there is no difference in meaning between the first part and the second part.

35. As stated in *Vossloh* at [20] (quoted at para 18 above), the Court must endeavour to avoid a construction which makes a clause otiose or duplicative. In my judgment, the judge's construction renders the first part of section 7.1(b) otiose as it simply duplicates and adds nothing to the second part. The parties must be taken to have intended something extra by the first part and in my judgment, the natural construction is that the first part is intended to constitute a personal payment guarantee in respect of payment of the Indebtedness, whereas the second part is intended to constitute a 'see to it' guarantee in respect of the obligations of Midland Acres under the Agreement other than the obligation to pay the Indebtedness.

36. Secondly, the above construction derives considerable support from the recitals to the Agreement. It is well-established that the recitals to an agreement may be taken into

account by the court as an aid to interpretation. Lewison, The Interpretation of Contracts, (7th edition) summarises the position as follows at 10.37:

> ***"The recitals to a document may perform a different function to the operative part of the document, but nevertheless they are part of the document itself, or at least part of the context in which the contract is made. Since the circumstances surrounding the making of a contract may be relied on as an aid to interpretation, it follows that recitals may be similarly relied on. Accordingly, a recital may set out the background and purpose of an agreement. In order for a recital to be an aid to interpretation it must be capable of being read consistently with the operative parts of the contract."***

37. There are of course limits to the use which may be made of recitals. Where the words of the operative part of the contract are clear, effect must be given to them and they will not be controlled, cut down or qualified by the recitals. However, where the operative part of a contract is unclear, the recitals may be used as an aid to interpretation. Lewison summarises the position in the following terms at 10.51:

> ***"It appears, therefore, that recitals may be used to control the operative part of a contract in any case where the language of the operative part is not absolutely clear. Such a conclusion would be consistent with the general principle that any contract must be interpreted as a whole and in the light of the background knowledge available to both parties when the contract was made. Whether the recitals are regarded as being part of the contract itself or merely part of that background knowledge, the result is the same. It is submitted therefore that recitals may govern or qualify the operative part of a contract even where the contract is not ambiguous in the true sense, provided that there is some doubt about its true meaning, when read as a whole."***

The author quotes ample authority to support these two summaries.

38. As recitals A-C of the Agreement make clear, the factual background to the Agreement was that Midland Acres was indebted to Brasco in the sum of approximately US$9m and that Mr Prasad had guaranteed payment to Brasco of this Midland Acres' Indebtedness.

39. It appears to have been accepted before the judge that the wording of the guarantee given by Mr Prasad in respect of Midland Acres' Indebtedness to Brasco was such as to create a personal payment guarantee; see [25] of the Judgment and paras 11 and 15 of Mr Prasad's written closing submissions before the judge. Mr Dixey also accepted before us that the guarantee contained in the documents referred to at para 8 above amounted to a personal payment guarantee so that any claim against the guarantor would be in debt.

40. Thus, the factual background to the Agreement was that Mr Prasad had given a personal payment guarantee to Brasco in respect of the Indebtedness of Midland Acres to Brasco.

41. Recital D having referred to Mr Prasad's guarantee of Midland Acres' Indebtedness to Brasco, recital E goes on to say:

> ***"Brasco wishes by this Agreement to assign the said Indebtedness to Rabsco with the benefit of the said guarantee."*** [Emphasis added]

42. In my judgment, this can only mean that the intention of the parties, as expressed in recital E, was that Rabsco should have the benefit of the same guarantee as Mr Prasad had given Brasco, i.e. a personal payment guarantee.

43. As stated above, if the wording of section 7.1(b) was clear in constituting a 'see to it' guarantee rather than a personal payment guarantee, recital E could not have the effect of causing it to be a personal payment guarantee. However, in my judgment, the wording of section 7.2(b) is not clear and, for the reasons stated earlier, the more natural construction is in favour of a personal payment guarantee in respect of the Indebtedness. In these circumstances, the terms of recitals D and E can be used to assist in concluding that the intention of the parties was for the guarantee by Mr Prasad to Rabsco to be a personal payment guarantee in the same way as his guarantee to Brasco and in construing section 7.1(b) as having achieved that intention.

44. Mr Dixey referred the Court to the *'Entire Agreement'* provision contained at section 8(c) of the Agreement in the following terms:

> ***"This Agreement constitutes the entire agreement between the parties with respect to the subject matters hereof and supersedes all prior understandings and agreements with respect thereto. The words 'hereof', 'hereby', 'herein' and similar terms means the entirety of this Agreement, except where the context otherwise clearly requires."***

He submitted that this confirmed the express intention of the parties that the obligations created in the loans that preceded the Agreement were to be superseded and therefore the wording of the guarantee in those loans was irrelevant and could not be used as an aid to interpretation of the guarantee in the Agreement.

45. I do not accept that clause 8(c) has this effect. The recitals form part of the Agreement and can be used as an aid to interpretation without infringing section 8(c). It is recital D which states that Rabsco is to have the benefit of the guarantee that was given to Brasco and accordingly brings in as part of the factual background to the Agreement the terms of the guarantee to Brasco.

46. Thirdly, the construction which I would place on section 7.1(b) derives some support from the terms of section 7.3 of the Agreement. That sub-section provides that, when a demand is made upon a guarantor to pay under a guarantee, the obligation of that guarantor shall be construed as if he had been a principal covenantor and not a surety. Formal demand for payment by Mr Prasad having been made by Rabsco on 17 September 2020, this provision comes into effect. If Mr Prasad is to be regarded as a principal covenantor, it suggests that the claim against him is one in debt for the amount demanded.

47. The judge dismissed the significance of section 7.3 by stating simply that it *'adds nothing to the construction of clause 7.1 as it is operative only where the guarantor undertook to 'pay or perform''*. This would effectively deprive section 7.3 of any purpose or meaning

and would not take account of the principle that an agreement should be construed as a whole.

48. I accept that section 7.3 purports also to have effect where the claim against a guarantor is not for payment of a sum of money but for performance of some other obligation by Midland Acres. I accept that the existence of section 7.3 cannot turn such a non-monetary obligation into a liability in debt. Accordingly, section 7.3 does not affect the correct interpretation of the second part of section 7.1(b). But that is no reason why it cannot assist in construing the first part of section 7.1(b), which relates only to the payment of money.

49. Fourthly, if as the judge held, both parts of section 7.1(b) are 'see to it' guarantees (from which it must follow that every guarantee in section 7.1 is a 'see to it' guarantee), some of the language in section 7.2 would be wholly redundant. As is well established (e.g.[23] and [24] of the judgment in *Vossloh* quoted at para 18 above and the second paragraph of the extract from the speech of Lord Reid in *Moschi* quoted above at para 24), a personal payment guarantee is an obligation which is ancillary to that of the principal debtor. Without the language included in section 7.2 concerning the grant of indulgence etc, it would be unenforceable if the creditor granted the principal debtor an indulgence which would affect the original obligation of the principal debtor even on a temporary basis. That is why language such as that included in section 7.2 is routinely included in a well drawn personal payment guarantee. Inclusion of such language in a 'see to it' guarantee would be otiose because the guarantor remains obliged to cause the principal debtor to perform his obligations as they exist from time to time as between the principal debtor and the creditor under the relevant contract regardless of any temporary indulgence by the creditor. The fact that such language is included in section 7.2 suggests that the first part of section 7.1(b) is a personal payment guarantee; otherwise the language would be redundant.

50. Putting all these matters together, I respectfully differ from the judge and would hold that the correct construction of the first part of section 7.1(b) of the Agreement is that it creates a personal payment guarantee on the part of Mr Prasad with the consequence that Rabsco's claim against him lies in debt rather than for damages.

(ii) The pleading point

51. Even if I am wrong in holding that Rabsco's claim lies in debt rather than for damages, I conclude that the judge erred in dismissing the claim.

52. It must be inferred from [28] of the Judgment that the judge found that Rabsco's claim as pleaded in the Statement of Claim was in debt rather than for damages. Mr Dixey submits that she was right so to find.

53. As set out earlier, the Statement of Claim did not specifically state whether the claim was brought in debt or for damages. It simply asserted that Mr Prasad had failed to pay pursuant to a demand under the guarantee and claimed the sum of $35,017,406 (being the principal sum due by Midland Acres as at 20 October 2020) plus continuing interest.

54. In pleading its claim in this way, Rabsco appears to have acted consistently with the practice suggested by Bullen & Leake & Jacob's Precedents of Pleadings (19th edition), vol 1. Thus at pages 302-303, two examples of a claim in guarantee are given and a further example is given at page 658. In none of these examples is it spelt out whether the claim is in debt or for damages. In each case, the claim simply pleads the guarantee, that the principal debtor has failed to pay a specified sum, that demand has been made on the guarantor for payment of the specified sum and that the guarantor has not paid that sum. The claim then simply claims the specified sum; it does not specify whether the claim is brought in debt or for damages.

55. Similarly at [9] of his judgment in *Sunbird Plaza* quoted at para 26 above, Mason CJ seems to have been of the view that the modern practice of pleading is simply to sue the guarantor for the money sum which the principal debtor has failed to pay.

56. In my judgment, given these examples of modern practice, it was not appropriate to classify Rabsco's claim as being brought in debt rather than for damages when the Statement of Claim did not specify the basis of the claim in circumstances where it does not appear to be a requirement of good pleading to do so.

57. Mr Dixey submitted that Rabsco could not have been taken by surprise because, in a letter dated 17 September 2020, as well as in paragraph 6(c) of the Defence, Mr Prasad

had made clear that he considered any claim should be brought for damages. But whether Rabsco was taken by surprise or not, the fact remains that the Statement of Claim did not specify whether the claim was brought in debt or damages and I do not consider that there were grounds upon which the judge could properly conclude that it must have been brought in debt.

58. Even if, contrary to my view, the Statement of Claim is properly construed as being a claim in debt whereas it should have been a claim in damages, I nevertheless consider that dismissing the claim altogether was a disproportionate order. If allowed to stand, it would be a triumph of form over substance.

59. That is because, in a case where what is guaranteed is the payment of a debt, there is unlikely in practice to be any difference between the amount of the unpaid debt and the damage said to be suffered by the creditor as a result of the non-payment by the principal debtor (and therefore the guarantor's consequent breach of his contract to see to it that the principal debtor performs his contract). The creditor's loss and damage is the amount of the unpaid debt, which is all that he was entitled to from the principal debtor.

60. It is true that, whereas in a claim for damages there is a duty on the creditor to mitigate his loss, there is no such duty in a claim for debt. But, as Andrews & Millett state at 330: *"..it is difficult to see what practical effect an obligation to mitigate would have in this context, given that it is well established that the creditor may choose to proceed against the surety without first making any claim or taking proceedings against the principal, or a co-surety, even if they are solvent, or realising other securities".*

61. That is certainly the case here as section 7.2 (quoted at para 16 above) specifically provides that Rabsco need not make any demand or take any action or pursue any remedies against Midland Acres before calling in the guarantee of Mr Prasad.

62. In his skeleton argument, Mr Dixey indicated that, in a claim for damages, the loss would not be known until the liquidation of Midland Acres had been completed. That cannot be correct given the existence of section 7.2. Rabsco was entitled to sue Mr Prasad immediately following non-payment by Midland Acres without pursuing any remedy

against Midland Acres. His loss and damage was the outstanding amount. In the event of Mr Prasad paying the amount of the Indebtedness under the guarantee, Mr Prasad would be subrogated to all the rights possessed by Rabsco against Midland Acres in respect of the Indebtedness, including the right to any recovery in the liquidation. During the hearing, the Court pressed Mr Dixey on whether, given the terms of section 7.2, there could be any difference in amount between a claim for damages and a claim in debt. Mr Dixey very fairly conceded that it was not easy to think of how a claim in damages could be for any different amount but speculated that there might be something.

63. In my judgment, on the facts of this case, a claim in damages would be for exactly the same amount as a claim in debt. It is to be recalled that the only substantive defence put forward by Mr Prasad was that the guarantee had been waived by Mr Torchinsky. This defence was rejected by the judge. Accordingly, there can be no dispute that the Indebtedness is due by Midland Acres and that Mr Prasad has provided a valid guarantee of that Indebtedness. In the circumstances, to insist on Rabsco having to start all over again with new proceedings because of a technical deficiency in the pleading (if such is the case) in circumstances where the claim in damages will be for exactly the same amount as the claim in debt, was a disproportionate order and inconsistent with the overriding objective. If (contrary to my view) the Statement of Claim was defective, the right course of action would have been to insist upon an amendment at trial.

Summary of conclusions

64. For these reasons, I would allow the appeal on both grounds and, subject to the next paragraph, enter judgment for the amount claimed.

65. We were informed at the hearing that the liquidation of Midland Acres has now been completed and that Rabsco has received a distribution from that liquidation. Mr Valentin made clear that Rabsco would of course give credit for that receipt against the amount due from Mr Prasad under the guarantee.

The Hon. Sir Richard Field, Justice of Appeal

66. I agree.

The Rt. Hon Sir John Goldring, President

67. I also agree.