Spotlight

KEY POINTS

- The "purview doctrine" may set limits to the extent that it is possible, even by the most careful drafting of the original guarantee, to avoid the need to re-take security on a variation.
- An English court would be likely to interpret the wide language used in the current LMA Templates as sufficient to ensure that the included guarantee will continue to be effective despite most routine variations to the terms of the Finance Documents.
- However, it would not be prudent to assume that even this very wide wording is sufficient to ensure that the guarantee covers all possibilities. Some may still be held to be outside its general purview.
- In cases where that is possible, it will be necessary to re-take security.
- An alternative in such cases may be to take an express written confirmation from the guarantor. For safety, it should be in the form of an agreement supported by consideration or under seal, confirming both that the existing guarantee remains in force, and that it extends to all the obligations of the borrower(s) under the amended or varied facility.

Author Richard Salter QC

Syndicated lending and the "purview doctrine": how to preserve guarantees when varying the guaranteed obligation

In this article, Richard Salter QC examines the origins of and theory behind the "purview doctrine" and offers some practical pointers to those called upon to document variations in syndicated lending transactions secured by a guarantee.

INTRODUCTION

In syndicated lending, facility agreements often need to be amended, sometimes quite soon after they have been executed. Where such facilities are secured by a guarantee, or by proprietary security[1] given by a third party that will be treated in law as if it were a guarantee[2], the peculiarities of the law of guarantees may cause practical problems.

All well-drawn guarantees include clauses which purport to permit variations to the underlying obligation without the guarantor being discharged. However, the "purview doctrine" may set limits to the extent that it is possible, even by the most careful drafting of the original guarantee, to avoid the need to re-take security on a variation.

In this article, I examine the origin of and theory behind this doctrine, and try to offer some practical pointers to the transaction lawyers who are asked to document such changes, often under pressure from their clients not to incur the cost and delay of re-taking security.

THEORY AND ORIGIN

I start with the theory.

The questions

When a loan agreement secured by a guarantee is to be varied two principal questions need to be asked:

(1) Will the guarantor be discharged by the variation, or will the terms of the guarantee be effective to prevent that discharge? and, if not

(2) On the true interpretation of the guarantee, will it apply to the loan agreement, as so varied?

The answers to these questions are likely to depend upon the interplay between the terms of the guarantee and one or more of the following three legal principles:

- The equitable protections given to a guarantor. For present purposes, the most important of these (often referred to as the rule in *Holme v Brunskill*)[3] is the principle under which any variation in the terms of the agreement between the creditor and the debtor which could prejudice the guarantor will discharge the guarantor from liability, unless the guarantor consents to the variation or the contract of guarantee provides to the contrary.[4] Also important, however, are the related equitable protections, including those by which a guarantor is released by the release of a co-guarantor or the release or surrender of any other security held for the guaranteed obligation.
- The general principle that clear words are needed to exclude or limit rights otherwise assured by law. The effect of this in a contract of guarantee is that "the parties may, if so minded, exclude any one or more of the normal incidents of suretyship. However, if they choose to do so clear and unambiguous language must be used to displace the normal legal consequences of the contract".[5]
- The old principle of guarantee law that "neither equity nor law will put a construction on [a guarantee] which results in imposing on the [guarantor] any more than, on the strictest construction of the instrument, he must be said expressly to have undertaken".[6] (There is an unresolved tension in the cases between this old principle and the more modern approach,[7] which interprets guarantees in the same way as any other commercial contract.)[8]

The purview doctrine

It is at this point that the "purview doctrine" comes into play. The origin of this, perhaps surprisingly, seems to have been a textbook rather than any decided case. In the first (1898) edition of his work on *Principal and*

Spotlight

Surety, Mr Sidney Rowlatt (later Rowlatt J) expressed the view that.[9]

> 'It is apprehended that [a surety's] assent [to a variation], whether previous or subsequent to a variation, only renders the surety liable for the contract as varied *where it remains a contract within the general purview of the original guarantee*, and the assent can operate as the waiver of something in the nature of a condition, or of an equitable claim to the cancellation of a security whose express terms cover the contract as varied.[10] If a new contract is to be secured, there must be a new guarantee.'[11]

The reference in *Rowlatt*'s footnotes to *Pybus v Gibb*[12] was to a statement by Lord Campbell CJ that:

> '[W]here there is a bond of suretyship for an officer, and, by the act of the parties or by Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided. Even if the sureties were consenting parties *by parol* to such a change, it could hardly affect their liability under the bond. The question is, whether the nature and functions of the office or employment are changed; for, if they are, *it is not the same office within the meaning of the bond.*'

Kitson v Julian,[13] also cited by *Rowlatt*, was a case where it was alleged that the guarantors had consented to an increase in the term of the obligation guaranteed, but that was held ineffective because: 'The replication indeed sets up a continuance of the liability with the assent of the defendants: but *that is only a parol agreement.*' *Rowlatt*'s third citation, *Leathley v Speyer*,[14] was by contrast a case about interpreting the scope of the guarantee, in which it was said that 'the written guarantee must contain language which is capable of being applied to the liability which is sought to be enforced; but extrinsic circumstances may be given in evidence for the purpose of shewing the meaning of the instrument and to what debts it was intended to apply'.

These cases seem to me to provide the key, in their historical context, to what *Rowlatt* was getting at in this passage. At the time when this was written, the prevailing theory was that the inevitable effect of varying the terms of an existing contract was impliedly to discharge the original contact and to produce, not the original contract with a variation, but a new and different contract.[15] Thus, unless the express terms of the guarantee on their true construction already covered that new contract (as "a contract within the general purview of the original guarantee"), the guarantor's "assent to a variation" of the old one (particularly if only given orally) would be ineffective, because what was required was not a mere assent, but a new agreement of guarantee (evidenced by signed writing, so as to comply with the Statute of Frauds) covering the new contract.

In cases decided in 1918 and 1923[16] the House of Lords decided that this old approach to the effect on the original contract of an agreement to vary it was wrong.[17] The effect should, instead, be determined by the intention of the parties, and whether it was their intention to rescind or simply to vary. If the new agreement reveals an intention to rescind the old, the old goes; but if it does not, the old remains in force, subject to the effect (if any[18]) of the agreement to vary. That more practical approach remains the law today.[19]

Rowlatt's observation (as it appeared in the second (1926) edition[20]) was taken up and applied in 1936 by Lord Atkin in *Trade Indemnity Co Ltd v Workington Harbour and Dock Board*,[21] when dealing with the issue of whether a new, unpredicted loan to a contractor building a dock was covered by the terms of a guarantee which included language to the effect that the guarantor should not be 'released or discharged … by any agreement … for any alteration in or to the said works or the contract'.

According to Lord Atkin:

> '…The words "any arrangement … for any alteration in or to the said works or the contract" are very wide. Probably they would have to be cut down so as not to include such changes as have been suggested as substituting a cathedral for a dock, or the construction of a dock elsewhere, or possibly such an enlargement of the works as would double the financial liability. An author of great authority [*Rowlatt on Principal and Surety* (2nd edn, 1926) p 118], happily still with us, suggests that such words only relate to alterations "within the general purview of the original guarantee"…'

That passage is the (surprisingly modern) judicial basis for the "purview doctrine".

Because Lord Atkin was there speaking of an "anti-avoidance" wording, the "purview doctrine" is sometimes stated as simply being a rule that "even very wide words in a guarantee's anti-avoidance clause may not cover something that goes beyond the parties' reasonable contemplation".[22] However, that ignores the true meaning of the textbook passage explained above. Properly analysed (and as developed in later cases),[23] the "purview doctrine" can affect the answer to both questions set out above: not just whether the wording of the guarantee is effective to prevent the variation from discharging the guarantor, but also whether the varied contract is in any event within the scope of the guarantee.

The problem

On one view, the "purview doctrine" is simply a principle of interpretation, construing apparently wide words by reference to the scope of what would have been in the parties' minds at the time when they used them. That seems to be the context in which Lord Atkin was using the passage from *Rowlatt* in the *Trade Indemnity* case.[24] If that is the correct analysis of the doctrine, it ought (at least in theory) to be possible to draft around it by using sufficiently clear words in the original guarantee.

However, there are *dicta* in more recent judgments (including in the Court of Appeal) suggesting that the doctrine is instead "a doctrine of law, reflecting the equitable concerns of *Holme v Brunskill*, however much it may be influenced by matters of interpretation".[25] For the reasons already explained, these *dicta* may result from a mis-understanding of the passage in *Rowlatt*

from which the doctrine stems. However, they are of high authority.

For practical purposes, transaction lawyers must therefore presently work on the assumption that the effects of the doctrine cannot wholly be avoided, even by the most careful drafting.

This all gives rise to a considerable degree of uncertainty, and a real risk that any substantial restructuring of the original underlying agreement without either obtaining express agreement from the surety that the old guarantee will extend to the new facilities, or executing a fresh guarantee, may leave the creditor unsecured.[26]

PRACTICALITIES

The choices

There are, in practice, only three ways to ensure that that a guarantee remains fully effective following a variation of the underlying obligation:

- Ensure that both the provisions of the original guarantee defining the extent of the liability guaranteed, and those which protect against automatic discharge, are sufficiently widely drafted that the varied contract plainly comes within the general purview of the original guarantee and so remains effective;
- Obtain a written confirmation from the guarantor, stating that the existing guarantee will remain in force and will extend to all the obligations of the borrower(s) under the varied facility;
- Take a fresh guarantee.

The choice of which of these to rely on involves an exercise of judgment. If there is doubt about the first, then the second or third should be followed. The choice between the second and the third is likely to be dictated by the nature of the security and of the proposed variation, by practical considerations, and by comparative expense.

The wording of the original guarantee

The first of these ways involves considering the wording of the original guarantee, to see whether what is proposed clearly falls within its general purview.

Unfortunately, the decided cases offer more of a scatter diagram than any coherent thread of principle as to what can safely be so regarded. The touchstone seems to be whether the proposed variation is "a true variation of an existing obligation" or "the entering of what is in fact a different obligation even though it may purport to be no more than a variation".[27] It is not easy to tell which is which. I can offer only the following tentative suggestions by way of pointer:

- It seems (per Chadwick LJ in *Triodos*[28]) that a new agreement which simply reschedules the existing indebtedness can in principle fall within the general purview of a guarantee containing suitable coverage and anti-avoidance clauses.
- It also seems (per Bingham J in *The 'Nefeli'*[29]) that further lending can in principle fall within the general purview of such a guarantee, if it is expressly provided for in the original agreement, for example by way of option or other right.
- It also seems (per Rix LJ in *CIMC Raffles*[30]) that some limited increase in the extent of the guaranteed liability can in principle fall within the general purview of such a guarantee, even if it is not expressly provided for in the original agreement.[31]
- On the other side of the line, it seems that any very significant or fundamental change in the nature, purpose, terms or amount[32] of the lending (not expressly and specifically contemplated by the original agreement) may well be held to fall outside the general purview of the original guarantee.[33]

The LMA Template

In response to *Triodos*, the LMA revised its template agreements to try to draft round the "purview doctrine". For example, the LMA *Senior Multicurrency Term and Revolving Facilities Agreement for Leveraged Acquisition Finance Transactions (Senior/Mezzanine)*[34] (the LMA Template), does its best to include even significant variations within the general purview of the original guarantee in clause 24 (Guarantee and Indemnity).

The obligations guaranteed by clause 24.1 are defined by reference to the original transaction, rather than in an "all monies" form. However, the wording goes on expressly to contemplate the possibility that that original transaction will be varied. The obligations are initially identified as obligations (under clause 24.1(a)) 'under the *Finance Documents*' and (under 24.1(b), 'as if it was the principal obligor') 'due under or in connection with any *Finance Document*'. The definition of "Finance Document" in clause 1.1 (Definitions) is also specific: but clause 1.2 (a)(iv) (Construction) then provides that:

> 'A "Finance Document"… is a reference to that Finance Document … *as amended, novated, supplemented, extended or restated*…' [35]

Prima facie, therefore, the obligations guaranteed under clause 24.1 will include those arising under Finance Documents which have been amended, novated, supplemented, extended or restated.

This extension in the definitions is reinforced by the statement of "Guarantor Intent" in clause 24.5, under which each Guarantor expressly confirms that: '…it intends that this guarantee shall extend from time to time to *any (however fundamental) variation, increase, extension or addition of or to any of the Finance Documents* and/or any facility or amount made available under any of the Finance Documents for the purposes of or in connection with any of the following…'[36]

This express declaration as to the parties' intentions is plainly admissible as an aid to construction of the guarantee contained in clause 24.1 (Guarantee and Indemnity). It may also bring into play the operation of the doctrine of contractual estoppel,[37] preventing the guarantor from seeking to contradict the terms of this express contractual statement as to its intention.

Clause 24.4 (Waiver of Defences) contains a similarly widely worded waiver of defences, which purports to permit (inter alia) the granting of time, the release of any parties, the failure to take up or the release of security, and

> '(e) any amendment, novation, supplement, extension restatement (however fundamental and whether or not more onerous) or replacement of a Finance

Spotlight

Document or any other document or security including, without limitation, any change in the purpose of, any extension of or increase in any facility or the addition of any new facility under any Finance Document or other document or security.'

Another relevant feature of the LMA Template is that significant variations are expressly provided for in clauses dealing with the underlying liability. Clause 30 (Changes to the Lenders) expressly contemplates that an Existing Lender may assign any of its rights or novate its rights and obligations under the Finance Documents to a New Lender. Clause 32 (Changes to the Obligors) expressly contemplates the addition of an Additional Borrower, and the Resignation of a Borrower; and Clause 42 (Amendments and Waivers) expressly contemplates the amendment or waiver of any of the terms of the Finance Documents, and provides (subject to the terms of the Intercreditor Agreement) for how such changes shall be agreed on behalf of the Lenders.

Together with the overall commercial context (such changes being common in syndicated lending), these provisions help to make it clear that the possibility of such changes was within the contemplation of the parties at the time the guarantee was given.

There are some curiosities in the drafting of standard form. For example, the extended definition of "Finance Document" in clause 1.2 does not use the word "replace", although that word appears in clause 24.4. It may therefore, perhaps, be that the replacement of a particular Finance Document will not have the effect of discharging the Guarantor, but the guarantee will not extend to liabilities under that replacement Finance Document.

It is nevertheless my view an English court would be likely to interpret the language used in the LMA Template as sufficient to ensure that the guarantee contained in clause 24.1 (Guarantee and Indemnity) will continue to be effective despite most routine variations to the terms of the Finance Documents.

Regrettably, however, given the uncertainties described above, it would not be prudent to assume that even this very wide wording will be sufficient to ensure that the guarantee covers every possible variation.

- The wording may not be sufficiently wide to cover cases where the variation involves (whether in theory or in practice) the *replacement* of an underlying obligation. As pointed out above, the extended definition of "Finance Document" in clause 1.2 (Construction) uses the word "re-state" but not the word "replace", although "replace" appears in clause 24.4 ('Waiver of Defences').
- The wording may not be sufficiently wide to cover anything done for a purpose outside the list in clause 24.5 (Guarantor Intent).
- The wording may not be sufficiently wide to cover any changes made to an extent or in a way not provided for in clauses 30, 32 or 42.
- Finally, it may be that a court would say that there is a point beyond which "any (however fundamental) variation, increase, extension or addition of or to any of the Finance Documents" stops being just that, and becomes "something that goes beyond the parties' reasonable contemplation" – a point where a "true variation of an existing obligation" becomes "the entering of what is in fact a different obligation, even though it may purport to be no more than a variation". It is not possible to predict with precision where a court would say that that point comes in any given situation. That will always be a question of fact and degree. The size of the increase in the amount borrowed, the extent and nature of any amendments to the Facility Agreement, the identity of the parties etc are all relevant circumstances. It is simply not possible to lay down any bright-line test.

Even so, it seems to me that two things can be said with reasonable confidence:

- First, in cases where both the nature and size of the variation are expressly contemplated by the original Finance Documents – for example, where the borrower is expressly given an option to request a specified amount of further borrowing– a court is very likely to hold that that variation falls within the purview of the guarantee in clause 24.1.[38]
  - So, for example, in my view the exercise of an accordion option would probably be held by an English court to be covered by the guarantee in clause 24.1 of the LMA Template. It does not seem to me to matter in principle whether the uncommitted facility is capped at a fixed amount, or by reference to a formula. What matters is that the possible further lending is expressly and specifically contemplated in the original agreement.
  - Given the very wide wording of clause 24 of the LMA Template, it does not necessarily follow that further lending even above the "accordion" element would automatically be held to fall outside the general purview. It will depend upon the terms of the transaction documents, and the circumstances of each transaction. The statement of Guarantor Intent in clause 24.5 of the LMA Template, for example, expressly contemplates an increase in the amount to be lent, and that amount already includes the "accordion" element. It would, however, be prudent to be cautious in such circumstances. It may be easier in such cases to argue that the parties did not contemplate an increase in lending beyond the specified extension amount.
- Second (and in contrast), it would be prudent to take an express confirmation or to retake security, as appropriate, and not simply to rely upon the wide wording of clause 24.1:
  - when the variation involves anything that might plausibly be described as a replacement (rather than a re-statement) of the original facility or finance documents – for example, where a new and additional tranche is advanced by a new lender;[39]

- where the purpose of the new facility is not one of those expressly and specifically contemplated in clause 24.5; or
- where changes are made to an extent or in a way not provided for in clauses 30, 32 or 42 or elsewhere in the original Finance Documents.

Beyond those extreme cases, it will in every case be a question of judgment: and it will usually be wise to err on the side of caution, particularly where the proposed variation involves very significant or fundamental changes to the terms of the underlying obligation.

When considering any particular transaction, it will, of course, be necessary to consider the particular documentation concerned, and not to assume that its wording is identical with the LMA Template or that used in any previous transaction.

The effect of a written confirmation

The "more cost-effective alternative" to re-taking security that is suggested by the editors of Andrews and Millett is a written confirmation. This, depending on its terms, can take effect in law in one or more of four ways: as a consent by the guarantor to the variation; as an estoppel; as a variation to the existing guarantee; and/or as a new guarantee.

As a consent

Since the rule in *Holme v Brunskill* applies only to variations to which the guarantor does not consent, a simple consent given by or on behalf of the guarantor will usually suffice to exclude the operation of that rule. The burden of proof is on the creditor to show that there has been such a consent, but if the creditor can discharge this onus, the guarantor's liability will be effectively preserved despite the variation.[40] A simple board resolution by the guarantor company can take effect as such a consent.

However, such a simple consent may well not work where the contract, as varied, does not remain within the general purview of the original guarantee, since it does not address the question of whether the scope of the guarantee is wide enough to cover the amended obligations. For that, something more is required.

As an estoppel

If, instead of a simple consent, a specific written confirmation is taken from the guarantor at the time of the variation, both that the existing guarantee remains in force, and that it extends to all the obligations of the borrower(s) under the varied facility, this may operate both as a consent, and as a representation founding an estoppel concerning the scope of the guarantee.

As a contract

Unfortunately, to the extent that such a confirmation seeks to re-write the terms of the original guarantee, its effectiveness may be questionable,[41] unless it takes the form of a written agreement supported by consideration[42] and/or under seal, which can then take effect either as a contractual estoppel[43] (preventing the guarantor from seeking to contradict the terms of its express contractual statement) or as a contractual variation to the existing guarantee, or as a new guarantee.

Any such agreement of confirmation would, of course, need to comply (like any other contract) with any relevant requirements relating to the guarantor's corporate capacity, to formalities, and to the authority of the signatories. It would also need to be carefully worded, since it may equally be subject to the principles of strict construction discussed above. It may also perhaps be subject to the same limited duty of disclosure as a new guarantee,[44] and to such general law matters as mistake, misrepresentation, duress, undue influence, unconscionability and the law of insolvency.

However, subject to these considerations, there is no reason why such an agreement of confirmation should not be effective in accordance with its terms. If properly worded and duly signed, it should satisfy the requirements of the Statute of Frauds, as it will (by referring to the existing guarantee) contain all the terms of the guarantee, and will be signed by the party to be charged. No other rule or principle of the law of guarantees prevents commercial parties from agreeing by fresh contract whatever they choose to agree.

But such a confirmation may itself be a transaction for the purposes of the provisions of the Insolvency Act 1986 relating to the avoidance or setting aside of transactions: and there may also be complications where "proprietary security" is concerned. Inter alia:

- There is no general provision in the Companies Act 2006 for registering (or delivering a certified copy of) amendments to registered charges:[45] but the company must keep available for inspection a copy of every instrument effecting any variation or amendment of such a charge.[46]
- Where the property comprised in the charge includes real property, any instrument amending or varying the charge must nevertheless be registered at the Land Registry,[47] and the instrument creating it may need to satisfy the formal requirements of the Law of Property (Miscellaneous Provisions) Act s 2.[48]
- To the extent that the variations go beyond true variations of the existing obligation, so that the agreement of confirmation involves the creation by a company of a new charge over any of its assets:
  - That new charge is likely to be registerable under the Companies Act 2006 Part 25; and
  - To the extent that such a new charge includes real property, it is also likely to be registerable at the Land Registry as a new charge.
- Issues of priority may arise.[49] ■

1 English law typically divides security into two classes: "personal security", and "proprietary security". The security given by a guarantee is usually classed as "personal security", because a guarantee does not of itself provide the creditor with recourse to any specific property. "Proprietary security", by contrast, involves the collateral provider in granting to the creditor some form of proprietary interest in the debtor's property (the form of proprietary interest varying

according to the type of security given). See generally Bridge and others *The Law of Personal Property* (1st edn, 2013) at 7-005; Beale and others, *The Law of Security and Title-Based Financing* (2nd edn, 2012) at 1.03.

2 For many purposes, English law regards a person who simply grants an interest in their property as security for the performance of another person's obligations, without themselves undertaking any personal obligation, as a guarantor: see eg *Re Conley, ex p Trustee v Barclays Bank Ltd*; *Re Conley, ex p Trustee v Lloyds Bank Ltd* [1938] 2 All ER 127 at 131 (CA), per Sir Wilfrid Greene MR. In general, the law of guarantees applies to such third party proprietary security just as it does to third party personal security in the form of a guarantee. So when, in what follows, I describe the principles applicable to guarantees, they should be understood as applying also to such third party proprietary security.

3 (1878) LR 3 QBD 495.

4 See *Chitty on Contracts* (32nd edn, 2015) Vol II at 45–104; Andrews and Millett, *Law of Guarantees* (7th edn, 2017) at 9-023 to 9–028; and O'Donovan and Phillips, *The Modern Contact of Guarantee* (3rd English edn, 2016, by Courtney and Phillips) at 7–01 to 7-73.

5 *Trafalgar House Construction (Regions) Ltd v. General Surety & Guarantee Co Ltd* [1996] AC 199 at 208C, per Lord Jauncey of Tullichettle. For a more recent application of this principle, see eg *Liberty Mutual Insurance Co (UK) Ltd and another v HSBC Bank plc* [2002] EWCA Civ 691.

6 *Eastern Counties Building Society v Russell* [1947] 1 All ER 500 at 503; citing *Bacon v Chesney, Stamford, Spalding & Boston Banking Co v Ball* (1862), 4 De G F & J 310 and *Blest v Brown* (1862) 4 De G F & J 367, per Lord Westbury LC. For more modern statements of this principle, see eg *General Surety and Guarantee Co Ltd v Francis Parker Ltd* (1977) 6 BLR 16 at 21, per Donaldson J; *National Bank of New Zeakland v West* (1978) 2 NZLR 451, PC; and *Coghlan v SH Lock (Australia) Ltd* [1988] LRC (Comm) 492, PC, at 499, per Lord Oliver.

7 'It is clear that the well-known modern principles of construction … do indeed apply to contracts of guarantee just as they do to other contracts': *Harvey v Dunbar Assets plc* [2013] EWCA Civ 952, [2013] BPIR 722 at [28], per Gloster LJ. See also *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep 429, CA, at [12]–[14] and [27]–[28]; and *National Merchant Buying Society Ltd v Bellamy* [2013] EWCA Civ 452, {2013] 2 All ER (Comm) 674 at [39].

8 See the discussion in *Meritz Fire and Marine Insurance Co Ltd v Jan de Nul NV* [2010] EWHC 3362 (Comm), [2011] 1 All ER (Comm) 1049 at [55]–[61], per Beatson J (affirmed by the Court of Appeal, but without discussion of this point, at [2012] 1 All ER (Comm) 182).

9 Footnotes as in the original; emphasis added to the text. See now Moss and Marks, *Rowlatt on Principal and Surety* (6th edn, 2011) at 4-72.

10 All releases come under one or other of these heads: eg *General Steam Navigation Co v Rolt* (1865) 6 CB (NS) 550 under the former; and *Hollier v Eyre* (1840) 9 C&F 1, *Mayhew v Crickett* (1818) 2 Swanst 185, and *Smith v Winter* (1838) 4 M&W 454 under the latter.

11 See *Pybus v Gibb* (1856) 6 E&B 902 at 911. Cf *Kitson v Julian* (1855) 4 F&B 854; *Leathley v Speyer* (1870) LR 5 CP 595. The effect of the Statute of Frauds must also be borne in mind.

12 (1856) 6 E&B 902 at 911.

13 (1855) 4 F&B 854.

14 (1870) LR 5 CP 595.

15 See *Goss v Lord Nugent* (1833) 5 B & Ad 58; *Stowell v Robinson* (1837) 3 Bing N C 928; *Stead v Dawber* (1839) 10 Ad & E 57; *Marshall v Lynn* (1840) 6 M & W 109; and *Giraud v Richmond* (1846) 2 CB 835; applied by the Divisional Court in *Williams v Moss' Empires* [1915] 3 KB 242 and by the Court of Appeal in *Morris v Baron* [1918] AC 1.

16 *Morris v Baron* [1918] AC 1, HL; *British and Benningtons Ltd v NW Cachar Tea Co Ltd* [1923] AC 48, HL.

17 See *United Dominions Corporation (Jamaica) Ltd v Shoucair* [1969] 1 AC 340 at 349, PC, per Lord Devlin.

18 The case law in this area has mainly arisen from situations in which it has been argued that the Statute of Frauds or similar statutory provisions make the intended agreement unenforceable or void. In consequence, 'the niceties of legal reasoning which appear in this branch of the law are not easy to justify': *Samuel v Wadlow* [2007] EWCA Civ 155 at [35].

19 See *Samuel v Wadlow* [2007] EWCA Civ 155; and *British Broadcasting Corporation v Kelly-Phillips* [1998] 1 All ER 845, CA.

20 Edited by Rowlatt's third son, John Rowlatt, later First Parliamentary Counsel to the Treasury.

21 [1937] AC 1 at 21.

22 *CIMC Raffles Offshore (Singapore) Limited v Scahin Holding SA* [2013] EWCA Civ 644, [2013] 2 All ER (Comm) 760 at [42], per Sir Bernard Rix.

23 Eg *Polaris Steamship Co SA v A Tarricone Inc (The 'Nefeli')* [1986] 1 Lloyd's Rep 339; *Melvin International SA v Poseidon Schiffahrt GmbH (The 'Kalma')* [1999] 2 All ER (Comm) 761; *Triodos Bank NV v Dobbs* [2005] EWCA Civ 630, [2005] 2 Lloyd's Rep 588; *Sea Emerald SA v. Prominvestbank Joint Stockpoint Commercial Industrial and Investment Bank* [2008] EWHC 1979 (Comm), [2008] 1 Lloyd's Law Rep Plus 96; and *CIMC Raffles Offshore (Singapore) Limited v Scahin Holding SA* [2013] EWCA Civ 644, [2013] 2 All ER (Comm) 760.

24 His comment was in any event *obiter*, since the actual decision was that there was no variation, but only independent lending not within the scope of the guarantee.

25 *CIMC Raffles Offshore (Singapore) Limited v Scahin Holding SA* [2013] EWCA Civ 644, [2013] 2 All ER (Comm) 760 at [51], per Sir Bernard Rix. See also *Triodos Bank NV v Dobbs* [2005] EWCA Civ 630, [2005] 2 Lloyd's Rep 588 at [18], per Longmore LJ; and *Sea Emerald SA v. Prominvestbank Joint Stockpoint Commercial Industrial and Investment Bank* [2008] EWHC 1979 (Comm), [2008] 1 Lloyd's Law Rep Plus 96 at [142], per Andrew Smith J.

26 See Andrews and Millett, *Law of Guarantees* (7th edn, 2017) at 4-026; and O'Donovan and Phillips, *The Modern Contract of*

Biog box
Richard Salter QC practises from 3 Verulam Buildings, where he specialises in commercial litigation and financial law. Richard also teaches financial law to postgraduate students at the University of Oxford, where he holds the title of Visiting Professor. Email rsalter@3vb.com

Guarantee (3rd English edn, 2016, by Courtney and Phillips) at 5-069.

27 *Triodos Bank NV v Dobbs* [2005] EWCA Civ 630, [2005] 2 Lloyd's Rep 588 at [16], per Longmore LJ.

28 *Triodos Bank NV v Dobbs* [2005] EWCA Civ 630, [2005] 2 Lloyd's Rep 588 at [33]. Cf *Urban Ventures v Thomas* [2016] EWCA Civ 30, [2016] 2 P&CR DG2.

29 *Polaris Steamship Co SA v A Tarricone Inc (The 'Nefeli')* [1986] 1 Lloyd's Rep 339 at 346.

30 *CIMC Raffles Offshore (Singapore) Limited v Scahin Holding SA* [2013] EWCA Civ 644, [2013] 2 All ER (Comm) 760 at [63].

31 Cf *Moat Financial Services Ltd v Wilkinson* [2005] EWCA Civ 1253, where the Court of Appeal seems to have thought that merely lending more money to a debtor over and above the amount originally borrowed and guaranteed by the guarantor would not be a material variation releasing the guarantor, even in the absence of an anti-avoidance clause. *Sed quaere*. *Triodos* does not seem to have been cited.

32 Doubling the liability or materially changing the purposes of the lending were among Lord Atkin's examples in the *Trade Indemnity* case.

33 'One can perhaps imagine changes falling short of a novation which would yet be so fundamental that they could not properly be described as a variation at all. I will not attempt to say where the line is to be drawn': *Finance Group plc v Beechmanor Ltd* (1993) 67 P & CR 282, per Lloyd LJ, cited by Longmore LJ in *Triodos* at [17].

34 Version published on 7 August 2027.

35 Emphasis added.

36 Emphasis added.

37 See the cases cited in footnote 43 below.

38 'In such a case … there is a guarantee of a contract whereby the terms and obligations may change, rather than of a fixed obligation … [T]he guarantee must make it clear that it relates to and encompasses whatever obligations may from time to time exist under the principal transaction, rather than a fixed obligation of the principal contract before the permitted variation takes place': O'Donovan and Phillips, *The Modern Contact of Guarantee* (3rd English edn, 2016, by Courtney and Phillips) para 7-028.

39 See Bethell-Jones 'How far can you stretch a mortgage?' [1998] JIBL 287: 'I think that what is being done [in such a case] is more than an "amendment". It is the replacement of one facility by another, however carefully it may have been worded as an amendment. I can see that the point is arguable, but if I was acting for the Agent – or for any of the Banks – I would be extremely unhappy about doing this and would not give a clean sign off on the validity of the security.'

40 O'Donovan and Phillips, *The Modern Contract of Guarantee* (3rd English edn, 2016, by Courtney and Phillips) at 7-56.

41 For example, according to the editors of O'Donovan and Phillips, *The Modern Contract of Guarantee* (3rd English edn, 2016, by Courtney and Phillips) at 5-069, 'The potential difficulty in relying on a written undertaking from the guarantor at the time of the restructuring … is that it can only be effective as a legally binding variation of the original guarantee, so that it must either be in the form of a deed or supported by consideration. The undertaking cannot be used simply as a tool of construction to extend the scope of the original guarantee because of the rule that subsequent negotiations cannot be used to interpret a prior concluded agreement.'

42 'If the consideration is the entry into the new facility arrangements, the guarantor's undertaking that the guarantee will apply to it must be executed prior to (or at least at the date of) the execution of the facility agreements. Otherwise, the consideration will fail as past consideration, and the variation will be ineffective': O'Donovan and Phillips, *The Modern Contract of Guarantee* (3rd English edn, 2016, by Courtney and Phillips) at 5-069.

43 See *Peekay Intermark v Australia and New Zealand Banking Group* [2006] EWCA Civ 386, [2006] 1 CLC 582; and *Springwell Navigation Corp v JP Morgan Chase Bank (formerly Chase Manhattan Bank)* [2010] EWCA Civ 1221, [2010] 2 CLC 705. This doctrine is not without its critics: see eg McMeel, "Documentary fundamentalism in the senior courts: the myth of contractual estoppel'"(2011) LMCLQ 285; Trukhtanov, "The Limits of Contractual Estoppel" [2012] LMCLQ 359; Braithwaite "The origins and implications of contractual estoppel" (2016) 132 LQR 120; and Davies and Hare, "Limits of rescission for misrepresentation" [2016] JIBFL 387.

44 See *Royal Bank of Scotland v Etridge* (No. 2) [2002] 2 AC 773 at [81] and [188]; *North Shore Ventures Ltd v Anstead Holdings* [2011] EWCA Civ 230, [2012] Ch 31; and *Deutsche Bank AG v Unitech Global Ltd* [2016] EWCA Civ 119.

45 The provisions in the Companies Act 2006 s 859O for "Notification of addition to or amendment of charge" apply (in summary) only where the amendment involves adding a negative pledge clause or changing the priority of the charge.

46 Companies Act 2006 s 859P.

47 See The Land Registration Rules 2003 rule 113.

48 Where an attempted variation of a mortgage is ineffective because it fails to comply with the formal requirements of the Statute of Frauds or of the Law of Property (Miscellaneous Provisions) Act 1989, the original mortgage stands: see Falcon Chambers and Morgan, *Fisher and Lightwood's Law of Mortgage* (14th edn, 2014) para 10.6.

49 For the limited right of a mortgagee to "tack" further advances, see Falcon Chambers and Morgan, *Fisher and Lightwood's Law of Mortgage* (14th edn, 2014) paras 38.9 to 38.22.

Further Reading:

- Satisfaction guaranteed? [2014] 5 JIBFL 293.
- Equity set alongside freedom of contract: Deutsche Bank Unitech, round two [2016] 7 JIBFL 393.
- LexisPsl: Banking & Finance Q&As: How can I ensure security and guarantees remain effective on a refinancing?