

ENGLAND AND WALES / JUDGMENT

Beck Interiors Ltd v Russo

COURT
IN THE HIGH COURT OF JUSTICE

BEFORE

Between
MR JUSTICE RAMSEY
BECK INTERIORS LIMITED
and
DR MARIO LUCA RUSSO

Claim No: HT-09-264
Date: 29 JULY 2009
Claimant
Defendant
Tape transcription by Exigent Group Limited
44 Carnaby Street, London W1F 9PP

(Judgment approved by Mr Justice Ramsey 28/10/2009)

Source: caselaw.nationalarchives.gov.uk · Research copy typeset by Esheria. Not court-issued or certified.

Source record

Neutral Citation Number: [2009] EWHC 3861 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Before:

Between
MR JUSTICE RAMSEY
BECK INTERIORS LIMITED
and
DR MARIO LUCA RUSSO

Claim No: HT-09-264
Date: 29 JULY 2009
Claimant
Defendant
Tape transcription by Exigent Group Limited
44 Carnaby Street, London W1F 9PP

(Judgment approved by Mr Justice Ramsey 28/10/2009)

JUDGMENT

Exigent Group Limited www.exigent-global.com MR JUSTICE RAMSEY:

Introduction

1. This is an application for Summary Judgment under CPR Part 24 by the Claimant, Beck Interiors Limited (“Beck”) against the Defendant, Dr Mario Luca Russo (“Dr Russo”), in which Beck seeks sums under a guarantee (“the Guarantee”) provided by Dr Russo in relation to sums due under a contract (“the Contract”) between Beck and Dr Russo MediSpa Ltd, formerly The Rejuvenation Spa Ltd (“the Company”). 2. 3. 4. 5. 6. In these proceedings, under the Guarantee, Beck seeks to recover £413,125.00 plus interest, together with £4,939.72 in respect of the Adjudicators’ fees in relation to an Adjudicator’s decision in respect of sums due under the Contract. Alternatively, Beck seeks to recover that amount as a sum due under the Contract. In previous proceedings before this Court, Beck sought to recover these sums from the Company, but because the Company issued a notice of intention to appoint an Administrator and Beck’s application for permission to continue those proceedings under Schedule B1 of the Insolvency Act 1986 was refused, those proceedings were and remain stayed. On 26 June 2009 Beck commenced these proceedings and directions were given for an expedited hearing of this Part 24 Application which arises, at least in part, under an Adjudicator’s decision. Mr Justin Mort, who appears on behalf of Beck, submits that the guarantee covers the Company’s liability under the Adjudicator’s decision; alternatively Beck’s claim to be paid under Clause 13.2 of the Contract and that Beck is entitled to Summary Judgment. Geraldine Andrews QC and Paul Buckingham, on behalf of Dr Russo, submit that they have real prospects of successfully defending these proceedings on the basis that: (a) The guarantee was discharged because the contract was varied in material respects in that Beck granted the company further time to pay and Beck carried out additional work in the form of variations. The guarantee was given on condition that Beck would return to site on 5 January 2009 to complete the outstanding and defective work at level 50 and Beck failed to comply with that condition. The Adjudicator’s decision is not binding on Dr Russo in relation to his obligations under the guarantee and the sums are not properly due under Clause 13.2 of the Contract and, in any event, the company has an entitlement to cross-claim for damages for defective or incomplete work. (b) (c) 7. Before I deal with those contentions it is necessary to set out some of the background as it appears in the evidence on this application.

Background

8. Dr Russo is the 90% shareholder and sole director of the Company which decided to set up a Spa at unit 2035 in the new Westfield Shopping Centre in London. Exigent Group Limited www.exigent-global.com 9. 10. 11. The Contract was formed by a letter of intent dated 28 October 2008, from the Company to Beck, which contained Appendices 1-4. That letter of

intent was accepted and acknowledged by Beck on 30 October 2008. At Appendix 4 there was a payment schedule which set out sums to be paid on particular dates. By 18 December 2008, Beck had paid £90,000 out of the total sum due of £117,500.00 (£100,000.00 plus 17.5% VAT). A further £10,000.00 was paid on 22 December 2008. This left a sum of £17,500.00 due. On 23 December 2008 there were meetings between Dr Russo and Mr Vaughton and/or Mr Kent of Beck, or telephone conversations. Dr Russo's evidence, in paragraphs 13-15 of a witness statement in the Adjudication, was as follows: "Mr Kent said that if I was to personally guarantee the payments due to Beck from Medispa, then he would ensure that his workers returned to site on 5 January, in order to complete the works but that, in any event the ground floor would be in a state that I could trade out of over the Christmas period by the end of the day. In the absence of a better offer and in view of my desire to have the ground floor completed as soon as possible, I agreed. Martin Anderson was present during these discussions. Martin Anderson and I left the site and returned at 3pm. We were asked again to return in two hours time, at 5pm. When we returned at 5pm, Mr Kent had prepared a personal guarantee for me to sign which I did, but strictly on the basis that Beck returned to site on 5 January in order to complete the defective works. We were asked once again to return in 2 hours time. I asked Mr Kent whether he thought the unit would be ready for hand-over in 2 hours and he said yes." 12. In a second witness statement, at paragraph 19, Dr Russo said this: "I cannot specifically recall speaking with Mr Vaughton on the telephone on 23 December about the guarantee although I note the email that he sent to me on 23 December."

13. Mr Vaughton says, in paragraph 7 of his second witness statement in these proceedings: "... the agreement that I reached with Dr Russo on 23 December 2008, as referred to in my email of that date, was that if Dr Russo agreed to provide the personal guarantee, Beck would abandon its existing entitlement to suspend work in respect of Dr Russo MediSpa Limited's previous payment defaults that would have otherwise taken effect on 24 th December in the event of continued non-payment. It was that (general) right to suspend work that we gave up as part of the agreement made on 23 December 2008. The date of 5 January 2009 was simply the first working day after the Christmas shut-down in the industry. Exigent Group Limited www.exigent-global.com On 23 December 2008 Beck was not promising to return on 5 January 2009 in order to complete outstanding works to level 50 (i.e. the ground floor). ..." 14. The email referred to in those witness statements is in the following terms – it is dated 23 December 2008 and timed at 16:16 hours: "Following our conversation today. Beck confirms that if we receive the due payment of £17,500 today. If you agree that we shall receive payment Number three in full inc VAT on or before 7 January 2009. If you agree that we shall receive payment number four including variations and VAT etc within 14 days of completion for staircase (1st floor fit-out will not be complete). If you agree that we shall receive all subsequent payments on the dates stipulated in the revised schedule in full including variations and VAT etc. If we receive prior to Completion and handover today your personal guarantee to underwrite the balance of the payments due on this contract as per the above proposal, by means of signing and handing to us a witnessed and notarized copy of the

attached letter, which must be personally addressed by your good self. We shall handover the ground floor area certified and complete sufficient to trade and shall return on 5 January to complete balance of works as contractually obliged. All other T&C to remain. ” 15. The terms of the Guarantee, which were attached, were as follows: “This letter confirms that I, Dr Mario L Russo, of <personal address> hereby personally guarantee payment of all monies that are due or will become due to Beck Interiors Limited, under the contract dated 28th October 2008 entered into between The Rejuvenation Spa Limited and Beck Interiors Limited for the aforementioned project. The attached schedule hereby sets out all monies due in the sum of £1,040,032.24 plus VAT of which £175,000.00 plus VAT has already been paid. The balance of £865 032.24 plus VAT is the subject of this personal guarantee.” 16. The Guarantee was signed and dated by Dr Russo and witnessed by Mr Anderson, the Employers’ Representative under the contract. The Guarantee attached the payment schedule which was an amended version of Appendix 4 to the Contract. It provided for £50,000.00 to be paid by 14 January 2009, sums of £325,000.00 and £125,000.00 to be paid by 18 February 2009 and various other sums to be paid on other dates, making the same total sum as in the original Appendix 4 of £973,500.00. It also referred to contract variations and included sums payable for those variations on 18 February 2009. 17. The Guarantee covered not just the sum of £973,500.00 but also a total of £66,532.24 for variations, making a total of £1,040,032.24, referred to in the Guarantee. Exigent Group Limited www.exigent-global.com 18. 19. 20. 21. 22. Subsequently, a meeting took place on 20 January 2009 at which a new payment schedule in the form of Appendix 4 was agreed. That schedule provided that whilst £325,000.00 was still due by 18 February 2009 and £125,000.00 was still due by 27 February 2009, subsequent dates were changed, as was the date for “PC” (Practical Completion), which was changed to 14 April 2009. In addition, the sum for variations changed to £142,675.16, so that the total sum now due was £1,116,175.16. By a notice dated 20 March 2009 the Company gave notice of termination under Clause 13 of the Contract, with termination taking place on 27 March 2009. Under clause 13.2 of the Contract, on such termination, the Company agreed as follows: “...to pay all payments listed on Appendix 4- Payment Schedule, attached hereto, up to and including the payment immediately after the date of any cancellation (without any withholding of retention).” As a result of the termination, Beck claimed payment of sums due up to 27 March 2009 in the sum of £850,000.00, but did not claim any further sum for contract variations. The total sum claimed to be due was therefore £850,000.00 plus £133,125.00 for contract variations, giving a total of £983,125.00 plus VAT. As payments of £570,000.00 had been made, the balance claimed was £413,125.00. Beck referred their claim for £413,125.00 to adjudication under the express adjudication provisions under the Contract and by a decision dated 9 May 2009 the Adjudicator held that the Company was liable to Beck for £413,125.00 plus £4,939.72 for his fees. As stated above, the Adjudicator’s decision was not paid and enforcement proceedings were brought against the Company but these were stayed under the insolvency provisions. At the hearing of the enforcement proceedings when the unsuccessful application to lift the stay was made, the Company indicated they had no defence to the claim for £413,125.00 in relation to sums due pursuant to the Adjudicator’s decision. The inability of Beck to recover the sum from the Company led to

these proceedings against Dr Russo under the Guarantee. This Application 23. On this application I have received three witness statements from Ms Kate Louise Bowen from Curry Popeck, Dr Russo's solicitors. The exhibits to those witness statements include, in particular, two witness statements of Dr Russo. I also have three witness statements from Mr Vaughton, the Managing Director of Beck. 24. 25. I now turn to consider the grounds relied on by Dr Russo in opposition to this application under Part 24: Discharge of the guarantee. The principle established in *Holme v Brunskill* (1878) 3 QBD 495 is that if there is any material variation in the terms of the principal contract that will discharge the surety, unless the surety consents to it. At 505 Cotton LJ said this: *Exigent Group Limited* www.exigent-global.com "The true rule in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without enquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court, will not in an action against the surety, go into an enquiry as to the effect of the alteration, or allow the question of whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable, notwithstanding the alteration, and that if he has not consented he will be discharged." 26. 27. 28. In this case Dr Russo relies on the variation of the Schedule on 20 January 2009 and the fact that after 23 December 2008, further "contract variations", which Dr Russo says were material variations, were instructed by Mr Anderson. The question is whether it is self-evident that the alteration is unsubstantial or one which cannot be prejudicial to the surety. [2004] In *Marubeni Hong Kong and South China Ltd. v 2 Lloyd's Rep* 198 at 227, Cresswell J considered the position in relation to the giving of time. He said this at [214] to [216]: *Government of Mongolia* "214. A surety is discharged when the creditor, without the surety's assent by binding agreement, gives time to the debtor. By giving time to the debtor, the creditor deprives the surety of the right to use the name of the creditor to sue the debtor. If this right is suspended for an hour or a day, this discharges the surety: *Polak v Everett* 1876 1 QBD 669 at 673-674. The Lord Chief Justice Cockburn in *Swire*

- (1876) 1 QBD 536 at 541 said: *v Redman* "The relation of principal and surety gives to the surety certain rights. Amongst others, the surety has a right at any time to apply to the creditor and pay him off, and then (on giving a proper indemnity for costs) to sue the principal in the creditor's name. We are not aware of any instance in which a surety ever in practice exercised this right; certainly the cases in which a surety uses it must be very rare. Still, the surety has this right. And if the creditor binds himself not to sue the principal debtor for however short a time, he does interfere with the surety's theoretical right to sue in his name during such a period. It has been settled by decisions that there is an equity to say that such interference with the rights of the surety- in the immense majority of cases not

damaging him to the extent even of a shilling must operate to deprive the creditor of his right to recourse against the surety, though it may be for thousands of pounds.” Exigent Group Limited www.exigent-global.com

215. Time is only given if there is a binding agreement arrived at for good consideration (William Rouse v The Bradford Banking Co Ltd [1894] AC 586 at 594, Lord Herschell LC.)
216. It is immaterial what form the giving of time takes, so long as there is a binding agreement by the creditor to suspend his rights...” 29. 30. I respectfully adopt that passage as correctly stating the law. In this case Beck gave time to the Company and I consider that it is not self-evident that the alteration is unsubstantial or one which cannot be prejudicial to Dr Russo. So far as contract variations are concerned, the Contract in this case had no clearly expressed provision setting out the right for the Company to instruct variations. It is, however, to be noted that by the time that the payment schedule was attached to the Guarantee, there had been contract variations which were included in that schedule. The Guarantee was given in relation both to the payments due and to sums due for contract variations. The Guarantee therefore covered the obligation of the Company to pay additional sums for the contract variations shown in the schedule.
31. Ms Andrews submitted that the further contract variations were an alteration and it was not self-evident that they were insubstantial or could not be prejudicial to Dr Russo. She submitted that the variations would mean that the Company would be less able to discharge its obligations for payment under the Contract and it could not be said that this alteration could not be prejudicial to Dr Russo. It seems to me that in circumstances where there is a contractual provision which provides for there to be variations to the work under a contract and a guarantee is given, there would be no alteration to the terms of the Contract when there was a variation to the work made under the provisions of that contract. The terms of the contract would not be varied and the obligation in terms of the amount of work would be altered in the manner provide for in the contract. 32. In this case the precise contractual basis on which contract variations were made is not clear. Whatever the mechanism, it is evident that Dr Russo was aware that there was a system under which contract variations were given which resulted in sums being shown in the schedule attached to the Guarantee in respect of those variations. However, on balance, on this Part 24 Application, I consider that it is arguable, though not strongly so, that there was a material alteration to the Contract in the form of the further variations after the Guarantee and that such alterations in the obligations under the Contract would generally be sufficient to discharge a surety.
33. Mr Mort submits that these alterations do not, in this case, have the effect of discharging the liability of Dr Russo under the Guarantee. He says that in this case Dr Russo was consulted and gave his consent to the alterations. Ms Andrews submits that it has to be ascertained whether objectively, in the light of the circumstances, Dr Russo was acting as guarantor under the Guarantee or as director of the Company. Exigent Group Limited www.exigent-global.com 34. This is a case where Dr Russo evidently acted both in his personal capacity and in his capacity as director and 90% shareholder of the Company and I agree with Mr

Mort that it is unrealistic to make an artificial distinction in terms of the knowledge and consent of Dr Russo in relation to these two capacities. For example, on 20 January 2009, Mr Vaughton says, in his third witness statement, at paragraph 6: “As set out in paragraph 20 of the particulars of claim, the Claimant agreed to modify the payment schedule of 20 January 2009. Dr Russo’s company had already missed one of the payments and of course I was very concerned about that, so there was a meeting ... at the meeting Dr Russo asked for a bit more time to make payment number 3 which, by that stage, was overdue. We agreed to that and to the other changes and dates for payments. I did not consult with Dr Russo about how he felt about the changes: he was the one asking for them.” 35. 36. This position is also reflected in minutes of a meeting on 14 February 2009, attended by Dr Russo which are exhibited to Ms Bowen’s third witness statement. In these circumstances I do not consider that it is reasonably arguable that Dr Russo was not consulted and did not consent to the alteration in payment obligations under the Contract in his personal capacity as guarantor. Equally, in relation to the variations in the work, it is clear that Dr Russo had knowledge and consented to additional works being carried out, as reflected in the amended schedules and I do not consider that the fact that the variations were formally given by Mr Anderson makes any difference. I do not therefore consider it to be reasonably arguable that the Guarantee was discharged by material alterations in the terms of the contract because Dr Russo, as I have said, had knowledge and consented to those alterations. In the circumstances I do not need to consider Mr Mort’s other submissions that the modification was not material, or that the variation to the payment schedule was not binding for lack of consideration. I had come to the preliminary conclusions that those grounds were not good grounds put forward by Mr Mort, but for present purposes it is sufficient to make the finding that Dr Russo had been consulted and had consented to the terms of the alterations. 37. The basis on which the Guarantee was given. At paragraphs 15 to 18 of the Particulars of Claim the agreement which gave rise to the Guarantee is pleaded as having been made in this way: “15. The agreement was made in the course of a telephone conversation that took place on 23rd December 2008 between Lee Vaughton, on behalf of the Claimant, and the Defendant acting both on behalf of himself and on behalf of the employer.

16. The telephone conversation was witnessed by Edward Kent, an employee of the Claimant.
17. By this agreement (inter alia)
 - (1) the Defendant agreed to enter into a personal guarantee and (in consideration) Exigent Group Limited www.exigent-global.com
 - (2) the Claimant agreed to modify the terms of appendix 4 payment schedule.
18. The terms of the agreement were confirmed in and/or evidenced by an email from Mr Vaughton to the Defendant dated 23 December 2008 (16:16 hours). A copy of the email is appended to this particulars of claim as appendix B. The following documents were attached to that email (also at appendix B):

- (1) A revised payment schedule setting out the (modified) dates when payments were to be made by the employer to the Claimant under a building contract in accordance with what had been agreed.
 - (2) A personal guarantee to be completed by the Defendant; as had been discussed and agreed between the parties on 23 rd December 2008.” 38. It can be seen that this differs from what Dr Russo says, as I have set out above, in paragraphs 13-15 of his first witness statement in the adjudication.
39. Ms Andrews submits that this amounted to a conditional agreement in that the Guarantee would be conditional on Beck returning to site on 5 January 2009. Mr Mort, on the other hand, submits on the basis of a detailed analysis of the documents that there was an agreement to provide the guarantee which was not conditional on Beck returning to site on 5 January 2009 and that any obligation as to return on 5 January 2009 was only a term which, if breached, would give rise to damages. 40. The case put forward by Ms Andrews is supported by what Dr Russo says happened on 5 January 2009. He said this, at paragraph 22 of his first witness statement: “A meeting was arranged for 5th January with Beck so that I could hand back the keys. I met on site, on the day of the proposed hand-over, with Shaun Carvalho (Project Manager at Beck), and Martin Anderson. Shaun Carvalho said he could not take the unit back until 23 January. No reason was given; I was absolutely astonished. I said that this was simply unacceptable. I asked what I was expected to do with a defective unit for another 18 days. Shaun Carvalho simply said take it or leave it. I made it quite clear to Shaun Carvalho that I gave the personal guarantee to Beck on the basis that Beck returned to work on 5 January. I also said that I did not believe that the guarantee was valid any longer.” 41. Dr Russo also says that he said this when he signed the agreement: “Mr Kent had prepared a personal guarantee for me to sign which I did, but strictly on the basis that Beck returned to site on 5 January in order to complete the defective works.” 42. There is therefore a dispute about the terms of an oral agreement made on 23 December 2008, which is evidenced by the email, but there is clearly a conflict between the evidence of Mr Vaughton and the evidence of Dr Russo as to what Exigent Group Limited www.exigent-global.com happened on that day. Dr Russo’s evidence, whilst not altogether clear, certainly puts it in this way: “If I was to personally guarantee the payments due to Beck from MediSpa, then he (i.e. Mr Kent) would ensure that his workers returned to site on 5th January 2009”. Dr Russo says he cannot specifically recall a telephone conversation on 23 December 2008, but instead he says he spoke to Mr Kent. In the circumstances, given that conflict of evidence, I cannot on an application under Part 24 resolve that conflict. If, as Ms Andrews submits, the agreement was to the effect that the guarantee was conditional, and that certainly has some support in the conduct of Dr Russo subsequently, there are arguable grounds the condition was not met and therefore that the Guarantee was not effective after 5 January 2009. If, however, Mr Mort is correct, then the guarantee remained in effect. In those circumstances, despite the skilful and detailed analysis which Mr Mort has carried out on the available material there are, in my judgment, real prospects that Dr Russo could successfully defend these proceedings on the basis that the Guarantee was subject to a condition which was not fulfilled. Having come

to that conclusion I do not need to consider the other arguments relied on by Dr Russo but having heard full argument I summarise my findings on those issues. 43. 44. 45.

Adjudication not binding on Dr Russo

46. Ms Andrews submits that Dr Russo, as guarantor, is not bound by the Adjudicator's decision against the company. She relies on *Re Kitchin* [1881] 17 ChD 668 and *Bruns v Colocotronis* (the "Vasso") [1979] 2 Lloyd's Rep 412 which were applied recently by Christopher Clarke J in *Sabah Shipyard v Government of Pakistan* [2008] 1 Lloyd's Rep 210. 47. In *Re Kitchin* James LJ said this at page 671: "It is contended that it is liable to pay any sum which an arbitrator shall say is the amount of the damages. The guarantee must be expressed in very clear words indeed before I could assent to the construction which might lead to the grossest injustice...If a surety chooses to make himself liable to pay what any person may say is the loss which the creditor has sustained, of course he can do so, and if he has entered into such a contract he must abide by it. But it would be a strong thing to say that he had done so unless you find that he has said so, in so many words. The arbitration is a proceeding to which he is no party; it is a proceeding between the creditor and the person who is alleged to have broken his contract and if the surety is bound by it, any letter which the principal debtor had written, any expression he had used, or any step he had taken in the arbitration, would be binding upon the surety. The principal debtor might entirely neglect to defend the surety properly in the arbitration; he might make admissions of various things which would be binding as against him, but which would not, in the absence of agreement, be binding as against the surety. It would be monstrous that a man, who is not bound by any admission of the principal debtor, should be bound by an Exigent Group Limited www.exigent-global.com agreement between the creditor and the principal debtor as to the mode in which the liability should be ascertained." 48. Lush LJ said this at page 674: "You must find explicit words to make a person liable to pay any amount which may be awarded against a third person, whether it be a jury, a judge or an arbitrator." 49. In *The Vasso* Goff J (as he then was) said this, at page 418-419: "It is well-established that general words in a guarantee, guaranteeing the due performance of all the obligations of the principal debtor do not, of themselves, have the effect of the surety as bound by an arbitration award in an arbitration between the principal debtor and the creditor, even where the arbitration award arises out of an arbitration clause in the contract containing the obligations of the principal debtor guaranteed by the surety. That is established by the case of *Re Kitchin* [1881] 17 ChD 668, a decision of the Court of Appeal which had stood unchallenged for nearly 100 years and is still cited in leading text books as good authority today. As was pointed out in that case, if the law was otherwise, serious injustice might occur. For example an arbitration award might result from an admission made by the principal debtor in the course of the arbitration without the authority of the surety. Again to take a more extreme example, the principal debtor might take no part in the arbitration whatsoever; he might not even appoint an arbitrator in which event, pursuant to Section 7 of the Arbitration Act of 1950, the creditor's arbitrator would act as sole arbitrator and the case, although it could not go by default, would simply proceed on the basis of the creditor proving his case before the sole arbitrator.

It cannot be right that a surety, by general words such as those in the Defendant's guarantee in the present case, should be bound by such an award. In truth, an arbitration clause which provides the machinery for resolving disputes arising between the parties to the contract and special characteristics which distinguishes it from the main obligations of the contract, as can be seen from the leading case of *Heyman v Darwin*

- [1942] AC 356. The short answer is that, as a matter of construction, a guarantee containing general words, as in the case of the guarantee of the Defendant, although applicable generally to obligations of the principal debtor arising under the relevant agreement, does not apply to an obligation to honour an arbitration award."
50. Whilst Mr Mort sought to draw a distinction between a temporarily binding adjudication decision and an arbitration award, I consider that the principle derived from the cases concerned with arbitration awards is equally applicable to any dispute resolution method which involve a decision on what sum is due or what damages are payable. This is made clear by Lush LJ in the passage from *Re Kitchin* cited above. The underlying rationale for that principle is that a party might neglect to defend itself properly; might make admissions or might otherwise conduct the case in the dispute resolution differently from the guarantor. Therefore, to overcome that difficulty, what is required is an Exigent Group Limited www.exigent-global.com agreement by the guarantor to be bound by the decision of an adjudicator, arbitrator or the court as between the parties to the contract or other means under which underlying dispute arises.
51. Mr Mort submits that the risk, to which James LJ in *Re Kitchin* and Goff J in *The Vasso* referred, does not apply in this case because Dr Russo was a witness in the adjudication which he conducted on behalf of the Company. He says that in arbitration a third party can become bound by the award of an arbitrator by participating in an arbitration and that similar principles should apply in an adjudication. 52. However, this will depend whether, on the facts, Dr Russo became bound in his personal capacity when acting in the adjudication between Beck and the Company and I do not consider that I can determine this issue on a Part 24 Application on the material before me. Therefore, on that basis, I consider that the Dr Russo has real prospects of successfully defending the claim, on the basis that, without more, Dr Russo would not be bound by the Adjudicator's decision in relation to personal obligations arising under the Guarantee.
53. Mr Mort also submits that, in any event, he can seek payment of the sums on the basis that they are sums due under the Contract, without relying on the Adjudicator's decision.
54. Ms Andrews submits that Beck has to prove that the sums have fallen due under Clause 13.2 and, in any event, Dr Russo could rely on defences, counterclaims and other matters available to the Company as set-offs against any sum due. Mr Mort submits that on the terms of Clause 13.2 and the Schedule, the sum of £413,125 is due.

55. Ms Andrews submits that some valuation process must take place. I do not accept that as I do not consider that this reflects the clear terms of Clause 13.2, which is that payment has to be made of the sums which are due in the payment schedule. On that basis, I consider that that sum of £413,125 would be due and I do not consider that Dr Russo has real prospects of successfully defending this application on that basis. However, I accept that to the extent to which the Company could assert a set-off for defective or incomplete works, Dr Russo can also rely on that as a defence. 56. 57. In this case, in the Adjudication, the company relied on a Withholding Notice in the sum of £243,166. In the absence of such a Withholding Notice, required under a construction contract or pursuant to Section 110 and 111 of the Housing Grants, Construction and Regeneration Act 1996, a party such as the Company cannot withhold payment of a sum due. In my judgment the guarantor can be in no better position than the Company and Ms Andrews expressly accepts that it is the rights of the Company under the Contract which Dr Russo, as guarantor under the Guarantee, relies on. On this application, however, I cannot determine whether the Withholding Notice was good as it depends on the facts and further submissions. I consider that in any event the absence of a Withholding Notice for more than £243,166 would mean Exigent Group Limited www.exigent-global.com that there would be no defence to the sum of £169,959, being the difference between the sum claimed and the sum of the Withholding Notice.

Conclusion

58. In the circumstances, for the reasons set out above, I have come to the conclusion that Dr Russo has real prospects of successfully defending the claim in this case and that as a result Beck's Application under Part 24 fails. 59. 60. 61. I have considered whether Dr Russo's case on the conditional nature of the guarantee is so weak as to justify an order that he should lodge some money in Court as a condition of being given leave to defend, but I have come to the conclusion that his case is sufficiently strong not to require that. I therefore dismiss Beck's application. In relation to costs, Beck have failed on the Part 24 application and on the general rule Dr Russo should be entitled to an order for costs. The only issue which affects the position is the fact that, by deciding certain issues on this Application, there is a potential saving in costs should this matter go forward. In my judgment there is a saving of costs and there are clearly issues on which Dr Russo has not succeeded. In all the circumstances it seems to me that the appropriate order is that Dr Russo should have 80% of his costs on this application. Exigent Group Limited www.exigent-global.com

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://caselaw.nationalarchives.gov.uk/ewhc/tcc/2009/3861>

CASE PAGE <https://chat.esheria.ai/case-law/england-and-wales/beck-interiors-ltd-v-russo-2009>

Prepared on 27 October 2026 · Esheria