# In The Supreme Court of Bermuda

## COMMERCIAL JURISDICTION

2018: No. 064

**BETWEEN:**

**MID-ATLANTIC BULK CARRIERS LTD.**

**Plaintiff**

**-and-**

**STEVEN DAILEY**

**Defendant**

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**Before:** **Hon. Chief Justice Hargun**

**Appearances:** **Mr Scott Pearman, Conyers Dill & Pearman Limited, for the Plaintiff**
**Mr Benjamin McCosker, Walkers (Bermuda) Limited, for the Defendant**

**Date of Hearing:** **13 January 2020**

**Date of Judgment:** **3 February 2020**

# JUDGMENT

*Claim under a guarantee; whether the guarantee complied with the formal requirements relating to deeds; whether the guarantor estopped from relying upon a formal defect; whether the guarantee was unenforceable on ground of economic duress; whether the guarantee was unenforceable on the ground of lack of consideration*

**Introduction**

1. By this action Mid-Atlantic Bulk Carriers Ltd ("MAB"), the Plaintiff, seeks to enforce a personal Guarantee entered into between MAB and Mr Steven Dailey, the Defendant, by a Deed dated 31 October 2017 ("the Guarantee"). The Guarantee provided that Mr Dailey agreed to be the Guarantor for any and all obligations of a company called Z-Dust Group, Inc. ("the Company"), which might arise under a separate charterparty agreement ("the Agreement").

2. By the terms of the Guarantee, Mr Dailey guaranteed to MAB *"any and all liabilities of the [Company] to MAB, including without limitation, the full and complete performance and observance of all of the covenants, representations, warranties and indemnities, and prompt and full payment, when due, of all of the obligations of the [Company] under the Agreement required to be performed, observed and paid by the [Company] and its successors and assigns, together with any and all expenses and/or costs and/or disbursements and/or fees incurred to enforce the Guarantee"*.

3. The Agreement was dated 25 October 2017 and entered into by the Company with MAB for the voyage of the ship *M/V African Buzzard* to transport a shipment of coal from the United States of America to Egypt. The Agreement was breached by the Company when the Company failed to load the coal on to *M/V African Buzzard* such that MAB suffered loss and damage.

4. On 8 February 2018, MAB commenced arbitration proceedings in London against the Company seeking damages arising out of the breach of the Agreement. The Arbitrators (Clare Ambrose, Timothy Hardy and Hefin Rees QC) by their Award made on 12 April 2019 declared and adjudged that the Company is liable to pay to MAB the sum of US $498,092.23 together with compound interest of US dollar $32,275.19 accrued from 17 November 2017 to the date of the award. The Arbitrators also awarded and adjudged that the Company shall pay MAB's legal

costs and expenses of the arbitration in the amount of US $120,000 together with interest at the rate of 4.5% per annum, compounded at three monthly rests from the date of the Award to the date of payment.

5. The Arbitration Award dated 12 April 2019 remains unsatisfied and by these proceedings MAB seeks to recover the amounts due under the Award from Mr Dailey.

**Procedural Background**

6. These proceedings were commenced by a Specially Endorsed Writ of Summons dated 22 March 2018 and by the Statement of Claim MAB sought to enforce the Guarantee against Mr Dailey.

7. Mr Dailey sought legal advice from Bermuda attorneys and on 16 May 2018, Cox Hallett Wilkinson Limited filed a Defence on his behalf. In the Defence Mr Dailey averred that the Guarantee was not properly or fully executed and furthermore that the Guarantee (or certain of its terms) were unenforceable as being contrary to public policy. Mr Dailey gave no further details of the Bermuda public policy involved and did not assert any additional grounds for denying liability under the Guarantee.

8. On 22 August 2019, the Court made an Order for Directions. Paragraph 6 of that Order provided that the parties shall exchange any statements of witnesses of fact before 18 September 2019. In compliance with that provision, Mr William Forster Darling filed his First Affidavit on 16 September 2019 and his Second Affidavit dated 29 November 2019.

9. In compliance with paragraph 6 of the Order dated 22 August 2019, Mr Dailey also filed a witness statement dated 6 November 2019. In that one page Witness Statement, Mr Dailey makes mention of the fact that the Guarantee was signed by

him but not witnessed at that time. Mr Dailey relies upon no other facts for alleging that he is not liable under the Guarantee.

10. On 1 October 2019, the parties were advised by the Registrar that the trial of this matter was scheduled to commence on 9 December 2019. On 2 December 2019, Mr Dailey sent an email to the Registrar stating *"Urgent request to reschedule my court date. I have a return visit to the hospital for follow-up test from my recent stay in the hospital. I can send you proof of that stay and the heart test that ran on my behalf*". As a result of this correspondence from Mr Dailey, the trial was adjourned to 13 January 2020.

11. On 6 January 2020, a week before the trial, Mr Dailey's new attorneys, Walkers (Bermuda) Limited, produced an Amended Defence on his behalf which was filed with the Court on 9 January 2020. By this Amended Defence, Mr Dailey took the point for the first time that the Guarantee is voidable at his election by reason of his signing of the Guarantee being induced by economic duress. He also took the point, again for the first time, that the Guarantee is voidable at his election for want of sufficient fresh consideration.

12. On 9 January 2019, Mr Dailey filed his Second Witness Statement in which he alleged for the first time that he had, at all material times, understood that MAB would be requiring a corporate guarantee and only on the eleventh hour MAB introduced the requirement for the personal guarantee. He asserted for the first time that he executed the Guarantee under pressure.

13. In the circumstances the Court is required to consider three issues: whether MAB complied with the formal requirements of executing a valid deed; whether the contract of guarantee is liable to be set aside on ground of economic duress; and whether the contract of guarantee is unenforceable on the ground that there was no valid consideration.

**Whether the Deed of Guarantee was validly executed?**

14. The requirements of valid execution of deeds in Bermuda is set out in Section 6A of the Conveyancing Act 1983 which provides that:

> *"(3) For the purposes of subsection (2)(b), an instrument is validly executed as a deed by an individual if, and only if—*
>
> *(a) it is signed—*
> *(i) by him in the presence of a witness who attests the signature; or*
> *(ii) by some other person at his direction and in his presence and the presence of two witnesses who each attest the signature; and*
>
> *(b) it is delivered as a deed by him or a person authorised to do so on his behalf."*

15. Mr Dailey accepts that he did in fact sign the Guarantee and he appreciated that it was a personal guarantee at that time. What is said by Mr Dailey is that when he signed the Guarantee there was no witness present who attested Mr Dailey's signature.

16. Mr Darling, who gave evidence on behalf of MAB, stated that he dealt with Mr Dailey and Mr Holland on behalf of the Company. On 31 October 2017 Mr Darling's colleague at MAB, William Thompson sent to Mr Dailey, with a copy to Mr Holland, the Guarantee agreement with the instruction "*if possible, please complete and scan back to us within today*." Mr Darling's evidence is that he received back the Guarantee duly executed by Mr Dailey on 1 November 2017 but without the signature of the witness. Mr Darling gave evidence that MAB was unaware and could not say whether Mr Holland was present when Mr Dailey signed the Guarantee. In the circumstances Mr Darling sent an email to Mr Holland on 2 November 2017, with a copy to Mr Dailey, with the following

enquiry: "*We received the attached from Steve [Dailey]. Perhaps you are able to sign as witness on the last page? If yes please do so and PDF the fully executed document back to us".* There was no response from Mr Dailey stating that Mr Holland was not present when Mr Dailey executed the Guarantee or in any other way suggesting that Mr Holland should not be signing the Guarantee as a witness. On 3 November 2017 Mr Holland sent an email to Mr Darling stating "*I have attached the executed witness section for the personal guarantee".*

17. In the circumstances, MAB argues that even if there was a formal defect in the execution of the Deed of Guarantee, Mr Dailey is estopped from denying that the defective Deed of Guarantee was validly executed. In this regard MAB relies upon the decision in *Shah v Shah* [2001] EWCA Civ 527, which concerned the enforceability of a deed in circumstances where the "witness" signed shortly after the defendants and did so without having been present when they signed the document. In those circumstances, the Court of Appeal held that the defendants were estopped from denying that the deed was validly executed. Pill LJ explained the rationale and scope of the application of estoppel in the following passages:

    *13. "... The delivery of the document constituted an unambiguous representation of fact that it was a deed. Mr Anup Shah acted reasonably in relying upon that representation, as in fact he did. The absence of the name and address of the witness, its presence not being a statutory requirement, and the character of the signature did not, in the circumstances, render the reliance unreasonable and there was nothing else in the circumstances which did so.*

    *14. The judge found:*

        *"(i) that the deed was properly signed by the parties with, as I find, full knowledge and understanding of its contents; (ii) that it was apparently validly witnessed, in the sense that the signature of a*

*witness duly appears against the statutory attestation; (iii) that it was put forward by the defendants as a valid and effective document in the knowledge that it was to be relied on and with the intention, as I find, of being bound by it. The intention was expressed to Mr Anup Shah at the meeting the previous day in Nairobi. I have no reason to suppose that that was not a genuine intention held by them at that time."*

*"Those findings were, in my judgment, justified. Mr Anup Shah said in evidence that he believed that the third and fourth defendants would have re-executed the document had they been asked to do so. There is no evidence that the formal defect would not have been corrected had Mr Anup Shah been made aware of it upon delivery of the document and the action to the detriment of the claimant is in the loss of the opportunity to go back to the defendants and obtain their signature in accordance with the statute. The judge's finding as to the genuine intention of the defendants amounts to a finding that they would have re-signed had they been asked to do so at the material time so that there was in the event prejudice. I leave open the question whether upon a representation by conduct that it is a valid deed being delivered, it is necessary to establish that the defendants would have cured the defect upon a resubmission to the signatory."*

*...*

31. *"Having regard to the purposes for which deeds are used and indeed in some cases required, and the long-term obligations which deeds will often create, there are policy reasons for not permitting a party to escape his obligations under the deed by reason of a defect, however minor, in the way his signature was attested. The possible adverse consequences if a signatory could, months or years later, disclaim liability upon a purported*

*deed, which he had signed and delivered, on the mere ground that his signature had not been attested in his presence, are obvious. The lack of proper attestation will be peculiarly within the knowledge of the signatory and, as Sir Christopher Slade observed in the course of argument, will often not be within the knowledge of the other parties.*

*32. In this case the document was described as a deed and was signed. A witness, to whom the third and fourth defendants were well known, provided a form of attestation shortly afterwards and the only failure was that he did so without being in the presence of the third and fourth defendants when they signed."*

18. Counsel for Mr Dailey relies upon *Christopher Briggs et al v Gleeds (Head Office) (a firm)* [2014] EWHC 1178 (Ch), where the deed was stated to be signed, sealed and delivered by each of the partners of Gleeds, but none of these signatures was witnessed. In contrast, the signatures of the trustees of the Scheme were duly attested. On these facts Newey J concluded that estoppel cannot be invoked where document does not appear to comply with the statutory requirement on its face:

*"43(iv) The "deeds" at issue in the present case are not "apparently valid". It can be seen from each document that it was not executed in accordance with the 1989 Act. This distinction from Shah v Shah is a significant one. If estoppel can be invoked in relation to documents that are not "apparently valid", the documents cannot necessarily be taken at face value. "[A]s far as possible," however, "it should be clear on the face of the document whether or not it has been validly witnessed" (see paragraph 8.3(i) of the Law Commission Working Paper). That is especially so since the validity of a deed can matter for many years, and those considering "deeds" long after they have been executed may well have no personal knowledge of the circumstances in*

*which they were executed and access to little or no contemporary correspondence."*

19. Counsel for Mr Dailey argues that Mr Dailey is not estopped from raising the invalidity of the Deed and he argues that the facts in this case are materially similar to the facts in the *Briggs* case. He argues that this is not a case where the covenantor has delivered an imperfect deed to the covenantee (unbeknownst to the covenantee) and should be estopped because of the covenantee's quite proper assumption that the deed was legally valid. Here, Counsel argues, MAB knew that the Guarantee had not been validly executed in the first instance, and upon a cursory review of the purportedly witnessed "deed" would have immediately realised that it, too, had not been validly executed. In particular it is said that Mr Dailey did not re-sign the Guarantee in Mr Holland's presence. Rather, what Mr Holland appears to have done is to backdate his attestation to 31 October 2017.

20. I have come to the view that in this case Mr Dailey is estopped from questioning the validity of the Deed of Guarantee by reference to the requirement that the deed be signed by a party in the presence of a witness attests the signature. Here, I accept Mr Darling's evidence that he was unaware whether Mr Holland was present when Mr Dailey signed the Deed of Guarantee. If Mr Holland was present when Mr Dailey signed the Deed he is, in my judgment, able to attest Mr Dailey signature a day later. In his email of 2 November 2017, Mr Darling enquired from Mr Holland whether he was able to act as a witness and that email was copied to Mr Dailey. The only response received was an email the following day from Mr Holland attaching the Guarantee duly signed by him as a witness. In the circumstances I consider that it was reasonable for MAB to assume that Mr Holland was present when Mr Dailey was executing the Guarantee and could properly act as a witness.

21. In coming to the view that this is an appropriate case where Mr Dailey should be estopped from questioning the formal validity of the Deed, I have taken into account the following additional facts:

(i) Mr Dailey accepts that he signed the Deed of Guarantee.

(ii) Mr Dailey stated to the Court that when he sent the personal Guarantee to Mr Darling on 1 November 2017 he expected MAB to rely on it.

(iii) Mr Dailey gave evidence that the only reason why a witness did not attest his signature when he signed the document was because there was no witness available. If a witness had been available he would have asked the witness to attest his signature.

(iv) I infer from (iii) above that if MAB had asked Mr Dailey to re-sign the document in the presence of a witness he would have done so.

(v) Mr Holland signed the document as a witness with the knowledge of Mr Dailey. Mr Dailey was copied the email sent to Mr Holland enquirng whether Mr Holland was in a position to sign the Deed of Guarantee as a witness.

(vi) On the basis of the Guarantee provided by Mr Dailey and witnessed by Mr. Holland, MAB proceeded with the Agreement.

(vii) The first time Mr Dailey raised any question in relation to the formal validity of the Deed of Guarantee was when he was asked by MAB to honour its terms.

**Economic Duress**

22. It is common ground that even if the Guarantee was invalid as a deed due to lack of compliance with the formalities of execution it still survives as a simple contract of guarantee. Mr Dailey contends that the Guarantee is voidable at his election because it was procured by MAB whilst Mr Dailey was under economic duress. He argues that even if the Court were to find that the Guarantee was in fact validly executed, the defence of economic duress remains available to him.

23. In this context Mr Dailey's primary case is that although the Agreement was concluded on or about 24 October 2017, it was only on 31 October 2017, when the vessel was due to arrive in port imminently, when it was understood that the coal would be loading as planned, and when there had been a sudden deterioration in the weather and a corresponding reduction in bulk freighter capacity, that a draft personal guarantee was presented to him. Mr Dailey states that he was led to understand that MAB would "walk away" from and terminate the Agreement if he did not sign the Guarantee. The economic consequences to the Company if MAB "walked away" from the deal, according to Mr Dailey, would be dire, and its reputation with its important clients irreparably harmed.

24. In *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm), Cooke J referred to some of the authorities dealing with the ingredients of actionable economic duress:

> *"24. I do not need to go through the line of authorities to which I was referred. The decision of the Privy Council in Pao On v Lau Yiu Long [1980] AC 614 set out the law as then understood, requiring that economic duress should "amount to a coercion of will, which vitiated consent." The payment made or the contract concluded could not be a voluntary act, if the doctrine was to apply. The law has moved on since then but Lord Scarman, page 365 C-E said it was material to enquire "whether the person alleged to have been*

*coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him, such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it." All those matters were said to be relevant in determining whether the victim had acted voluntarily or not.*

*…*

*33. The more recent cases on economic pressure, in no way, derogate from the principles to which I have referred. Dyson J (as he then was) in two decisions in 2000 set out the range of factors which fell to be considered when looking at the question of legitimate pressure. At paragraph 131 of DSND Subsea v Petroleum Geo-Services [2000] BLR 530, he set out the range of factors to be taken into account in a passage which he repeated in Carillion Construction Ltd v Felix (UK) Ltd [2001] BLR 1 at paragraph 24 and which were accepted as accurate by counsel in that case and in the subsequent decision of David Donaldson QC sitting as a Deputy High Court Judge in Adam Opel GmbH v Mitras Automotive (UK) Ltd [2007] EWHC 3481 (QB):-*

> *"The ingredients of actionable duress are that there must be pressure, (a) whose practical effect is that there is compulsion on, or a lack of practical choice for, the victim, (b) which is illegitimate, and (c) which is a significant cause inducing the claimant to enter into the contract: see Universe Tankships Inc of Monrovia v International Transport Workers Federation [1983] 1 AC 366, 400B—E, and Dimskal Shipping Co SA v International Transport Workers Federation [1992] 2 AC 152, 165G. In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure;*

*whether the victim protested at the time and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining."*

25. In considering the contention of economic duress the following facts need to be kept firmly in mind:

    (i) Mr Dailey accepted in evidence to the Court that there is not a single document before the Court in which he expresses the view that he signed the personal Guarantee under pressure.

    (ii) Mr Dailey filed his Defence in these proceedings on 16 May 2018 at a time when he was represented by Cox Hallett Wilkinson Limited. The Defence did not seek to invalidate the Guarantee on the ground of economic duress. There is no suggestion in that document that Mr Dailey executed the Guarantee under any form of pressure whatsoever.

    (iii) Paragraph 6 of the Order for Directions dated 27 August 2019 required the parties to exchange any statements of witnesses of fact on or before 18 September 2019. In accordance with that order, Mr Dailey filed his witness statement dated 6 November 2019, which seeks to set out the factual evidence upon which he seeks to rely in support of his case that the Guarantee is unenforceable. There is no suggestion in that Statement that Mr Dailey executed the Guarantee under any form of pressure.

    (iv) The first time reliance was placed on economic duress was on 6 January 2020, 7 days before the trial of this matter and over 3 years after the Guarantee was executed by Mr Dailey. The new defences (economic duress and lack of consideration) were pleaded in the Amended Defence dated 6 December 2020, following the instruction by Mr Dailey of his new attorneys, Walkers (Bermuda) Ltd.

26. In his Second Witness Statement dated 6 January 2020, filed 7 days before the trial of this matter, Mr Dailey alleges for the first time that he had understood at all material times that MAB would be seeking some form of corporate assurance as to the Company's ability to perform its obligations under the Agreement. He asserts that he never envisaged that what would be placed before him at the eleventh hour a *personal* guarantee, putting his personal assets on the line for the charterparty arrangements which had been negotiated without his involvement and about which he knew very little.

27. Mr Dailey further states that he was presented with a *personal* guarantee he had not anticipated during the afternoon of 31 October 2017 and asked to sign it "within today", where he was being told that the Agreement was at risk if the Guarantee was not signed, and where the combination of poor weather on the eastern seaboard and bulk carriers' reluctance to charter vessels to Egypt meant that there was no other option available to get the coal to its purchaser and in those circumstances he reluctantly applied his signature to the Guarantee. He argues that but for these unfortunate circumstances, he would not have signed the Guarantee.

28. Mr Dailey's evidence in relation to economic duress is challenged in all respects by MAB. In his Third Affidavit dated 9 January 2020, responding to Mr Dailey's Second Witness Statement dated 6 January 2020, Mr Darling gave evidence that it was made clear *before* the Company entered into the Agreement that MAB would require a *personal* guarantee. Mr Darling points out that this was MAB's first effective transaction with the Company, Mr Dailey and Mr Holland and MAB were very much concerned to ensure that it had as much security as it could obtain. Mr Darling was originally requesting a letter of credit or some sort of bank guarantee. In his email to Mr Holland on 23 October 2017 at 1:35pm Mr Darling enquires: *"Will they provide a letter of credit for the freight or some sort of bank guarantee?"*

29. Mr Darling gave evidence that during subsequent phone calls with Mr Holland, MAB's requirement for a letter of credit/bank guarantee was then reduced to a requirement for a mere personal guarantee from Mr Dailey. This was agreed to by MAB because as Mr Holland explained the Company could not provide a letter of credit/bank guarantee.

30. Mr Darling explained the sequence of events. By his email of 11:52am on 23 October 2017 he asked Mr Holland: *"If we can find a suitable ship today and start trading it you are ready to lock this in firm correct?"*

31. Mr Holland responded at 1:02pm that same day "*Yes sir. Ready to lock in and move forward short and long term".* Mr Darling enquired by his email of 1:35pm that same day "*Will they provide a letter of credit for the freight or some sort of bank guarantee?"*

32. By his email of 6:03pm the same day, 23 October 2017, Mr Darling confirmed to Mr Holland that the vessel was on "on subs" (i.e. the booking of the vessel was provisionally held for 24 hours). Mr Darling's email concluded: "*Once you confirm there is no turning back…"*

33. The next day, 24 October 2017, at 11:32am, Mr Holland emailed Mr Darling stating *"Steve Dailey asked that you let us know what you need to prove we are responsible for vessel payment thru Mid Atlantic so we do not lose the ship. I will send you the information on the Company shortly".* Mr Darling gave evidence that this email shows, at the very least, Mr Dailey was aware that something further was required by way of a guarantee.

34. Mr Darling gave evidence that the subsequent requirement for a personal guarantee from Mr Dailey was primarily on the phone rather than by email. His further conversations in relation to personal guarantee were initially with Mr

Holland, but Mr Darling did then speak directly to Mr Dailey on more than one occasion and *prior* to the transaction being concluded.

35. Mr Darling's evidence was that there was no doubt in his mind that MAB was requiring a personal guarantee (in the absence of a letter of credit/bank guarantee from the Company) as a necessary and contemporaneous part of the transaction. MAB's requirement was conveyed to both Mr Holland and Mr Dailey and agreed to by Mr Dailey before the transaction was concluded. Mr Dailey told Mr Darling on the phone that he would sign a personal guarantee and asked MAB to send the Guarantee to him for signature. Mr Darling cannot say precisely when his conversations with Mr Dailey took place during that time period discussed above, but he is certain that his conversations with Mr Dailey occurred *before* the transaction was agreed.

36. In support of his clear recollections of his conversations with Mr Dailey concerning the personal guarantee, Mr Darling refers to his email sent at 6:53pm on 24 October 2017, which was sent directly to Mr Dailey and copied to Mr Holland, in which Mr Darling states:

> *"Dear Steve,*
>
> *With reference to our various conversations, I am pleased to confirm that we have locked in a vessel as outlined below to load your cargo from Pier IX at Newport News, Virginia next week. There is no turning back we are fully committed/locked in on this vessel based on the below summary of main terms agreed between us. <u>As discussed on the phone we will revert latest tomorrow with some guarantee wording for you to sign</u>."* [Emphasis added]

37. In an email sent on 31 October 2017 at 8:26am Mr Darling advised Mr Dailey: "*Reverting with draft guarantee agreement later today".* In an email sent at 3:06pm that same day Mr Thompson on behalf of MAB advised Mr Dailey:

"*please find a copy of the Guarantee agreement, if possible, please complete and scan back to us within today"*

38. Mr Dailey did not question the wording or the fact that he was being asked to give a personal guarantee in any way. His only response was to sign the Guarantee and return it to MAB by email on 1 November 2017 sent at 4:37pm.

39. Having regard to all the circumstances and having observed Mr Dailey and Mr Darling give evidence in Court, I unhesitatingly accept the evidence of Mr Darling and reject the evidence of Mr Dailey where it differs from the evidence of Mr Darling. In particular, I accept Mr Darling's evidence that (i) MAB was requiring a personal guarantee (in the absence of a letter of credit/bank guarantee from the Company) as a necessary and contemporaneous part of the transaction; (ii) MAB's requirement was conveyed to both Mr Holland and Mr Dailey and agreed to by Mr Dailey before the transaction was concluded; and (iii) Mr Dailey told Mr Darling on the phone that he would sign a personal guarantee and asked Mr Darling to send the guarantee to him for his signature.

40. The argument based upon economic duress, in my judgment, is a desperate attempt by Mr Dailey to avoid liability under the Guarantee and is based upon factual assertions, made for the first time 7 days before the trial, which the Court entirely rejects. I find that Mr Dailey signed the Guarantee voluntarily and without any form of improper pressure from MAB. In the circumstances I reject the submission made on behalf of Mr Dailey that he is entitled to avoid his obligations under the Guarantee on the ground of economic duress.

**Issue of Consideration**

41. Counsel for Mr Dailey argues that the Agreement was concluded on or around 24 October 2017. He says that it was, on and from that date, a validly enforceable contract between MAB, on the one hand, and the Company, on the other. The

giving of guarantees of any description, he argues, was not a condition precedent to MAB's entry into the Agreement or its performance of its obligations pursuant to same. The Guarantee, he argues, was foist upon Mr Dailey at the eleventh hour. MAB had already begun to perform its obligations pursuant to the Agreement before the guarantee had even been signed.

42. In the circumstances, counsel for Mr Dailey argues, that the guarantee is voidable because MAB failed to give sufficient fresh consideration. He argues that there is no consideration if a party merely performs promises to perform its duty already imposed upon him under an existing contract.

43. In his Third Affidavit Mr Darling explains, in the context of this defence, that although his email of 24 October 2017 records the terms of bargain that was struck in terms of the vessel, he did not view those terms as reflecting the totality of this transaction. He says there were multiple elements to the transaction. This all occurred over a few days. MAB was contracting with Cargill to secure the vessel. MAB was contracting with the Company to charter out the vessel. Mr Dailey was contracting with MAB under the Guarantee. These were all necessary components of the transaction and all of these elements were known about in advance and were part of the deal.

44. Mr Darling further states that whilst his email of 24 October 2017 confirmed the terms of the agreement for MAB to charter the vessel, MAB had a promise from Mr Dailey at that time that he would sign a personal guarantee and, in the event, the larger transaction was not actually "papered" until MAB's subsequent provision of the Agreement and Mr Dailey's subsequent provision of the signed version of the Guarantee. Both these things occurred on 31 October 2017. From MAB's perspective, Mr Dailey promised to give a personal guarantee as part of the transaction in order to secure the Agreement and this was all part of one deal and in due course MAB received the Guarantee signed by Mr Dailey.

45. I accept Mr Darling's evidence set out in the previous two paragraphs and in particular I accept that the provision of the personal guarantee by Mr Dailey was a component of the overall transaction and it was agreed upon by Mr Dailey before the transaction was concluded. I accept Mr Darling's evidence that prior to the transaction Mr Dailey agreed that he would sign a personal guarantee and asked MAB to send the Guarantee to him for his signature.

46. In *Classic Maritime Inc v Lion Diversified Holdings Berhard* [2009] EWHC 1142 (Comm), Cooke J dealt with a similar submission in relation to past consideration and stated:

> *"36. ... Lion submits that the guarantee, on its face, therefore refers to past consideration and it is therefore unenforceable. Moreover, Lion maintains that it is inadmissible to look at extrinsic evidence to show other consideration.*
>
> *37. This argument is totally devoid of commercial sense and, I am glad to say, wrong as a matter of legal analysis.*
>
> *...*
>
> *43. The reality is that the guarantee was given as part and parcel of a single transaction, since it was specifically required by the August COA. There was no subsequent demand for a guarantee to be given, because it was already provided for in that COA. Consideration moved from Classic as the promisee in the context of the transaction as a whole. As originally set out in the August COA, the obligations undertaken by Classic were good consideration for the obligations undertaken by Limbungan, including the obligation to procure the guarantee. When the guarantee was given pursuant to Limbungan's obligations, (whether varied or not by the substitution of a different guarantor) the consideration it had in mind for the guarantee was the*

*fulfilment by Classic of its obligations under the August COA. When Classic tendered performance for the first two voyages of the August COA by nominating the performing vessels and arranging for them to sail to the load ports, it was fulfilling its obligations under the August COA as part and parcel of the single transaction which included the guarantee. The performance of those obligations towards Limbungan in itself amounted to good consideration in relation to the third party guarantor, Lion.*

*…*

*46. In Chitty on Contracts (30th Edition) paragraph 3-027 it is stated that, in determining whether consideration is past, the courts are not bound to apply a strictly chronological test. If the giving of the consideration and the making of the promise are substantially one transaction, the exact order in which these events occur is not decisive…."*

47. Having regard to my findings that the provision of a personal guarantee by Mr Dailey was a component of the overall transaction and was agreed upon by Mr Dailey before the transaction was concluded, the assumption and performance of the obligations on the part of MAB amounted to good consideration in relation to the personal guarantee provided by Mr Dailey. As the above passage from *Chitty on Contracts* makes clear in determining whether consideration is past, the courts are not bound to apply a strictly chronological test. If the making of the promise are substantially one transaction, as clearly is the case here, the exact order these events occur is not decisive. In the circumstances, I reject the submission that the provision of the Guarantee by Mr Dailey is not supported by sufficient consideration.

**Conclusion**

48. Having rejected all the defences put forward on behalf of Mr Dailey I conclude that the Guarantee is valid and binding in accordance with its terms upon Mr Dailey. Accordingly, I give judgment that Mr Dailey pay to MAB the amounts awarded to MAB in the Arbitration Award dated 11 April 2019, namely, the principal amount of US $498,092.23 together with interest of US $32,275.19 and the legal costs in the arbitration proceedings of US$120, 000.

49. I will hear counsel in relation to the issue of costs, if required.

Dated 3 February 2020

NARINDER K HARGUN
CHIEF JUSTICE