FENWICK ELLIOTT

The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

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Dispatch

Personal guarantees

InstaGroup Ltd v Northwest Insulations Ltd & Anor

[2026] EWHC 819 (Ch)

InstaGroup makes insulation materials and subcontracts the installation of those materials to third parties, such as Northwest, who entered into creditors' voluntary liquidation in August 2025. Mr Stansfield was a director of Northwest from 27 August 2008 until 19 April 2022. InstaGroup alleged that Northwest breached an agreement dating from 2013, and claimed over £3 million against Northwest. InstaGroup made a claim against Mr Stansfield based on the terms of a Guarantee entered into in 2008.

In 2008, InstaGroup had entered into an agreement with Northwest for the installation of cavity wall insulation. In October 2008, Northwest entered into a credit facility agreement. Mr Stansfield signed a pre-printed form entitled "*Credit Account Application Form*", which included the following:

> "*In consideration for [the claimant] agreeing to supply goods on credit as requested I, [the second defendant] being a director of [the Company] agree that … the [Company] will make full settlement of all monies that are now or shall at any time in the future become due from [the Company] to [the claimant] howsoever arising*",

and

> "*I hereby personally guarantee payment in respect of all such sums as are now or shall in the future become due from [the Company] to [the claimant] including interest at the rate specified in your Conditions of Sale or which shall otherwise be payable by law. This guarantee is to be a continuing guarantee and my liability under it shall not be affected by your giving time or any other indulgence to [the Company] or to me by any credit limit which may have been imposed from time to time or by any other matter or event whereby I would but for this provision have been released*".

The purpose of the 2013 Agreement was set out in its recitals:

> "*… (B) On behalf of InstaGroup, the Supplier [Northwest] will be arranging surveys and/or installing a number of energy efficiency improvements for end users under the Green Deal Framework Regulations and shall be providing these services (including the supply of any related goods) in accordance with the terms of this agreement.*
>
> *(C) InstaGroup wishes the Supplier to provide goods and services subject to the terms and conditions of this agreement and the Supplier agrees to do so*".

There was a wide-ranging indemnity clause, and the remedies included the right to require the immediate repayment by Northwest of all sums previously paid to them by InstaGroup. Mr Stansfield said that the Guarantee related to sums due from Northwest for goods supplied by InstaGroup on credit to it, and nothing more.

In her decision, Master Clark explained that the general principles of construction applicable to guarantees were summarised in *Marley v Rawlings* [2015] AC 129 by Lord Neuberger:

> "*…the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but, (b) ignoring subjective evidence of any party's intentions*".

The parties also referred to the rule in *Holme v Brunskill* (1878) L.R. 3 Q.B.D. 495, whereby any material variation of the terms of the principal contract (i.e. between the creditor and the principal) will discharge the guarantor. The meaning of "*material variation*" in law is summarised in Law of Guarantees at 9-024:

> "*A variation of the principal contract is material for the purposes of the rule in Holme v Brunskill where it is not necessarily beneficial to the surety or otherwise prejudices him, and where any lack of prejudice or benefit is not evident without enquiry. If the benefit or lack of prejudice is not self-evident, then the court will not embark on an enquiry as to whether the variation was indeed beneficial to the surety or otherwise unprejudicial*".

Master Clark considered the overall purpose of the 2008 Agreement, which was to enable Northwest to obtain credit from InstaGroup for goods supplied by it. The Guarantee was entered into in support of that purpose. The specific wording of the 2008 Agreement provided that Northwest would make full settlement of "*all monies*" that were or should at any time in the future become due from Northwest to InstaGroup "*howsoever arising*".

Master Clark considered that the use of the expression "*howsoever arising*" was not sufficient of itself to extend Northwest's liability to include transactions beyond the supply of goods covered by the 2008 Agreement. Further, the expression "*all monies*" did not have a fixed meaning, and there was nothing to suggest it referred to anything beyond the parameters of the 2008 Agreement.

The 2008 Agreement was a short, relatively informal document in a standard form to be used for all InstaGroup's customers. By contrast, the 2013 Agreement was a detailed 32-page document containing carefully drafted provisions. The 2013 Agreement was not part of the factual matrix when the 2008 Agreement was entered into.

Mr Stansfield submitted that the 2008 Agreement did not restrict Northwest as to how it used the goods supplied; nor did it refer to services. If the 2008 Agreement were to apply to other liabilities arising from Northwest's supply of services to InstaGroup, it could have said so.

Master Clark agreed, considering that Northwest's obligations under the 2008 Agreement were limited to monies owing in respect of the supply of goods to it, and did not extend to financial liabilities arising out of agreements for it to provide services to InstaGroup, either in place at the time or, even more so, entered into afterwards.

The Guarantee was for all such sums which were now due or should in the future become due from Northwest to InstaGroup. This was

a reference back to the 2008 Agreement, i.e. sums due for the supply of goods. On the proper construction of the Guarantee, it was limited to Northwest's obligations for goods supplied to it by InstaGroup pursuant to the 2008 Agreement. It was not, therefore, necessary to consider whether the Guarantee was discharged by the 2013 Agreement.

However, if that was not correct, Master Clark considered that the Guarantee was discharged when the 2013 Agreement was entered into. If the 2013 Agreement was a variation of the 2008 Agreement, then InstaGroup had not shown it was beneficial to Mr Stansfield or that it did not increase the risk to him. It would therefore have been a material variation which discharged the Guarantee.

That said, given that the 2013 Agreement provided that it superseded all previous drafts, arrangements, understandings, or agreements, it was not a variation but a new agreement. The Guarantee was discharged upon Northwest and InstaGroup entering into the 2013 Agreement.

A binding agreement or a step in negotiations?

GMC Utilities Group Ltd v Sumitomo Electric Industries Ltd

[2026] EWHC 885 (TCC)

SEI was the main contractor in relation to the construction of an undersea electricity interconnector between Wales and Ireland. SEI contracted the installation and associated civil works package for the onshore direct cable work to GMC. SEI made a demand under a performance bond, stating that GMC had not fulfilled its obligations under the subcontract due to a failure to meet the taking-over date, asserting that delay damages applied as a result. This call on the bond prompted correspondence between the parties about the possibility of GMC paying the sum demanded into an escrow account pending final agreement between the parties.

During those discussions, on 8 November 2024, GMC's solicitors wrote to the solicitors for SEI. One of the issues behind the dispute was whether that letter formed a binding agreement between the parties or whether that letter was more properly construed as part of an exchange which was subject to contract.

An Escrow Agreement was subsequently agreed between the parties on 19 December 2024. GMC relied on the time taken to agree that agreement as evidence that there was no agreement as alleged arising from the 8 November correspondence.

The parties agreed that the negotiations leading to the 8 November letter were not admissible as an aid to interpretation of the terms alleged to have been agreed. The judge said that it was sufficient to note that, in exchanges on 6 November 2024 headed, "*Without prejudice save as to costs and subject to contract*", GMC's solicitors wrote to SEI's solicitors seeking SEI's agreement to an escrow agreement being arranged with the escrow agent. By response sent the same day, SEI's solicitors accepted the proposal. A draft escrow agreement under the escrow agent was provided by GMC's solicitors "*subject to contract*" on 8 November 2024.

GMC said that the letter of 8 November 2024 was merely a step in negotiations being undertaken "*subject to contract*". Reliance was placed on the correspondence referred to in the first paragraph of the letter, which expressly began "*subject to contract*".

In contrast, SEI submitted that the numbered paragraphs of the 8 November letter contained the core terms of an agreement reached between the parties, for consideration, under which GMC agreed to pay monies into escrow in return for SEI's agreement not to seek payment from the issuer of the monies called under the performance bond.

The judge said that the legal principles as to the meaning and effect of negotiations "*subject to contract*" were not seriously in issue. Negotiations started "*subject to contract*" can conclude without that condition, either by express agreement or by implication that the condition was no longer to be applied, or by waiving it. In all cases, what must be borne in mind is that the court will not lightly hold that such a waiver exists or that such an implication can be made.

Here, the judge was unable to accept GMC's submission that no agreement was reached between the parties until the conclusion of the Escrow Agreement on 19 December 2024. It was clear from the opening paragraph of the letter of 8 November 2024, confirming acceptance of GMC's offer, that GMC considered a concluded agreement had been reached in the correspondence to which reference was made and was no longer proceeding "*subject to contract*". Either expressly or by implication, this removed any prior "*subject to contract*" condition.

Consistent with such a conclusion, the letter contained no such heading. Indeed, such a heading appeared on none of the correspondence passing between the parties after SEI purported to accept the 7 November counter-offer in its email sent on 8 November 2024. Furthermore, the letter of 8 November 2024 no longer contained the reservation of rights which was stated at the conclusion of the letter of 7 November 2024. This was also consistent with the parties having reached agreement as to how they would regulate their relationship with regard to the monies demanded under the performance bond.

It was also noteworthy that, in none of the exchanges after 8 November 2024, was it suggested that the conclusion of the Escrow Agreement was a pre-condition to a binding agreement on the terms of the letter of 8 November 2024. The correspondence concerning the Escrow Account was a separate chain of negotiations.

The judge accepted that the headings to the correspondence referred to in the first paragraph of the letter of 8 November 2024 could not be determinative on their own whether they formed part of a negotiation which commenced "*subject to contract*". Subsequent exchanges were not required to bear that heading. It was unclear why the confirmation email of 8 November 2024 was marked "*without prejudice save as to costs*". It may have been a reflection that the terms of the timing of the undertaking were yet to be agreed and that SEI believed it would have some protection on costs in having made clear that the balance of the terms were accepted, or alternatively, it may have been a reflection of the email to which it responded being headed "*Without prejudice save as to costs and subject to contract*". Whatever the reason, the position on the undertaking having been clarified later that day, SEI's acceptance of the same contained no reservation, nor was it headed "*subject to contract*".

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world. Dispatch is a newsletter and does not provide legal advice.

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