CADWALADER

May the 4th Be With You This Saturday

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I Would Prefer Not to – a Scriveners Tale – Not Bartleby

By **Steven M. Herman**
Senior Counsel | Real Estate

By **Sager Moritzky**
Associate | Real Estate

On March 5, 2024, the Supreme Court of the State of New York, ruled that an obvious scriveners error in a guaranty, exempting a guarantor from full recourse liability for the loan's debt, could be corrected to impose personal liability.[1]

Defendant, Bersin Properties, LLC ("Bersin"), entered into a $135 million loan as borrower, with Nomura Credit Capital, Inc. ("Nomura") as Lender. Nomura later conveyed the loan to NCCMI, Inc. ("NCCMI"), which funded $44 million to Bersin. The loan matured and Bersin did not repay any portion of the debt in breach of the loan. NCCMI brought an action against Bersin to foreclose on the mortgage to the property, however, the property was subsequently lost in a sheriff's sale that was held to satisfy a junior lienholder's judgement against the property. NCCMI released its mortgage on the property to the new owner for only $4 million, as the property was never developed by Bersin. NCCMI converted its foreclosure action to a plenary action seeking recourse on the underlying promissory note and guaranty.

Although the loan was nonrecourse, the Loan Agreement included carve-outs for losses resulting from specific bad acts ("Loss Recourse Indemnity") and recourse for the entire debt upon the occurrence of certain triggering events ("Full Debt Recourse Liability"). Scott Congel, Bersin's principal, was designated as the guarantor and executed an Indemnity and Guaranty Agreement (the "Guaranty"). The Guaranty provided that Bersin and Congel would, jointly and severally, guarantee payment of recourse obligations, and would be collectively, the Indemnitor. The Guaranty specified that Indemnitor assumed liability for the Loss Recourse Indemnity, while the borrower assumed liability for the Full Debt Recourse Liability, seemingly insulating Congel from loan indebtedness.

NCCMI disputed the defense that Congel should be shielded from the loan indebtedness by arguing that the recourse language was an obvious scrivener's error. NCCMI noted that the provision was almost an exact duplicate of the recourse language in the Loan Agreement inserted into the Guaranty, but the term "Borrower" was not replaced with Indemnitor. In addition, NCCMI argued that the Guaranty clearly intended for the liability to run to Congel for the Full Debt Recourse, pointing to the preamble in the Guaranty and other additional terms and provisions. One of NCCMI's main arguments was that to make only Bersin liable, a single-purpose entity with no assets other than the property, would be absurd causing Bersin to become its own guarantor.

The defendants argued that reformation of the contract was time barred under the six-year statute of limitations. However, the court noted that a scrivener's error outside of a claim of reformation of a contract may be corrected in "those limited instances where some **absurdity** has been identified or the contact would

otherwise be unenforceable either in whole or in part."[2] The court determined that a literal reading of the full recourse provision, allowing the borrower to guarantee its own debt, would be illogical and would render the Guaranty illusory and meaningless. The Court pointed to a ruling in a similar case, *PNC Capital Recovery v Mechanical Parking Sys.*, (282 AD2d 268 [1st Dept 2001], *lv dismissed* 69 NY2d 937 [2001], *appeal dismissed* 98 NY2d 763 [2002]) in which, Shlomo Kadosh, the president of a corporation signed a guaranty for a corporation's debt. However, the president argued that since his signature block listed his title as president, he should not be held personally liable under the guaranty. The Court rejected that argument noting "to permit a corporation to guarantee its own indebtedness was illogical and rendered meaningless the entire guaranty."

Lastly, the court noted that certain provisions of the Guaranty confirmed that the full debt recourse liability runs to Congel, as an Indemnitor. The terms of the Loan provided clear and convincing intrinsic evidence that the phrasing was a scriveners error. Thus, the court granted NCCMI's motion for summary judgement as to Congel's personal liability under the Guaranty.

The ruling in this case provided much needed relief from an obvious scrivener's error. However, the Court's ruling highlights that not only must the error be "absurd", the party seeking reformation has a high burden of showing an obvious error by clear and convincing evidence.[3] Absent a clear error making a contract unenforceable, clear and complete writings will still be enforced according to their terms in order to create stability and safeguard against fraudulent claims.[4] While the Lender "won" this case (absent any appeal), the Lender's win was somewhat pricey. How many years of litigation and attorney's fees were expended to get to this result. We would argue that this "win" is further evidence that a scrivener's error, even when you "win", is extremely costly. We will continue to monitor any appeal of this decision and update this article accordingly.

[1] *See NCCMI, Inc. v. Bersin Props.*, 2024 N.Y. Slip Op. 1161 (N.Y. App. Div. 2024)

[2] *See Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 547-548[1995]; *see also Jade Realty LLC v Citicorp Commercial Mtge. Trust 2005-EMG*, 20 NY3D 881, 883-884[2012].

[3] *See Warberg Opportunistic Trading Fund, L.P. v Georesources, Inc.*, 112 AD3d 78, 84-85 [1st Dept 2013].

[4] *See W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 160, 162 [1990].

UK Court ruled debenture is void for non-registration despite there being a Companies House registration certificate

By **Duncan Hubbard**
Partner | Real Estate

By **William Lo**
Associate | Real Estate

In the recent case of *Re VE Global UK Ltd (In Administration) [2024] EWHC 749 (Ch)*, the High Court explored whether a certificate of registration issued by Companies House can be considered as conclusive evidence of due registration of security. The ruling and the considerations made in this case highlight the importance of ensuring that the relevant security document that is being presented for registration is drafted sufficiently and the process for registration is followed meticulously.

The case centred around a debenture dated December 20, 2021, where a chargor had purported to grant security in favour of two investors. This debenture was not registered at Companies House. In order to further grant that security for the benefit of an additional third investor, an amendment agreement to the debenture was subsequently entered into on January 18, 2022. This amendment agreement was submitted to Companies House for registration without annexing the original debenture.

Companies House issued a certificate confirming the registration of a charge dated January 18, 2022 as created by the chargor in favour of the three investors. Under section 859I(6) of the Companies Act 2006 a certificate of registration is conclusive evidence that the required documents were delivered within the prescribed deadline. However, crucially, the certificate referred to the amendment agreement date, not the original debenture date.

The High Court ruled that the debenture was void against administrators for non-registration under section 859H of the Companies Act 2006.

In his judgment, Baister J referenced *R v Registrar of Companies, ex parte Esal (Commodities) Ltd [1986] 1 QB 1114*, In the Esal case, the relevant security document was delivered late and as such should not have been eligible for registration; however, the registrar accidentally and inadvertently registered the charge in any event. Despite these facts, the court ruled that the certificate of registration was considered conclusive evidence of registration of a charge. In this case however, the certificate of registration referred to a charge dated as of the amendment agreement date, not the original debenture date. Baister J noted that the amendment agreement did not create the charge but merely extended the terms of the document that did, and therefore concluded that the certificate purported to register a charge that did not exist.

Baister J also referenced *Re Bitumina Industries Ltd (in administration) [2022] EWHC 2578 (Ch)*. In Bitumina Industries, the certificate of registration was held to

have covered the relevant charge as the original security document and registration particulars were not "entirely different". In this case however, Baister J held that the original debenture and amendment agreement were not similar enough, with the terms of each agreement serving different purposes.

This ruling underscores the importance of meticulousness in registering security interests with Companies House. It serves as a cautionary tale for chargors and chargees to ensure alignment between registration certificates and the underlying security documents, thus averting potential legal pitfalls down the road. Re VE Global UK Ltd ultimately provides useful clarity on the reliance on registration certificates and highlights the need for precision in documenting and registering company security.

UK Financial Regulator Publishes Guidance on New Anti-Greenwashing Rule

Greenwashing remains at the top of enforcement agendas in 2024. There is growing awareness that many corporate claims regarding positive environmental impacts, sustainability and carbon-neutrality do not tell the whole story or are simply inaccurate. In light of that growing awareness, regulatory authorities are taking action to minimise greenwashing and enhance consumer protection. Among these is the UK's Financial Conduct Authority (FCA). In our recent Client & Friends Memo, we take a detailed look at the FCA's recently published guidance for companies outlining how they can ensure they comply with the authority's new anti-greenwashing rule.

Read the memo from Jason Halper, Duncan Grieve, Alix Prentice and Sharon Takhar here.

Recent Transactions

Here is a rundown of some of Cadwalader’s recent work on behalf of clients:

- Represented Bank of America, N.A. ("BofA") in connection with a $150,000,000 loan made by BofA to a prominent sponsor which is secured by a premier office building in Los Angeles, California.