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MODERN CONTRACT OF GUARANTEE

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New and updated commentary has been provided by **James O'Donovan**.

Definition and distinctions

Updated:

- When a guarantor signs a contract that imposes concurrent liability with the debtor, they are equally responsible for repaying the loan and have a direct obligation to the lender to settle the mortgage debt. See *McGuinness v Norwich and Peterborough Building Society* [2012] 2 All ER (Comm) 265, at [1.300].
- To constitute a guarantee, the form and wording are less important than the clear intention of the alleged guarantors to be accountable for the principal debtor's default. The essence is the commitment to fulfill the obligations if the principal debtor fails to do so. See [1.810].
- A guarantee generally means agreeing to pay a debt if the original debtor fails to, but the terms may differ in each case. See *Ryan v UPG 322 Pty Ltd* [2023] NSWSC 1293, at [1.1210].
- An agreement may be a simple indemnity rather than a guarantee and indemnity. See *Oliveri Legal Pty Ltd v Cassegrain Tea Tree Oil Pty Ltd (No 2)* [2023] NSWSC 1082, at [1.1250].
- The indemnity provision may be independent from the guarantee. See *Australian Securities Ltd v Ehrenfeld* [2023] WADC 121, at [1.1260].

Formation of the contract of guarantee

Updated:

- Consideration for a guarantee encompasses any value given by one party or detriment incurred by the other, and need not be detailed in the guarantee: *Jin Resources (Aus) Pty Ltd v Nicols* [2022] QSC 158.
The value is to be assessed at the time the guarantee is given: *Capitalink Pty Ltd v Withnall (No2)* [2023] NSWDC 547.
The consideration for a guarantee is ordinarily the lender acting on the promise of the guarantee to the lender's detriment, such as by not enforcing an existing debt or by lending further money. Courts presume that parties enter into bargains in anticipation of receiving benefit: *Capitalink Pty Ltd v Withnall (No 2)* [2023] NSWDC 547
See [2.1000].
- The court can order specific performance of a formal agreement to provide a guarantee. See *Regan v Brougham* [2019] NZCA 401; [2020] 2 NZLR 299, at [2.1500].

- Where it is not clear whether the principal contract provides for a Debtor Funding type of facility or a Debtor Acquisition type of facility, a guarantee of such a contract is not enforceable: *Breona Pty Ltd v Gosatti* [2023] NSWSC 423.

An agreement which does not identify the property over which security is to be provided, the circumstances in which the security may be exercised and the rights that attach to the exercise of the security is too uncertain to be enforceable: *Seven Gamma a s v IG Energy Holdings (Australia) Pty Ltd* [2023] NSWSC 1032.

Where a party executes a deed of agreement “on behalf of himself and all of his related entities” personally guaranteeing the obligations of a builder under a construction contract, the guarantee is not void for uncertainty for failure to identify the surety (or sureties). The deed of agreement is enforceable against the party as a guarantor: *Capitalink Pty Ltd v Withnall (No 2)* [2023] NSWDC 547.

See [2.1600].

Formal requirements

Updated:

- The court will ask itself who, objectively considered, was intended to be a party (or parties) to the contract of guarantee: *Carminco Gold & Resources Ltd v Findlay & Co Stockbrokers (Underwriters) Pty Ltd* (2007) 243 ALR 472; [2007] FCAFC 194.

Post-contract conduct can assist in the identification of the parties: *Lederberger v Mediterranean Olives Financial Pty Ltd* (2012) 38 VR 509; [2012] VSCA 262.

See [3.900].

- An order for rectification of the principal contract does not constitute a variation justifying a discharge of the guarantor. See *Bond v Hong Kong Bank of Australia Ltd* (1991) 25 NSWLR 286, at [3.930].
- Where a guarantee is drafted by business people, it is unlikely that a party acts in a personal capacity and on behalf of related entities. See *Capitalink Pty Ltd v Withnall (No 2)* [2023] NSWDC 547, at [3.1100].
- An individual director does not have authority to enter into financial transactions without consulting his co-director: *City Garden Australia Pty Ltd (in admin) v Dai* [2023] NSWSC 1498. Even if there is no board resolution, there must be at least a “meeting of the minds”. Moreover, a company

secretary's authority to execute documents is ordinarily confined to countersigning documents pursuant to a resolution of the board of directors: *Motor Yacht Sales Australia Pty Ltd v Cheng* [2021] NSWSC 1141. See [3.1325].

- There must be a representation made by the company to the third party – intended to be and in fact, acted upon by the third party – that the agent had authority to make representations in the course of communicating with the third party on behalf of the principal. See *City Garden Australia Pty Ltd (in admin) v Dai* [2023] NSWSC 1498, at [3.1330].
- Some protection to the company is given by the requirement that the third party (eg the lender) must be engaged in dealings with the company in the first place: *Soyfer v Earlmaze Pty Ltd* [2000] NSWSC 1068. A lender would be entitled to make the assumptions in s 129 of *Corporations Act 2001*(Cth) in relation to those dealings, and the company would not be entitled to assert that any of the assumptions are incorrect: *City Garden Australia Pty Ltd (in admin) v Dai* [2023] NSWSC 1498. See [3.1380].
- A solicitor's knowledge should not be imputed to their client for the purpose of s 128(4) of *Corporations Act 2001*(Cth). The focus of the inquiry should be on what the lender knew: *City Garden Australia Pty Ltd (in admin) v Dai* [2023] NSWSC 1498. See [3.1390].
- A person can be liable for misleading and deceptive conduct in providing a false assurance that the creditor would be repaid in the future by the principal debtor, even if the assurance does not take the form of a guarantee. See *Lin v Zheng* [2023] NSWCA 174, at [3.2800].

Factors affecting validity

Updated:

- Spoken words must be proven with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the circumstances of the case. See *Julstar Pty Ltd v Hart Trading Pty Ltd* [2014] FCAFC 151, at [4.510].
- It's not considered unconscionable to delay legal action to recover a debt with high interest when the borrower fails to pay as promised after property sale. See *Ledinh Sovereign Super Pty Ltd v CT Stone Pty Ltd* [2023] NSWSC 1079, at [4.2000] and [4.5040].

- A wife who is unable to prove that she was completely subservient to her husband may be unable to have her personal guarantee of her husband's business debts set aside because of unconscionable conduct based on a "special vulnerability" that was known to the creditor. See *Senworth Capital Pty Ltd v W & W Investment Group Pty Ltd* [2023] NSWSC 989, at [4.2010].
- A mere allegation of a disparity in bargaining power does not constitute unconscionable conduct. See *Tai Star 01 Pty Ltd v Lining Holdings Pty Ltd* [2023] NSWSC 1254, at [4.4100].
- A guarantor who affixes his signature to the execution page of a guarantee and signs a waiver of independent legal advice can be bound by the form of his guarantee in existence on that date even if he does not read the guarantee. See *Jasper Nominees Ltd v Kairouz* [2023] VSC 718, at [4.9320].
- A claim against a solicitor for breach of the "no conflicts" fiduciary duty is not an apportionable claim for the purposes of s 34(1) of Pt 4 of the *Civil Liability Act 2002* (NSW) because a failure to take reasonable care is not an element of such a claim. See *City Garden Australia Pty Ltd (in admin) v Dai* [2023] NSWSC 1498, at [4.9880].

The scope of the guarantor's liability

Updated:

- Where a congruent operation of the various components of the contract as a whole is, on the face of the agreement, not intended or achievable, then a guarantee of the obligations under such a muddled contract will be unenforceable. See *Breona Pty Ltd v Gosatti* [2023] NSWSC 423, at [5.100].
- A recital in a deed cannot override the effect of a deed, properly construed. See *Tjen v Marquess Investment Fund Pty Ltd* [2023] NSWCA 315, at [5.120].
- The non-performance by the borrower of its obligation to pay the loan did not itself indicate that the lender could not enforce the loan facility agreements at law. Hence, a claim to an indemnity where the principal contract is unenforceable will fail. See *Australian Securities Ltd v Ehrenfeld* [2023] WADC 121, at [5.140].
- The grant of a further lease as a result of an option to renew is not necessarily conditional on the execution of an appropriate guarantee by the existing guarantors or new guarantors, if required by the lessor. It is a question of construction of the lease. See *Bargain World CQ (Rockhampton) Pty Ltd v AHC Ltd* [2023] QSC 201, at [5.400].
- Compound interest payable upon default does not constitute a penalty where the interest rate during the term of the loan was nil, the parties were commercially sophisticated and legally advised and the interest rate was

consistent with market rates. See *Jasper Nominees Ltd v Kairouz* [2023] VSC 718, at [5.410].

- A guarantor may be liable under a contractual indemnity in favour of a landlord for all costs, charges, damages, and expenses incurred by the landlord by reason of the tenant's default. This type of indemnity is not limited to the creditor's reasonable costs. See *Products Pty Ltd v Ashmog Investments Pty Ltd* [2023] VCAT 1112, at [5.420].
- A right to request that guarantors grant a mortgage or charge over any property now or hereafter held by the guarantors does not confer an immediate right recourse to the property; it is contingent upon further acts of the parties, for example, the requirement that the lender request such a security. Hence, it will not give rise to an immediate security interest. See *Rainford v SA & RT Tesoriero Pty Ltd* [2023] VSC 617, at [5.430].
- An all moneys guarantee remains enforceable even without a specified credit limit on the application form, as the debtor can seek credit up to an amount the creditor agrees to provide. See *Mary Donald Nominees Pty Ltd v Buckby Contracting Pty Ltd* [2023] WADC 25, at [5.610].

Discharge from liability by the determination of the principal transaction

Updated:

- A claim against guarantors for unpaid rent under a lease and damages will not be defeated by an argument that the lease was discharged by frustration where there was no finding as to whether the lessee's business had been rendered unusable by public health orders issued during the Covid-19 pandemic in relation to licensed restaurants. See *ISPT Pty Ltd v Cao* [2023] NSWSC 1115, at [6.2000].

Discharge from liability by reason of the creditor's conduct towards the principal

Updated:

- The principle in *Ankar* does not require the creditor to consult the guarantor as to the manner of exercising an existing right, such as a contractual right to pay suppliers to a builder directly and then recoup the payment through a reduction in the contract price for the construction of the works. See *Capitalink Pty Ltd v Withnall (No 2)* [2023] NSWDC 547, at [7.100].
- A guarantor will not be discharged where the borrower and the lender enter into a deed of forbearance which recognises that the loan agreement remains on foot but converts the lender's entitlement to interest to an entitlement to a share in the profits of the project for a specified period. See *Tjen v Marquess Investment Fund Pty Ltd* [2023] NSWCA 315, at [7.250].

- The principles in *Ankar* can be excluded or modified by an express provision in the guarantee preserving the liability of the guarantor where there is a variation in the time or method of payment of any amount of the principal debt by the borrower. See *Jasper Nominees Ltd v Kairouz* [2023] VSC 718, at [7.610].

Discharge from liability by the determination of the guarantee

Updated:

- A guarantee cannot operate in respect of future advances after the death of the principal debtor unless it provides a contrary stipulation. See *Ronan v Australia and New Zealand Banking Group Ltd* [2000] VSCA 77; (2000) 2 VR 531 at [52], applied in *Walters v Perton* [2023] VSC 37, at [9.600].
- In the case of *Nashco Pty Ltd v Yang* [2022] NSWCA 137, the NSW Court of Appeal took the view that the terms of the Guarantee in that case, read in the context of the other documents which the parties executed at the same time, were intended to accommodate the circumstances that obtained between Nashco and Grand Metal following the assignment of the business of the Nashco Partnership. See [9.820].

Rights of the creditor

Updated:

- If the facts pleaded and established make out a cause of action establishing the liability of the defendant guarantor to pay a liquidated sum to the creditor, then relief is a matter for the court, and it does not matter than the prayer for relief sought damages: *Rawson v Hobbs* (1961) 107 CLR 466; 35 ALJR 342; [1961] HCA 72 at 485, applied in *Australian Securities Ltd v Ehrenfeld* [2023] WADC 121.

The court can make an order against both the purchaser and the guarantor requiring them both, jointly and severally, to pay the purchase price on settlement: *Ryan v UPG 322 Pty Ltd* [2023] NSWSC 1293.

See [10.3000].

- Leave to amend will not be granted where the plaintiff seeks to advance a case which is inconsistent with the plaintiff's primary case. See *Oliveri Legal Pty Ltd v Cassegrain Tea Tree Oil Pty Ltd (No 2)* [2023] NSWSC 1034, at [10.3020].
- A "walk away" offer may be regarded as a genuine offer of compromise where it is apparent at the time the offer was made that the offered had very good

prospects of success. See *Rathner v Bartlett (No 2)* [2023] NSWSC 1166, at [10.3155].

New:

- New commentary discussing the topic of Cross examination and the Rule in *Browne v Dunn* is inserted at [10.3117].

Rights of the guarantor before payment

Updated:

- If the principal debtor is entitled to a remedy against the creditor, then the guarantors are entitled to a similar remedy by way of an equitable defence to the claim against them, subject to the provisions of the guarantee. See *Australian Securities Ltd v Ehrenfeld* [2023] WADC 121, at [11.950].

Rights of the guarantor after payment

Updated:

- A guarantor's right of indemnity is not an instance of subrogation. Rather, it is a stand-alone equitable doctrine, often referred to as the "equity of exoneration." See *Lerino v Gutta* (2012) 43 WAR 372; [2012] WASCA 222, at [12.100].
- Where guarantors provided a mortgage over their property in addition to a guarantee and decided to sell the mortgaged land to minimise their losses on a project development, the proceeds applied in reduction of the mortgage debt were not payments under the guarantee. See *Rathner v Bartlett* [2023] NSWSC 1026, at [12.1150].
- The relevant intention must arise from a consideration of the substance of the transaction in its context. See *Global Consulting Services Pty Ltd v Gresham Property Investments Ltd* (2018) 365 ALR 143; [2018] NSWCA 255, at [12.1200].
- A lender who holds a charge over the interests of the guarantors in property jointly with other persons as joint tenants can enforce the charge by obtaining an order for sale by a statutory trustee under s 66 of the *Conveyancing Act 1919* (NSW) or its equivalent. See *Gemi Investors Pty Ltd v Cetin* [2023] NSWSC 1099, at [12.1750].
- The purpose of pre-judgment interest is to compensate the judgment creditor for the practical loss it has suffered by being out of pocket for the amount of the judgment. See *Rathner v Bartlett* [2023] NSWSC 1026, at [12.2150].

- A paying surety is entitled to be surrogated to the creditor's securities even if the principal debtor has been dissolved. See *Leon v Kensington Mortgage Co Ltd* [2023] EWHC 121 (Ch); [2023] 2 WLUK 88, at [12.2600].

New:

- A right of contribution can give the claimant a sufficiently arguable counter-claim, set-off or cross-demand for the purposes of s 41(7) of the *Bankruptcy Act 1966* (Cth) to set aside a bankruptcy notice served on the claimant. See [12.1540].

Consumer credit legislation

Updated:

The Australian Government has released exposure draft legislation to give ASIC the power to approve one or more provisions relating to enforceable Code provisions. However, it is currently unclear if ASIC intends to make all or part of the Code legally enforceable, at [14.1605].

Suretyship in private international law

Updated:

An anti-suit injunction may be granted where it is necessary to protect the court's own processes or to restrain unconscionable conduct or the unconscientious exercise of legal rights through foreign proceedings: *Genso Laboratories, LLC v Care A2 Plus Pty Ltd (recs apptd)* [2023] FCA 1024 (application dismissed), but leave to appeal granted: *Care A2 Plus Pty Ltd v Gensco Laboratories LLC* [2023] FCA 1246, at [16.1300].

