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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:

- The use of the words, “guarantee” or “indemnity” in the document itself are not decisive, because the essential nature of the agreement must always be considered. See *Yeoman Credit Ltd v Latter* [1961] 1 WLR 828 at 833; [1961] 2 All ER 294, at [1.810], [1.1100].
- A guarantee expressed as a primary obligation can secure payment of an amount that would be payable by a company upon redemption of preference shares regardless of whether the company was in a position to redeem the shares. See *Caratti v Zhou* [2024] WASCA 39, at [1.900].
- Where the words of the agreement make the obligor jointly and severally liable *with the lessee* to the lessor, this is a strong indication that the parties’ intention was to create an indemnity. See *Crawford v Demertjis & Ruhs Pty Ltd* [2024] NSWSC 48, at [1.1120].

Formation of the contract of guarantee

Updated:

- A guarantee signed by one director is not void for uncertainty for failure to identify other sureties. See *Capitalink Pty Ltd v Withnall (No 2)* [2023] NSWDC 547, at [2.1600].

Formal requirements

Updated:

- However, there may be evidentiary difficulties in establishing that a company director provided a guarantee by making oral statements on numerous occasions. See *Kearney v Grow Choice Pty Ltd* [2023] NSWCA 325, at [3.300].
- Courts determine guarantee parties by objectively assessing who was intended to be a party. See *Carminco Gold & Resources Ltd v Findlay & Co Stockbrokers (Underwriters) Pty Ltd* (2007) 243 ALR 472; [2007] FCAFC 194, at [3.900].
- The subjective intention of parties is crucial in determining agreements, not the objective intention. This principle is supported by precedent, public policy, and justice, and has been adopted in jurisdictions like England and New Zealand. See *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, at [3.930].
- A guarantor can be bound by their signature on the execution page even if it is not attached to the guarantee provided that the guarantor was provided with

a copy of the entire guarantee before they signed on the execution page: *Jasper Nominees Ltd v Kairouz* [2023] VSC 718.

Where the guarantee contains a provision stating that a particular person signs in his *personal* capacity, it is difficult to show that they also signed as agent for a related entity: *Capitalink Pty Ltd v Withnall (No 2)* [2023] NSWDC 547.

See [3.1110].

- Directors can execute guarantees if it's in the company's ordinary business, such as providing guarantees for legal fees. See *Oliveri Legal Pty Ltd (t/as Oliveri Lawyers) v Cassegrain Tea Tree Oil Pty Ltd* [2024] NSWCA 74, at [3.1325].
- Directors must have ostensible authority from the company to sign guarantees or indemnities, otherwise no representation of their authority will be made. See *Oliveri Legal Pty Ltd (t/as Oliveri Lawyers) v Cassegrain Tea Tree Oil Pty Ltd* [2024] NSWCA 74, at [3.1330].
- Dealings with a managing director for his own purposes, namely the pursuit of personal litigation, are not dealings with the company for the purposes of s 129(3). See *Oliveri Legal Pty Ltd (t/as Oliveri Lawyers) v Cassegrain Tea Tree Oil Pty Ltd* [2024] NSWCA 74, at [3.1380].
- A court can independently compare questioned and authentic signatures to determine if they match, without needing expert evidence. See *Wanis v Lifestyle Residences Hobsons Bay Pty Ltd* [2024] NSWSC 274, at [3.1900].

Factors affecting validity

Updated:

- Promissory estoppel prevents a defendant from asserting legal rights if they caused the plaintiff to rely on an assumption of non-enforcement. See [4.450].
- There is at least an evidentiary onus on the stronger party to show that the transaction was fair, just and reasonable. See *Bale v Kimberley Developments Pty Ltd* [2022] NSWSC 820, at [4.2000].
- An independent lawyer giving a guarantor legal advice has no duty to provide financial advice but should cover the situation where one or more of the borrowers as co-guarantors becomes insolvent. See *Citibank Savings Ltd v Nicholson* (1997) 70 SASR 206, at [4.2040].
- Asset-based lending relies on the borrower's tangible assets, while cash flow lending depends on the borrower's cash flow to support the borrowing base.

See *La Trobe Financial Asset Management Ltd v Nikolyn Pty Ltd* [2022] WASC 264, at [4.5038].

- In the absence of a significant power imbalance, a charging clause in a contract to supply stock on credit terms does not constitute an "unfair term" for the purposes of s 24 of the Australian Consumer Law. See *Super Start Batteries Pty Ltd v Shearer* [2023] QDC 241, at [4.6190].
- There is no persuasive or binding authority that only a legal practitioner who has no connection with a borrower can provide independent advice to a lender. See *La Trobe Financial Asset Management Ltd v Nikolyn Pty Ltd* [2022] WASC 264, at [4.8000].

The scope of the guarantor's liability

Updated:

- Under a lease indemnity, the indemnifier is liable for all lease payments, enforceable even if the lessee company is deregistered, without needing reinstatement. See *Crawford v Demertjis & Ruhs Pty Ltd* [2024] NSWSC 48, at [5.140].
- Conventional estoppel is focused on the consensual basis of the parties' relationship; it operates where both parties have adopted the same assumption as to the basis for their relationship. See *Moratic Pty Ltd v Gordon* [2007] NSWSC 5; (2007) NSW ConvR 56-172, at , at [5.430].
- A guarantee for "any amount due" excludes overpayment claims, but adding "including any Claim" can extend it to cover restitutionary claims for overpayment. See *Sun Engineering (Qld) Pty Ltd v Ravenswood Gold Pty Ltd* [2024] QSC 68, at [5.590].
- In other words, joint and several liability means that there is one joint and as many several liabilities as there are promisors. See *Big Rivers Timbers Pty Ltd v Stewart* (1999) 9 BPR 16,605, at [5.605].
- A provision that was intended to compensate a party for the consequences of being deprived of the use of the money it was owed and which it needed to conduct its business was not a penalty even though the rate of interest was 20% p.a., compounding daily. See *Jaycon Pty Ltd v Williams* [2023] QSC 297, at [5.1460].

New:

- A guarantee for "any amount due" excludes overpayment claims, but adding "including any Claim" can extend it to cover restitutionary claims for overpayment. See *Sun Engineering (Qld) Pty Ltd v Ravenswood Gold Pty Ltd* [2024] QSC 68, at [5.590].

Discharge from liability by the determination of the principal transaction

New:

- In *Crawford v Demertjis & Ruhs Pty Ltd* [2024] NSWSC 48, an indemnifier was liable for liabilities for rent and outgoings accruing under the lease during the period of deregistration of the lessee company even though the lessee company was not liable for those payments because it was deregistered. See [6.1075].

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

Updated:

- The variation rule excludes pre-guarantee contract alterations, but a guarantor is discharged if post-guarantee changes alter borrower obligations without consent.. See *Lee v ATL (Australia) Pty Ltd* [2023] NSWCA 327, at [7.250].
- The *Ankar* principle can be excluded by an express guarantee provision, preserving guarantors' liability despite variations in the principal contract. See *Tjen v Marquess Investment Fund Pty Ltd* [2023] NSWCA 315, at [7.550].
- A principal debtor clause expressed in broad terms can exclude the variation rule: *Valstar v Silversmith* [2009] NSWCA 80.

Where the terms of the guarantee create a primary obligation to the lender, this does not mean that the guarantee is, in substance, an indemnity: *Lee v ATL (Australia) Pty Ltd* [2023] NSWCA 327.

See [7.560].

Rights of the creditor

Updated:

- A chargee who lodges a caveat after the commencement of an administration does not breach the prohibition in Corps Act 2001, s 440J(1) upon enforcement of a guarantee and charge in respect of a credit agreement for a company against a spouse or relative of a director. See *Langdon v Tradelink Pty Ltd* [2024] VSC 113, at [10.320].

New:

- Where the guarantor is liable as a principal debtor, an order for specific performance can be made against a purchaser and guarantor jointly and severally requiring payment of the purchase price on settlement. See *Ryan v UPG 322 Pty Ltd* [2023] NSWSC 1293, at [10.3128].

Rights of the guarantor after payment

Updated:

- The guaranteed debt is considered, by a legal fiction, notionally to remain in force and any securities are likewise deemed to continue even though the principal debt is discharged. See *Banque Financière de la Cite v Parc (Battersea) Ltd* [1991] 1 AC 221, (HL), at [12.2400].
- The High Court ruled the first mortgagee must account for surplus funds and upheld appellants' subrogation rights without breaching guarantee terms or causing inequity. See *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269; 260 ALR 71; 83 ALJR 1210; [2009] HCA 44, at [12.2450].
- In *AE Goodwin Ltd v AG Healing Ltd* (1979) 7 ACLR 481 at 487, Powell J held that the remedy of subrogation is available to a surety who has paid merely part of the principal debt, provided the whole principal debt has been discharged. This principle has been followed on numerous occasions. See [12.2600].
- If a surety or co-debtor pays off the entire principal debt, it will be entitled to the creditor's securities by subrogation, but these securities in the hands of the paying surety or co-debtor secure only the just proportion that the principal debtor is liable to indemnify or that the co-sureties are liable to contribute. See *Leon v Kensington Mortgage Company Ltd* [2023] EWHC 121 (Ch), at [12.2800].
- The statute undoubtedly reinforces the basic right of a surety or co-debtor to the creditor's securities "in the event of discharge of the relevant debt in full". See *Leon v Kensington Mortgage Company Ltd* [2023] EWHC 121 (Ch), at [12.2850].
- A disclaimed lease that is vested in the secured creditor under s 568 of the *Corporations Act 2001* (Cth) can be a security for the purposes of a paying surety's or co-debtor's remedy of subrogation. See *Leon v Kensington Mortgage Company Ltd* [2023] EWHC 121 (Ch), at [12.2880].
- If a surety redeems a mortgage, the property does not thereby become the property of the surety. The most that the surety may gain by way of a proprietary interest is subrogation to the rights of the mortgagee. See *Leon v Kensington Mortgage Company Ltd* [2023] EWCA Civ 2047, at [12.3150].

New:

- A paying surety is entitled to subrogation to the creditor's securities even if the principal debtor is dissolved, regardless of when dissolution occurs relative to debt satisfaction. See *Leon v Kensington Mortgage Company Ltd* [2023] EWHC 121 (Ch), at [12.2618].