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Update Summary

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MODERN CONTRACT OF GUARANTEE

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

Formal requirements

Updated:

- Whether a person executes a written document in one or more capacities is not a question of construction, but a question of fact in respect of which extrinsic evidence, including evidence of subsequent events, is admissible, irrespective of presence of ambiguity in the document. See *Sinclair v Balanian* [2024] NSWCA 144; *Manicaros v Commercial Images (Aust) Pty Ltd* [2024] QCA 40, at [3.1300].

The scope of the guarantor's liability

Updated:

- Contractual words which identify a party are a prime example of the fact that ambiguity is a conclusion which can only be reached after regard to surrounding circumstances.

The rule that post-contractual conduct is admissible to determine whether a contract exists, but inadmissible to determine its construction, applies only to contracts that are wholly written and it does not extend to admissions.

See *Sinclair v Balanian* [2024] NSWCA 144, at [5.110].

Rights of the creditor

Updated:

- The principle of res judicata applies where a judgment is entered by consent. See *Chamberlain v Deputy Commissioner of Taxation (ACT)* (1988) 164 CLR 502 at 508; [1998] HCA 21, at [10.3150].

Performance bonds

Updated:

- A bank guarantee can secure a tenant's obligation to make good the leased premises at the termination of the lease. See *City X-Ray Pty Ltd v Rigby Hall Pty Ltd* [2024] NSWDC 222, at [15.110].

Taxation

Updated:

- The amount payable under a business indemnity can be claimed as an allowable deduction under s 51(1) of the *Income Tax Assessment Act 1936* (Cth) in the year in which the liability is incurred. See *Hooker Rex Pty Ltd v Commissioner of Taxation* (1988) 19 ATR 1241; (1988) 88 ATC 4392, at [18.300].

