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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**.

Definition and distinctions

Updated:

- A surety's promise for "prompt performance" covers all obligations, allowing the court to order the guarantor to fulfill the principal contract if purchasers fail. See *Taylor Square TT Pty Ltd v Kinselas Pty Ltd (No 2)* [2024] NSWSC 987, at [1.300].

Formal requirements

Updated:

- If the deed of guarantee is not witnessed, it can still be enforced as a document under hand if it is supported by consideration: *LK Bros Pty Ltd v Collins* [2004] QSC 26.

A contract signer need not see the whole document; executing the relevant paragraph with intent to be bound is sufficient: *Commonwealth Bank of Australia v Super Property Group Pty Ltd* [2024] QDC 124.

See [3.800].

Factors affecting validity

Updated:

- Silence doesn't imply non-existence of a fact unless there's a reasonable expectation that relevant facts will be disclosed. See *Gemi 193 Pty Ltd v Zhu* [2024] NSWSC 1113, at [4.560].
- Lenders should send the transaction documents directly to a legal practitioner retained solely to advise the third-party mortgagor independently. See *Gemi 193 Pty Ltd v Zhu* [2024] NSWSC 1113, at [4.1890].
- A person can be under a special disadvantage even if they have a moderate level of financial sophistication. See *Gemi 193 Pty Ltd v Zhu* [2024] NSWSC 1113, at [4.2010].
- A small business contract negotiated and tailored in a meaningful way may not be considered a standard form contract, even if it contains boilerplate clauses. See *DCZ Early Learning Pty Ltd v Semper Mortgage Management Pty Ltd* [2024] QSC 120, at [4.6040].

The scope of the guarantor's liability

Updated:

- The contra proferentem rule is to be used only where the document is otherwise ambiguous; it is a principle of last resort. See *Taylor Square TT Pty Ltd v Kinselas Pty Ltd (No 2)* [2024] NSWSC 987, at [5.100].

Rights of the creditor

Updated:

- A surety's promise of "prompt performance" of "all" obligations includes both monetary and non-monetary obligations, allowing the court to order specific performance by the guarantor. See *Taylor Square TT Pty Ltd v Kinselas Pty Ltd (No 2)* [2024] NSWSC 987, at [10.3128].

Rights of the guarantor after payment

Updated:

- A co-borrower does not have a right of contribution against a guarantor because they are not co-sureties for the same debt. See *Ossen Pty Ltd v K & S Developments Pty Ltd (recs and mgrs apptd)* [2024] NSWSC 165, at [12.1350].
- Directors can claim creditor's securities after paying guaranteed debt, but it's not a personal use asset for CGT purposes. See [12.2600].

Consumer credit legislation

Updated:

- Debtors unable to meet credit obligations due to illness, unemployment, or other reasons can notify the credit provider and apply for hardship relief to modify contract terms.

From 1 July 2010 to February 2013, the hardship relief regime was only open to debtors with debts of \$500,000 or less. From March 2013, all debtors could apply for hardship relief, with banks improving support, but ASIC continues to monitor and address inadequate practices.

If a credit provider refuses to change a credit contract, the debtor can apply to the court for a variation. The court may grant or refuse the change, but interest will continue to accrue.

See [14.660].

Performance bonds

Updated:

- A principal is not required to return a bank guarantee provided by a contractor at the end of the defects liability period under a construction contract if the principal has a restitutionary claim against the contractor for overpayment. See *Sun Engineering (Qld) Pty Ltd v Ravenswood Gold Pty Ltd* [2024] QSC 68, at [15.400] and [15.860].

Taxation

Updated:

- A liability can be incurred without disbursement if the taxpayer is committed and the amount is reasonably estimable. See [18.300].