



Legal Update

Guarantee Not Enforceable due to Failure to Disclose Terms of Another Guarantee

Failing to inform all guarantors about the terms of any variation of loan terms can be a risk for lenders, and can constitute misleading and deceptive conduct and release guarantors from liability.

In the decision of *Adisan Pty Ltd v Irwin* [2015] NSWCA 217, the Supreme Court found that a failure by a lender to disclose to a guarantor a limitation on another guarantor's liability amounted to misleading and deceptive conduct and the guarantee was unenforceable.

Facts

A Loan Agreement between a Lender and two development companies ("Borrower") was guaranteed by six co-guarantors, including Irwin (the Respondent in the proceedings). An advance of \$600,000.00 was made to the borrower. The principal and capitalised interest was to be repaid by 12 January 2009. No monies were repaid by that date. The parties then subsequently agreed to vary the Loan Agreement to extend the time for repayment and the interest payable. It was a condition of the variation that further security be provided by way of a mortgage over an apartment in Noosa owned by Bingemann Holdings Pty Ltd ("Bingemann") and a guarantee from that same company.

It was also agreed between the Lender, the Borrower and Bingemann that Bingemann's liability as guarantor would be limited to the amount released from the sale of the Noosa apartment. A Deed of Variation (documenting the above) was then executed by the Lender, the Borrower, the six existing guarantors (including Irwin) and Bingemann. However the Deed did not disclose the limitation of Bingemann's liability as guarantor.

The Borrower then failed to pay the monies due under the amended loan facility. The lender served default notices on the guarantors, requiring payment of an amount of \$1,190,696.52, and sought to enforce the guarantee provided by Irwin.

The guarantee documentation expressly stated that Irwin's liability as guarantor was joint and several and there was no requirement for the Lender to enforce the other security (including the guarantee provided by Bingemann) prior to enforcing the guarantee provided by Irwin.

Decision

Irwin argued that the guarantee was unenforceable, due to the Lender's failure to disclose the limitation of Bingemann's liability (and that this amounted to misleading and deceptive conduct). Irwin also argued

that as the Deed of Variation did not include all of the amendments to the loan facility, Irwin (by signing the Deed of Variation) did not in fact agree to the amended loan facility.

The Court found that the failure to disclose the capping of Bingemann's liability ultimately meant that the guarantee given (by Irwin) did not extend to the amended facility. It was also said that the Lender did not follow its own contractual obligation to disclose the terms of what was effectively a "new loan contract" to the guarantors.

The Court therefore declared that Irwin's guarantee was unenforceable.

This case highlights the importance (for both lenders and guarantors) to carefully consider whether any variation or amendment to the terms of loan agreements are fully disclosed, including the terms of guarantees provided by other guarantors, to all guarantors.

Things to consider before signing a Guarantee

It is imperative that, before guaranteeing a loan, guarantors understand their obligations under the guarantee documentation, including the terms of the loan agreement between lender and borrower. In particular, a guarantor must understand the following:-

1. Action may be taken against you if the borrower defaults in repayment of the loan. When default occurs however it is not necessary for the lender to first take action against the borrower. The lender may simply elect to proceed immediately against you without even notifying the borrower.
2. The terms of the guarantee as to whether you are guaranteeing one particular loan, a series of loans or a continuing obligation such as a bank overdraft.
3. Failure to repay a guaranteed loan can have disastrous impacts. Specifically, the lender could obtain judgment against you personally, for all amounts owing under the guarantee (including costs and interest).

In enforcing the judgment, the lender may (among other things) elect to commence bankruptcy proceedings against you. If you fail to comply with a bankruptcy notice, you will be declared bankrupt, after which a trustee in bankruptcy is appointed (and your property will vest in the appointed trustee). The consequences of bankruptcy can be disastrous, including:-

- Your assets may be sold, with the exception of household goods, tools (up to an indexed amount) used to earn an income, and motor vehicle/s (up to an aggregate value).
- Your income and employment may be affected - if your income exceeds a certain limit you may be required to make contributions from your income. Furthermore, you cannot be a director of a company and if you run a business under a name (other than your own), you must tell everyone that you deal with that you are a bankrupt.
- You will not be able to travel overseas without the trustee's permission (and you may be required to surrender your passport).

Should you require assistance in relation to any of the matters raised above, please do not hesitate to contact us.

For further information contact [Luke Steptoe](#) or [Paul McHugh](#).

August 2016

Like us on [Facebook](#)  and follow us on [LinkedIn](#)  for regular legal updates

This document and other recent articles can also be found on our website at www.tml.com.au/news



Thompson McNichol Lawyers

Suite 5, 32 Aerodrome Road | PO Box 552 | Maroochydore | QLD | 4558
E mail@tml.com.au | P 07 5443 1566 | F 07 5443 7196 | W tml.com.au

Liability limited by a scheme approved under professional standards legislation. This transmission and any attachment, is intended solely for the named addressee. It is confidential and may contain legally privileged information. The copying or distribution of this transmission or any information it contains, by anyone other than the addressee, is prohibited. If you have received this transmission in error, please delete it and let us know by reply email or by telephone 61 7 5443 1566. This email is subject to copyright. Emails may be interfered with, may contain computer viruses or other defects and may not be successfully replicated on other systems. We give no warranties in relation to these matters.

Please consider the environment before printing this e-mail

© COPYRIGHT

These materials are subject to copyright which is retained by the author. No part may be reproduced, adapted or communicated without consent except as permitted under applicable copyright law.

DISCLAIMER

The information in this document is not intended to be a complete statement of fact or law relating to the issues raised. Statements made are general comments only and do not constitute or convey advice per se. Accordingly, no person should rely on this information without first obtaining specific advice from our office.
