
THIRD PARTY SECURITIES AND GUARANTEES

QUESTIONS AND ANSWERS

Question - Ian Gilbert (Australian Bankers Association, Melbourne):

I thoroughly enjoyed the three speakers this afternoon and I would perhaps direct this comment more than a question at Glen Smith. Given I think the estimation is something like 6000 or 7000 branches of banks around the country, staffed with fallible human beings, the very fuzzy edges of the law that we have heard examined this afternoon, the presence in the *Code of Banking Practice* of the requirement upon banks to recommend that prospective guarantors take independent legal advice and also that the *Consumer Credit Code*, expected to commence in March of next year, provides that one of the grounds on which a guarantee transaction can be re-opened is whether the guarantor obtained independent legal advice, I wonder whether it really is an over-reaction by banks to require certificates from solicitors where guarantee situations are involved. Perhaps you could comment on that.

Response - Glen Smith (Commentator):

For the sake of brevity, I did not address today issues under the *Code of Banking Conduct*. In my paper one of the other benefits of adopting the suggested standard procedure in all cases is that under the new *Code of Banking Conduct*, I think it is Part 17, in relation to the guarantees which fall within that Part, you are going to be required to provide them with an advice anyhow. The other general comment made in that context in the written paper, is that even for guarantees falling outside that class, bearing in mind the amount of criticism reflected in the Martin Committee's report about bank practices in relation to guarantees, it seems like a very good PR exercise in any event. That is not however directly addressing your question. I acknowledge that any system is going to have problems with human fallibility, but it just seems to me that while you can say there are 7,000 branches out there, on the other hand there must be 100,000 guarantees or whatever executed a year. If in every single case you are going to require that the guarantor go away and take independent advice, it is just simply going to become unworkable.

The Law Council paper identifies significant areas of concern. One major concern is that most guarantors entering into guarantees regard this as an imposition on them — to have to go away and get independent legal advice. Basically they are emotionally committed to giving the guarantee and you are just getting in their road. Under those circumstances they cannot see why they should be paying any fees, and you just end up in a dilemma. I acknowledge the staff numbers and the dangers of human fallibility, but on the other hand you must really look at the commerciality of requiring independent advice as a general practice in all cases.

Comment - Rowan Russell (Mallesons Stephen Jaques, Melbourne):

Also a comment about that same topic. The objective of any law in this area should be that lenders who adopt sensible procedures have reasonable certainty that their guarantees will be enforceable. Having regard to the very fuzzy edges as to when the special circumstances might arise, it seems to me that the solution that Glen is proposing of only having solicitors' certificates on some occasions may well not give that sort of certainty because I think it is unlikely that you will

be able to translate those circumstances into workable procedures for bank officers to be able to distinguish between when the certificate should be required and when it should not. And it is for that reason that I would also recommend that the Law Council proposal be taken seriously. It does require legislative change, but it does give certainty because if the statutory declaration as proposed is given then the bank will be discharged in relation to these elements.

Question - Stanley Kalinko (Sly & Weigall, Sydney):

Tony Oakley alluded to the fact that the blame might be cast on to lawyers in due course rather than bankers when perhaps certificates are sought from lawyers and when the lawyers are blamed for not giving proper explanations. I think one must consider the task the lawyer has if he is to do his job properly — it would be to familiarise himself with all the documentation, and have a full consultation with the parties. If he charged for that he might find himself charging between \$1,000 and \$1,500 for his time. Now there is no guarantor out there who is going to want to pay that sort of money. So if you take short cuts, or do favours for friends, where will we stand with lawyers in due course? I think the whole problem is going to really rebound on this profession and we are going to have to be really careful, and you may well find lawyers will not want to give certificates. The banks will say you have to have them from lawyers but lawyers will not want to give them.

Response - Tony Oakley (Commentator):

In England we do not have the formalised certificate practice which you have in Australia which I really found out about for the first time when I read Glen's paper. I read the whole paper and all the details of the different certificates that you have. What normally happens in England is simply this. The mortgagor and guarantor are advised that the guarantor should be separately advised. In most of the cases which have been litigated this actually has not happened in any meaningful sense — another member of the same firm has done it, but usually with the principal debtor in the room. Those groups of cases which I discussed all turn on whether in those circumstances the bank is bound by what the solicitor has done or the bank can rely on a solicitor's letter simply saying nothing more than that, that yes, we have separately advised the wife, for example. As I say, there is a conflict of authority on that at the moment. The three most recent cases suggest that you can rely on the solicitor's affirmation. If that is the case, that the solicitor said the wife was independently advised when the husband was in the room, I think it is arguable that there has been some misconduct there. That is why I said that the critical spotlight might well come to fall on solicitors like that. All that means in our system is for the principal debtor not to be in the room at the time and that solicitors do not say that someone has been separately advised if both parties were there. I take your point completely about the fees. It would be quite ludicrous to expect a guarantor to pay those sort of sums, but that would be a proper fee to charge for doing what you envisage. Unfortunately the House of Lords never takes the slightest notice of considerations like that, since they are no longer fee earners and we have case after case where they say all sorts of wonderful things. In takeovers, for example, you are supposed to go to the court for a declaration so that everybody can find out what is going on when you are engaged in secret negotiations. So I am afraid I have no confidence that your sorts of arguments would have the slightest weight with the present members of the House of Lords. But I agree with you.