

CURRENT DEVELOPMENTS:  
CURRENT ISSUES ON THE LAW OF GUARANTEES

QUESTIONS AND ANSWERS

**Comment - Paul Rogerson (Gadens, Sydney):**

The point that Mr Bear makes about the giving of the certificates by solicitors explaining guarantees - I think a point should be borne in mind in New South Wales that there is a ruling by the New South Wales Law Society that solicitors are not supposed to give those certificates. Apparently a few years ago a building society used to issue standard requisitions to the mortgagor's solicitors and the mortgagor's solicitor had to certify that he had explained the terms of the mortgage to his client and his client understood it. And a lot of mortgagor's solicitors complained about it and the Society made a ruling accordingly. I am a terrible hypocrite in that whilst I am aware of this ruling I always insist that guarantor's solicitors sign the certificate at the end of our guarantees. So I think from the point of view of the New South Wales practitioners in fact they should resist the request of people such as myself to sign these certificates. And I will do my best to have a lapse of memory of this New South Wales Law Society ruling.

The second point is that in relation to Bawn's case if I could shed a little bit of inside knowledge on this. We acted for one of the parties and one of the things about Bawn's case is the rather peculiar facts and what helped Mrs Bawn to win was the evidence given by Mr Bawn. And whilst we have been talking the past couple of days about how much we all hate banks, Mr Bawn hated Mrs Bawn even more. So when Mr Bawn was called as a witness neither party knew what he was going to say so it was agreed between the parties that he would be called by Trade Credits and we agreed that we could all cross examine him. And we did. And he did his best to sink the slipper into his wife and unfortunately he missed and really gave a kicking to Trade Credits. And the other aspect which helped us enormously was the point about Mrs Bawn resigning as a director of the company and having her resignation refused by her husband. We asked her to provide us with some evidence as to what happened and she went home one night and she came in the next day with a carbon copy of a letter that she wrote to her husband dated some time in 1981 where she had tendered her resignation. And when we cross-examined her husband as to this letter, he said that he had never heard of it but then again Mrs Bawn, she was a lovely lady and she kept remarkable records which helped us no end.

**Question from the Floor: (No name given)**

I wonder if the panel could comment on what the position might be if despite all the explanation in the world by the solicitor advising the guarantor and despite all the certificates in the world the guarantor still does not understand his obligations?

**Response - Paul Bear:**

I think the answer is that you simply cannot under any circumstances cover every situation. I think this is the very point that was made in the first paper that you will always get the unusual circumstance which you simply cannot by your normal procedural methods counter.

If I could just add to that a word of advice to the banks and I am not in the hot spot here. There is a very ancient Latin maxim which doesn't even cover these sort of circumstances. And the maxim runs something like this. "Senta ubi sub ubi" and literally translated means "always wear under wear" and banks can protect their backsides as much as they like but there will always be these hard cases which you can't counter.