CURRENT DEVELOPMENTS:
CURRENT ISSUES ON THE LAW OF GUARANTEES

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Having looked at all the relevant cases I do think they turn essentially on questions of fact. The principles are the same. We have had some nasty cases. I mentioned Bundy's case earlier, but we have recovered from that and the courts are being more sensible. The courts are still quite ready to help guarantors but the principles have not changed. But this does not mean that guarantees don't work. Looking at the cases I am easy about the idea of guarantors not having independent advice.

The English courts have said after resigning from the idea that all bank managers are financial advisers, they said that it was all right for a bank manager to tell a guarantor the effect of the transaction and the document - that does not make him an adviser. I think that while that may be correct as a statement it is very difficult to follow.

I have once tried to act on behalf of a lender and advising a guarantor in the same room about the effect of the guarantee. It is very difficult indeed. You can describe what a guarantee does, but if you start talking about its clauses and their effect you start moving away from the factual description of what the legal position is into the implications, and you move into the area of advice. I think it is far better if you can possibly arrange it to have the guarantor separately advised and therefore follow the independent solicitor route. We do not have the same kind of law as you Consumer Transactions Act but the principles are the same. So I do think that it is important if possible the guarantor should be separately advised and the principles of law which we all share should make the thing work.

On a more constructive note there are two things which I have learnt from experience in guarantee situations. I emphasise that these are not in the retail area because most of my practice or 99% of it is in the commercial area where people are professionally advised and so those problems do not come up. But time and again when a client, particularly a bank, comes to me and says they are going to lend to X guaranteed by Y, I find it useful to say: "Who is the credit really going to?". Very often

it is Y and when you have explained that you are taking a double risk if your real debtor is Y because you are relying on a secondary obligation and therefore you have to hope that both the primary obligation and the secondary obligation work in law. It is very often possible to reconstruct the thing so that the loan is made or the credit is advanced to the person who would have been the guarantor. It makes the thing much more satisfactory legally.

Sometimes of course it cannot be done. If you are lending to a group of companies they may feel very strongly that the loan has got to be advanced to the subsidiary or whoever. But that is one way around the problem which does work and sometimes without too much difficulty.

The other thing which I find getting more popular in London in the commercial context is to use the standby letter of credit. Now this is an American practice devised by Roland Brandel's wicked colleagues. It is to get around various laws which say that banks cannot give guarantees and instead of which they issue a standby letter of credit. They are quite simple. They are just an ordinary letter of credit which the bank issues and the bank says that on production of the bit of paper saying "you must pay" the I the bank will pay X pounds or dollars or whatever it is.

Now that is what the Germans call an abstract obligation and it is far better than a guarantee from the lender's point of view because there is no argument about the underlying facts, the primary obligations and all the rest of it. You present your bit of paper saying "you must pay" and you get your money, and that is the end of it. It only works of course where the guarantor is a bank but it is really getting quite popular in London. It is simple, and it works and you avoid all those problems that are associated with guarantees.