

Is Payment of the Debt Guaranteed? The Answer Is Not Always Straightforward...

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By Jeffrey Brown, a Principal of Matthews Folbigg, in our Insolvency, Restructuring and Debt Recovery Group.

The concept is simple enough: your terms of trade contain a section to be completed and signed by a person who agrees to personally guarantee all debts of your customer. If the customer can't or won't pay, you can turn to the guarantor for payment.

The guarantee is a tried and trusted part of the debt collection strategy for many businesses.

Far too often, we see instances where claims for payment made against guarantors run into serious trouble.

A common response by a guarantor to a debt collection claim is that they did not understand that by signing the document they would be personally bound to pay.

At first blush this might seem a weak argument, but in many cases it is successful.

If a written guarantee is not properly signed, it can open an argument that the person signing was not doing so as a guarantor but in another capacity. This is because most guarantors are also a director of the customer, and the same person who is signing on behalf of the company is providing the guarantee. So if there is any doubt over which "hat" the person signing was wearing at the time, it can throw the guarantee, and collection of the debt, into doubt.

Examples of this include:

- *Where a director has signed the guarantee, and put the customers name, ACN or ABN underneath their signature.* This suggests that the person is signing only in their capacity as director of the company, and is not signing in their personal capacity. In other words, it might suggest that they have not made a personal commitment to meet the company's debt.
- *Where the director has put the company's address details in the guarantee, rather than his or her own.* Again, this supports the argument that the person was acting only as a director of the company
- *Where the guarantee form is not signed at every place where a signature is required, or is signed in the wrong spot.* This may be enough to cast doubt over whether the person intended to sign and be bound by the guarantee

A good debt collection strategy will always include regular reviews of your terms of trade (to ensure they are as simple as possible while still retaining all the necessary features), and training for credit control staff on how to ensure all terms of trade are properly executed by

customers and guarantors.

Even if you discover that a debt you thought was guaranteed has run into trouble, all is not lost.

Courts in Australia have taken a consistently practical approach when confronted with questions over whether a guarantee is enforceable. A recent example of this approach included the following words in the judgment:

“The question of the capacity in which a person signed a document... is determined by assessing objective intention on a construction of the document as a whole, in light of the surrounding circumstances, to the extent to which such evidence is admissible. As concerns a commercial document, any question of the capacity in which a person signs must be considered in the relevant commercial setting. The inquiry is not limited to consideration of the signature and any qualification to it.” [footnote: WESTGYP PTY LTD -v- NORTHLINE CEILINGS PTY LTD [2018] WASC 244 (15 August 2018)]

Accordingly a court will consider the terms of the whole document, as well as evidence of the commercial relationship between the parties, in determining if a guarantee is binding.

Of course, no one wants to go through the time and expense of a court hearing in order to test these principles. That is why a few hours of close attention to your terms of trade, and the procedure for having personal guarantees signed, is always a worthwhile exercise.

If you would like more information or advice in relation to insolvency, restructuring or debt recovery law, contact a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

Jeffrey Brown on (02) 9806 7446 or jeffreyb@matthewsfolbigg.com.au

Stephen Mullette on (02) 9806 7459 or stephenm@matthewsfolbigg.com.au