Proceedings against director in respect of guarantee of company debt not prevented when proceedings commenced prior to administration

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A recent decision of the New South Wales Supreme Court confirms that the protection given to company directors in section 440J of the *Corporations Act 2001* (Cth) (**Act**) in respect of non-enforcement of director guarantees of company liabilities during administration does not apply to proceedings commenced prior to the administration.

Section 440J of the Act provides that during administration of a company, a guarantee of a liability of the company cannot be enforced against a director, spouse or relative of a director, and a proceeding in relation to such a guarantee cannot be begun. The purpose of the provision is to ensure that directors are not discouraged from appointing an administrator because of the threat of personal guarantees of company debt being enforced against them.

In *Mizuho Bank Ltd v Mark Anthony Ackroyd* [2016] NSWSC 1148 the Court was required to determine whether section 440J extends to proceedings already commenced against a director prior to the administrator being appointed.

Having considered the wording and intent of section 440J the Court held that section 440J does not apply to proceedings already commenced prior to the administration. The result was that the plaintiff creditor could continue its proceedings against the director commenced prior to the administration in respect of his guarantee of the company's obligations up to the amount of $20,040,000.

In giving judgment in the case the Court noted that if continuing proceedings were to be prevented by appointment of an administrator, section 440J could encourage directors to appoint an administrator to protect their own personal position. The Court also noted that in a situation where proceedings have already been commenced, the risk of potential liability under the guarantee inhibiting appointment of an administrator has passed because action in respect of the guarantee has already being brought. This and the wording and purpose of section 440J provided compelling reasons for the section to be found to not apply to proceedings already commenced prior to the administration.

Read the judgment here:
https://www.caselaw.nsw.gov.au/decision/57b54c61e4b058596cb9e8f9#(link is external)

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