

**THE
MODERN
CONTRACT
OF
GUARANTEE**

2nd ENGLISH EDITION

by
J C Phillips

SWEET & MAXWELL

THE MODERN CONTRACT OF GUARANTEE

English Edition

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PREFACE

Economic recessions have deleterious consequences for many sections of society and the last few years have also made the position of guarantors particularly vulnerable, with creditors finding it necessary to enforce their collateral securities. The accompanying case law has been extensive and there has been hardly one area of the law relating to guarantees which has been untouched by judicial pronouncement. It is true that there has been no decision quite as dramatic as that of the House of Lords in *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 A.C.773 (relating to the bank's liability and responsibility for guarantees entered into as a result of undue influence) which was exhaustively examined in the previous edition of this work. Yet many decisions have been significant in shaping the law or determining the application of existing principles to increasingly sophisticated contractual arrangements.

The relevant developments are examined in this work within the same structural framework as that adopted within the previous edition. In Part I ("Formation and Validity") there is an analysis (in Chapters 2 and 3) of recent case law as to the circumstances in which the validity of the guarantee can be impugned by lack of consideration or contractual intention (re-visiting defences commonly raised in the 19th century), as well as issues relating to the Statute of Frauds, execution by companies, and the effect of a failure by co-guarantor to execute the guarantee. The legal status and construction letters of comfort are also considered. Chapter 4 then traces developments in respect of non-disclosure, misrepresentation and undue influence in terms of their effect on the validity of the guarantee. This chapter also discusses the impact of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 upon particular terms of the guarantee in the light of recent decisions.

As examined in Chapter 5 of Part II ("Liability and Discharge") there has been much case law since the last edition setting out more clearly (although perhaps not without some remaining uncertainty) the general principles of interpretation applicable to guarantees, as well as emphasising that specific issues of construction continue to arise. This is despite the efforts of those drafting guarantees (including myself) to remove ambiguity. Examples of current problems of interpretation include the meaning and ambit of an "all monies" guarantee; whether or not the guarantee embraces past or future indebtedness, or both; the identification of the correct creditor and guarantor; and whether a director signing a guarantee has incurred personal liability. The determination of the scope of the transactions embraced by the

guarantee is especially important when the terms and sometimes the nature of the principal transaction has been altered pursuant to a financial restructuring arrangement and an additional section has therefore been included in this edition to identify the resulting difficulties and possible solutions.

The importance of drafting is also apparent in Chapter 6 in decisions relating to Voluntary Schemes of Arrangement and Authorised Guarantee Agreements. Chapters 7 and 8 examine those doctrines which discharge the guarantor, such as variation of the principal contract and impairment of securities held for the enforcement of the principal obligation. In this context this edition gives particular scrutiny in the light of recent case law to the efficacy of clauses (including “the principal debtor” clause) which purport to preserve the liability of the guarantor in such circumstances.

The “Rights of the Parties” are investigated in Part III. Here special attention is given to the position of creditor, guarantor and principal in the context of insolvency, including the important effect of non-competition clauses, as well as the incorporation of new developments on the requirements of a valid demand, the guarantor’s right of set off and to *quia timet* relief. There is also a detailed discussion of the rights of indemnity, contribution and subrogation. In the last part of the work (Part IV “Guarantees in Particular Contexts”) Chapter 13 on performance bonds looks at the recurring question as to whether the bond is conditional or unconditional (and in this context the impact of a “conclusive evidence” clause), the fraud exception, and the beneficiary’s duty to account. Finally, in Chapter 14, which deals with private international law problems in respect of guarantees, there is material on the Rome I Regulation, which has become law since the last edition.

There has been little legislative reform on the law of guarantees. In the authors’ view this is unfortunate because (as explained in this edition) there are some aspects of the general principles that need reappraisal, for example, the law relating to the variation of the principal contract, the giving of time to the principal, and the requirement that there should be strict compliance with conditions precedent.

Aside from incorporating changes to the law in this edition there has been some re-arrangement of material within certain Chapters, for example, Chapters 2,3 and 10. This has been done with the objective of achieving greater clarity and making the legal analysis more easily accessible to the reader. This is important for us as authors because the work is intended not simply as a scholarly analysis and evaluation of the law of suretyship, but also as a detailed reference text for the judiciary and for those in the legal profession who practise in this area of law (either as litigators or as those drafting commercial contracts). It is very much hoped that the book proves useful.

John Phillips has been responsible for this edition, but of course it also reflects the work of both authors since its first Australian edition in 1985. The law is stated as at June, 1 2010.

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