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Goldsmith v Macquarie Leasing Pty Ltd

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Lenders and financiers often provide finance to a company borrower on the basis that the company directors give personal guarantees to the financier, guaranteeing the due and punctual performance of the company. The recent judgment in *Goldsmith v Macquarie Leasing Pty Ltd*,[1] handed down by Dixon J in the Supreme Court of Victoria on 28 June 2013, deals with many complex legal issues relating to the enforcement of guarantees. The key issues include the requirement for a guarantee to be in writing under the Instruments Act 1958 (Vic),[2] whether the identity of a principal in a guarantee is necessary for the enforceability of that guarantee by the principal, and questions relating to principles of agency. Despite these matters, it is clear from Dixon J's judgment that any director providing a guarantee for a company's financial obligations should think carefully about doing so, and should consider the very real risk that the director may at some point have to make good that guarantee.

The facts

Corporate Finance Pty Ltd, as trustee for the Corporate Finance Unit Trust (Corporate) and as agent for the financier Macquarie Leasing Pty Ltd (Macquarie), entered into a Commercial Hire Purchase Agreement on 5 March 2008 (Agreement) with YoMo (Australia) Pty Ltd (YoMo). The directors of YoMo guaranteed the performance of YoMo's contractual obligations under the Agreement by executing a guarantee and indemnity (Guarantee). YoMo defaulted and, after terminating the Agreement, both Macquarie and Corporate sought to enforce the Guarantee by serving a notice of demand on each director guarantor for the outstanding balance due.

Magistrates Court findings

In the Magistrates Court, each director guarantor except one, Mr Goldsmith, admitted to entering into the Guarantee with Corporate. However, they contended that as Macquarie was not a party to, or disclosed as principal in, the Agreement, Macquarie could not enforce the Guarantee against the directors. They argued that Macquarie's identity was a necessary requirement for enforceability of the Guarantee, by reason of s 126 of the Instruments Act, and denied that Corporate had the authority to act as agent for Macquarie. Mr Goldsmith separately argued that there was no evidence that he had executed the Guarantee at all, and should not be personally liable. The magistrate found in favour of Macquarie and Corporate, holding the Guarantee enforceable and binding on all directors.

On appeal to the Supreme Court of Victoria

The directors appealed to the Supreme Court, seeking orders that the magistrate's findings be dismissed for five key reasons. First, the directors argued that the magistrate incorrectly held that s 126 of the Instruments Act had been complied with. Second, they claimed that Corporate did not have authority to act as Macquarie's agent, and Macquarie was not principal of Corporate and was therefore not entitled to enforce the Guarantee. Third, the directors believed that the magistrate erred in finding that it had been properly established that Mr Goldsmith executed the Guarantee. Finally, the directors attempted to argue the fourth and fifth reasons, which were less significant, being that the magistrate erred in relying on the affidavit of Steven Alexander, and that the amounts claimed by the defendants were calculated incorrectly in accordance with the terms of the Agreement.

Each key issue argued on appeal has been summarised below, along with Dixon J's very well-articulated reasons, the evidence relied upon, and the final decisions.

Issue 1: Was the requirement of writing complied with?

Had the requirements of s 126 of the Instruments Act been met?

The directors questioned here whether Macquarie was entitled to rely on the Guarantee when it was not a party to, and was not sufficiently identified or named in, the Guarantee as an interested party or principal. After lengthy analysis, Dixon J found these grounds to be without substance and believed that this contention, even if accurate, was not fatal to Macquarie's case and not really to the point.

The directors argued that the proper application of s 126 required that "the agreement on which the action is brought, or a memorandum or note of the agreement, is in writing". Relying on this provision, they argued that

Macquarie's identity was a necessary requirement for enforceability of the Guarantee. The directors also relied on *Rosser v Austral Wine & Spirit Co Pty Ltd*[3] in their argument that "the parties to the agreement must be named in writing or at least sufficiently identified therein".[4] As it turned out, this was essential to the directors' appeal, as it was Macquarie, not Corporate, that suffered a loss.

Justice Dixon found that the parties who owed obligations (YoMo), as well as the party to whom the obligations were owed (Owner), were clearly identified in the Agreement. The Owner was described in the Agreement as Corporate and its assigns, its successors and, where the identified Owner is an agent, its principal. Justice Dixon held that the benefit of the Agreement and Guarantee could clearly be assigned or transferred to any person by the Owner without impairing the Guarantee, and therefore agreed with the magistrate that the directors' claim that s 126 was not complied with was misconceived.

Was Macquarie a stranger to the Guarantee obligation with no interest in or standing to enforce it?

Although Macquarie may not have been "disclosed" as principal in the Agreement and Guarantee, Dixon J agreed with the magistrate that it could still enforce the Guarantee in which Corporate was acting in the capacity of agent for Macquarie. In Dixon J's views, a careful reading of the whole of the Agreement demonstrated that the Guarantee was intended to be for the benefit of the Owner, which also referred to Macquarie.

Even if Macquarie was an undisclosed rather than a disclosed principal, *Mooney v Williams*[5] establishes that a principal can step in and take over the benefit of an agreement made by an agent who had not previously disclosed the existence of a principal. Importantly for financiers relying on guarantees, Dixon J also noted that, while it was not necessary to determine this question in this case, according to Phillips and O'Donovan in *The Modern Contract of Guarantee*,[6] the rule that an undisclosed principal could sue may extend to persons who are not parties to, and unascertained at the date of, an agreement.

Justice Dixon therefore rejected the directors' defence and held that it was clear, based on the ample evidence before the magistrate (outlined in the next section), that Macquarie was the true Owner.

Issue 2: Was Macquarie a disclosed principal of Corporate?

The directors expanded on their argument that Macquarie was not a disclosed principal by denying an agency-principal relationship between Corporate and Macquarie, contending that Corporate was not authorised to enter into the Guarantee as agent for Macquarie. However, based on evidence presented to and accepted by the magistrate, it was clear to Dixon J that Macquarie was properly disclosed as principal of Corporate. This evidence included a written Agency Agreement between Macquarie and Corporate, governing the agency relationship between them — including in relation to the Agreement and Guarantee. The directors, including Mr Goldsmith, also executed a Direct Debit Authority in favour of Macquarie that resulted in YoMo repaying the facility directly to Macquarie. By affidavit evidence (Alexander Affidavit) and in verbal statements, it was uncovered that Stephen Alexander of Corporate informed the directors that the facility was owned by Macquarie and that he in fact had no authority in relation to approvals, as he was acting under the agency agreement with Macquarie.

According to Dixon J, their further argument that cl 9.1 of the Agreement expressly excluded Corporate from binding Macquarie in relation to "securities", and therefore the Guarantee, had absolutely no merit. Justice Dixon explained that the terms of the Agreement also incorporated the director's Guarantees and were not restricted to the Agreement itself.

It was evident to Dixon J, and should have been to the directors also, that Macquarie was a principal taking the benefit of the Guarantee obtained by Corporate, Macquarie's agent, with actual authority. In any case, whether or not Macquarie was a disclosed or undisclosed principal is irrelevant, as an undisclosed principal is also competent to sue on a contract made by an agent on its behalf, acting within the scope of its actual authority. The directors therefore failed to satisfy Dixon J on this issue.

Issue 3: Did Mr Goldsmith execute the Guarantee?

The directors submitted that Macquarie and Corporate failed, without explanation, to call the attesting witness to Mr Goldsmith's signature on the Guarantee. Mr Goldsmith did not deny that the signature on the Guarantee was his, or that he did not give the Guarantee, but rather submitted that the Guarantee was not "properly and duly executed" — against which Dixon J wrote, "whatever that means". As Mr Goldsmith did not give evidence denying that the document bore his signature and did not raise any issue of fact out of the circumstances of his execution, Macquarie and Corporate calling the witness to his signature was not warranted. There was enough evidence for the magistrate to be "positively satisfied"[7] that Mr Goldsmith executed the Guarantee and, in Dixon J's view, there was no error of law identified on this ground.

Issue 4: Reliance on the affidavit of Steven Alexander?

Least compelling of the directors' arguments was that the magistrate erred by relying upon the Alexander Affidavit. This was especially so given that the directors themselves relied upon the Alexander Affidavit in explaining how their defence was developed, at which point the directors took no objection to the Alexander Affidavit being used. Justice Dixon held that it was not appropriate to later seek to exclude the affidavit on appeal.

Issue 5: Incorrect calculation of indemnity?

The directors finally contended the calculation of the final sum on two grounds. The first, which was dismissed by Dixon J, was that the sum quantified was not a "Termination Amount" specified by cl 15.1 of the Terms and Conditions. The second was the only ground that the directors managed to successfully argue, being that either the principal or the agent, but not both, could enforce the Guarantee. The Guarantee was for a single loss, suffered by either Macquarie or alternatively by Corporate as agent for Macquarie. However, Corporate's right to enforce the Guarantee as agent was destroyed by the intervention of the principal, Macquarie, in the exercise of Macquarie's own right. On this ground alone, the directors were successful and the finding for Corporate could not stand.

Findings and concluding comments

Justice Dixon found in favour of Macquarie that the director guarantors had to honour the Guarantee, and ordered the directors to pay Macquarie the sum of $79,225.24, together with interest. This judgment will be looked upon favourably by financiers accepting guarantees from company borrowers, and perhaps even with some relief. For director guarantors, however, the decision should be a reminder to take guarantees seriously and, where appropriate, to seek independent legal and financial advice over the guarantee document. The consistent theme throughout Dixon J's judgment was his unsympathetic attitude to the director guarantors' case — particularly when they tried to escape their obligations through arguments lacking substance, including a rather technical and weak defence regarding the manner in which the signature on the Guarantee was witnessed.

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About the author

Leonie Chapman's experience extends to banking and finance, consumer credit and mortgage lending, contract negotiation, trade practices and fair trading legislation, intellectual property and trade marks, corporate and financial services. After completing her Bachelor of Laws and Bachelor of Commerce in 2002, Leonie went on to work both in private practice and as senior in-house lawyer supporting a specialist lender and then for six years, Macquarie Bank Limited. Having achieved a Master of Laws in 2009 specialising in banking and finance law, Leonie's main focus now as Principal of LAWYAL Solicitors is on regulation and compliance for banking and financial institutions.

Footnotes

1. *Goldsmith v Macquarie Leasing Pty Ltd* [2013] VSC 332; BC201310609.
2. Instruments Act 1958 (Vic), s 126.
3. *Rosser v Austral Wine & Spirit Co Pty Ltd* [1980] VicRp 33; [1980] VR 313.
4. Above, n 3, at 314.
5. *Mooney v Williams* (1905) 3 CLR 1 at 8; (1905) 11 ALR 437; (1905) 23 WN (NSW) 39b; BC0500036.
6. J Phillips and J O'Donovan, *The Modern Contract of Guarantee*, Lawbook Co Australia, 2004.
7. Referring to *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] ALR 334; (1938) 12 ALJR 100; BC3800027.