HERBERT SMITH FREEHILLS

COURT DISMISSES CLAIM BASED ON 'REPLACEMENT' GUARANTEES

22 February 2017 | Australia
Legal Briefings – By **Andrew Eastwood** and **Simone Fletcher**

In *Australia and New Zealand Banking Group Limited v Manasseh* [2016] WASCA 41, the Western Australian Court of Appeal dismissed an appeal relating to the enforceability of a guarantee over subsequent financial arrangements.

Ms Manasseh entered into a guarantee with the bank to secure a financial facilities agreement for her husband's company (Vivaldi). Crucially, cl 8 of the agreement provided that the bank and Vivaldi could enter into new agreements or change or replace the existing guarantee arrangement without Ms Manasseh's consent, unless:

- The guarantee applied to any new or replacement arrangements; or
- The bank changed the guarantee arrangement in a way that increased the liability of the guarantor, and a law or any relevant code of conduct required consent for the increase.

Following default by Vivaldi, Ms Manasseh refused to give consent to an offer from the bank to alter the facility limit and extend its termination date. Notwithstanding the lack of guarantor consent, and the fact that consent was listed as a condition precedent in the bank's letter of offer to Vivaldi, the agreement went ahead. When Vivaldi subsequently defaulted again, Ms Manasseh argued that she was not liable under the new financial facilities arrangement.

The case concerned whether Ms Manasseh's liability under the Guarantee had been discharged either because a new contract (to which she did not consent) had been entered, or because the prior agreement increased Ms Manasseh's liability such that the guarantee was discharged under the common law *Ankar* principle (*Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549). In broad terms, the *Ankar* principle is that a guarantor will be released from a specific guarantee of the due performance of the principal debtor's obligations under a particular contract if the parties vary that contract in a way that is not insubstantial or incapable of prejudicing the guarantor.

In separate judgments, McLure P and Buss JA considered the text of the new agreement and the circumstances around it to reach the conclusion that it was a 'replacement' agreement. The relevant factors included that:

- the new agreement largely replicated the former agreement;
- it was not described as a 'variation';
- there were new fees; and
- there was an alteration of interest calculation and general conditions.

In contrast, Murphy JA, while dismissing ANZ's appeal, reached that conclusion on different grounds. Murphy JA held that the new agreement was a 'variation' rather than a 'replacement' agreement. However, the fact that the offer materially altered Ms Manasseh's rights as a guarantor required that her consent was still needed, under both clause 8 and the common law.

This result highlights the importance of financial institutions closely adhering to the terms of their guarantees when modifying financial facilities. This involves satisfying consent requirements, as well as addressing the *Ankar* principle where applicable.

In relation to the condition precedent in the new agreement requiring Vivaldi to gain guarantor consent, McLure P and Buss JA held that the bank waived this condition precedent and the agreement remained on foot. This may highlight courts will not invalidate financial agreements where financial institutions have not complied with their own requirements. Therefore, financial providers must ensure all conditions are met before allowing borrowers to access funds.

This article is part of a series highlighting a six judgments in the retail banking sector delivered by Australian courts last year covering a range of issues arising in banks' engagement with their clients, contractual arrangements and the application of standard terms and conditions. The cases provide a number of cautions for banks seeking to navigate through various traps. Click here to view the full list.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

ANDREW EASTWOOD
PARTNER, SYDNEY

+61 2 9225 5442
Andrew.Eastwood@hsf.com

LEGAL NOTICE

The contents of this publication, current at the date of publication set out above, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.