

Causation and the Code

Allan Kawalsky & Bryan France | July 2016 | Banking

Summary

The recent Victoria Supreme Court decision of *CBA v Wood* [2016] VSC 264 demonstrates the significant role which causation plays in cases where a guarantor seeks to avoid their obligations because the lender has committed breaches of the *Code of Banking Practice* (the Code).

In contrast to some earlier decisions involving Code breaches, the Court found that here the Guarantor had not shown that he would have acted any differently if the breaches had not occurred.

The Court also reinforced the position that the breaches of the Code were “mere warranties” and not conditions (as advocated for by Wood). Accordingly, the breach of a provision of the Code would not mean that Wood had a right to terminate the Guarantee, only that damages were payable, if proved.

Facts

Robert John Wood (Wood) is an orthopaedic surgeon and was also involved with his brothers in property development ventures.

Wood (and his associated entities) became party to a joint venture the purpose of which was to acquire and develop a property in Corowa, NSW as an “Eco Resort” before later selling and leasing back units of the Eco Resort.

In 2007, Bankwest advanced a loan to the joint venture company to refinance a previous facility provided by Westpac and in due course to provide further funds for construction. Bankwest required Wood to provide a personal guarantee as part of the loan to the company (Guarantee).

The joint venture company failed to repay the loan and Bankwest subsequently sought to enforce the debt obligations of the joint venture company and guarantors, including Wood. Other than Wood, each of the defendants pursued by the Commonwealth Bank of Australia (CBA), as successor in law to Bankwest, subsequently became bankrupt or went into liquidation.

Wood’s Defence

Wood sought to avoid liability under the Guarantee by alleging that CBA had breached the Code by:

- (a) failing to give him a separate copy of a letter of offer in addition to the execution version and financial statements required by cl. 28.4 of the Code; and
- (b) giving his Guarantee to somebody acting for the joint venture for execution by Wood in breach of cl. 28.6 of the Code.

Wood submitted that each of the clauses of the Code relied upon were conditions of the Guarantee, the breach of which would give Wood the right to terminate the Guarantee.

Wood also alleged that CBA had engaged in unconscionable conduct.

Decision

The Court noted that provisions of the Code that are incorporated into a guarantee have contractual force, citing the decision of *Doggett v CBA* [2015] VSCA 351, however it rejected Wood’s characterisation of clauses 28.4 and 28.6 as conditions, preferring CBA’s submission that the clauses were properly characterised as warranties, referring to the decision of *National Australia Bank v Rice* [2015] VSC 10.

Wood unsuccessfully alleged that it was represented to him that it was a condition of him signing the Guarantee that his liability was to be limited to a twelfth of the company’s liabilities. This argument was rejected for a number of reasons, including that the evidence did not

support it, and the Court did not believe that Wood would have acted any differently if he was aware of the true position.

The Court held that although CBA had breached its disclosure obligations under the Code, Wood had failed to establish a causal link between CBA's breaches and his liability as a guarantor, or that he would have acted differently but for the breaches, citing, among other factors, the following:

- Wood had a financial incentive to execute the Guarantee and stood to gain a very substantial profit;
- Wood's previous financial history and arrangements;
- Wood's own evidence that he did not review or check the necessary documents due to time pressure.

Wood's allegations that CBA had engaged in unconscionable conduct were rejected on the basis that there were no circumstances at the time of execution of the Guarantee which in any way adversely affected the ability of Wood to make a judgement as to what was in his best interests.

The Court described Wood as:

... a well-educated, intelligent and commercially experienced person who fully appreciated the nature of a guarantee at the time the Guarantee was executed.

Conclusion

The decision reinforces the position that not all breaches of the Code by a lender will be fatal, particularly if a guarantor cannot prove a causal link between the lender's breaches and the guarantor's liability, or show that they would have acted differently but for the lender's breaches.

The Court will take into account the characteristics of the individual concerned and the surrounding circumstances. Here Wood's education, intelligence and commercial experience were key factors in determining whether he would have acted any differently if the Code breaches had not occurred.

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