



The great escape: Can the guarantee you signed be enforced?

Authors // Chris Kintis, Christopher Farah and Tian Yan

March 2018

Personal guarantees are extremely common.

Chances are, one day you'll be required to sign one – perhaps as a company director, or maybe as a parent when helping your child obtain finance for their first home.

Often such guarantees are provided without much thought, simply so a transaction can progress smoothly.

But more frequently we are being approached by guarantors who are being pursued to pay up under their guarantee. In many instances we have been able to resolve such claims favourably for the guarantor.

In a recent case, our client settled the proceedings brought against him as guarantor by paying less than 5% of the amount claimed against him. We thought that was a pretty good outcome. So did our client! And it was achieved without the stress and expense of lengthy court proceedings.

Although each case turns on its own facts, there are some established legal principles we apply when considering claims against guarantors. In this publication we share with you some of those principles, and some considerations that we apply when assisting guarantors.

Ignorance is not always bliss

In many instances a guarantor signs a personal guarantee without properly thinking it through. Perhaps they have been required to act quickly by the person

supplying a good or service that they need, or maybe they feel they have no choice but to sign for a deal to progress smoothly.

Similarly, when being pursued for payment under a guarantee they have signed, some people are inclined to make the payment without first getting advice, assuming that they have no other choice. This isn't always so.

Once the facts and circumstances surrounding the signing of the guarantee are carefully investigated, often there are issues that affect the validity of the guarantee.

Some factors that determine if a signed guarantee is enforceable include:

- Did the guarantor get any legal or financial advice, or were they offered the opportunity to do so?
- Were the terms of guarantee explained to the guarantor clearly?
- Does the guarantee relate to another agreement? If so, is that other agreement enforceable?
- Did one party take advantage of the other party due to unequal bargaining power?
- Was the guarantor rushed to sign the guarantee or placed under undue pressure?
- What were the circumstances that led to the guarantee being provided or procured?

ClarkeKann is a commercial law firm with offices in Brisbane and Sydney. Our expertise covers commercial & corporate transactions, employment & IR, financial services, litigation, risk management and insolvency, property transactions and resources projects, across a range of industries. For a full list of our legal services, please visit our website at www.clarkekann.com.au. To update your contact details or unsubscribe to any of our publications, email us at publications@clarkekann.com.au.

This bulletin is produced as general information in summary for clients and subscribers and should not be relied upon as a substitute for detailed legal advice or as a basis for formulating business or other decisions. ClarkeKann asserts copyright over the contents of this document. This bulletin is produced by ClarkeKann. It is intended to provide general information in summary form on legal topics, current at the time of publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters. Liability limited by a scheme approved under professional standards legislation. [Privacy Policy](#)

The court has upheld these principles many times. You can [read about it more in our article](#) about the matter of *Alceon Group Pty Ltd v Rose* [2015] NSWSC 868, in which Chris Kintis of ClarkeKann successfully acted for the guarantor.

If you're being pursued after signing a personal guarantee you should seek advice to see if you are actually liable under that guarantee, or if it may be invalid.

Of course, knowing that a guarantor may be able to invalidate a personal guarantee, if you are relying on a personal guarantee as security, we recommend that you get advice to make sure your agreement is watertight. It is important that you get it right so you aren't left exposed with an unenforceable guarantee, and potentially a debt.

Please contact [Chris Kintis](#) to discuss how we can assist you.

For more information, please contact:



Chris Kintis //
Partner

T 61 7 8235 1251

E C.Kintis@clarkekann.com.au



Christopher Farah //
Senior Associate

T 61 7 8235 1213

E C.Farah@clarkekann.com.au



Tian Yan //
Lawyer

T 61 2 8235 1216

E T.Yan@clarkekann.com.au