



Extent of a guarantor's liability: Recent case law

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There have been three recent important decisions in the English courts concerning the extent of a guarantor's liability. The clarifications of the law set down in these cases are highly material to lenders. The most fundamental points arising from the decisions can be summarised as follows:

Enforcement of unsecured guarantees

- An individual guarantor can be pursued by way of statutory demand followed by a bankruptcy petition, without the creditor first having to issue proceedings and obtain a judgment debt. A corporate guarantor can be pursued in the same way: by proceeding directly to demand followed by winding up petition.
- However, this expedited enforcement process can only be followed where the guarantee contains provisions for payment by the guarantor on demand and that he/it takes on the obligations of principal debtor. It is also useful for the guarantee to include a clause confirming that a certificate from the creditor as to the amount owing is conclusive proof. If the guarantee does not contain these provisions, the guarantor takes on a liability which must be quantified by obtaining judgment before any insolvency process is instigated.

Where the creditor has security

- A creditor can pursue a guarantor to statutory demand and bankruptcy/liquidation even if the principal debtor has provided partial or full security to the creditor for its debt. It is not necessary for the creditor to first realise the security provided by the principal debtor.
- If, however, the guarantor has provided security for all of his own liability under the guarantee, then the creditor cannot instigate bankruptcy or liquidation proceedings without first realising its security.

Cross claims

- Where the principal debtor has a cross claim against the creditor, the court may exercise its discretion to set aside the statutory demand against the guarantor or, in the case of a corporate guarantor, restrain the presentation of a winding-up petition. In these circumstances, claims and cross claims of the creditor, principal debtor and guarantor must be litigated before the creditor can proceed to statutory demand and bankruptcy or liquidation.

Comment

The above analysis is a distillation of the decisions in *Remblance v Octagon Assets Limited* [2009], *McGuinness v Norwich & Peterborough Building Society* [2010] and *White v Davenham Trust Limited* [2011]. Clients should note that McGuinness is currently the subject of an appeal which might affect the summary of the enforcement of unsecured guarantees in this note. A further update will follow when the appeal is decided.

Further information and briefing sessions

If you require any further information in relation to the contents of this note or the law on guarantees or generally, we should be happy to provide a briefing session for you on request.

Further information

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