

## Is a personal guarantee always binding? Authors: Chris Kintis, Chloe Howard & Robert Anstee

In the current environment with rising inflation and interest rates, there is more pressure on business owners and individuals to ensure financial obligations are met. This is particularly so when these obligations have been guaranteed by business owners, directors, or family and friends. A failure to meet these obligations may have dire financial consequences for these guarantors.

Whilst many might view a personal guarantee as an ironclad agreement, there are circumstances where a personal guarantee is not legally enforceable.

In this article, we provide an overview of personal guarantees and the circumstances in which guarantors may have a personal guarantee set aside.

### Key Takeaways

- Present economic conditions are placing greater pressures on businesses who obtain finance on the back on personal guarantees and who are liable to enforcement in the event of default.
- However, a purportedly signed guarantee is not necessarily the end of the matter. Other circumstances may still cause the guarantee to be set aside, offering relief to guarantors.
- The recent case of *Bendigo and Adelaide Bank Ltd ('the Bank') v Pickard* [2019] SASC 123 found that a bank was unable to enforce personal guarantees signed by directors in its attempts to recover a loan.
- Guarantors should seek specialist advice as to the circumstances under which they can have a guarantee set aside.

### What is a personal guarantee?

A personal guarantee is an individual's (the 'guarantor') promise to repay money or fulfil obligations, usually made on behalf of a business. You might sign one as a company director, or you might sign one to guarantee your children's mortgage. Providing a personal guarantee provides an avenue to access funding that otherwise would not be available.

For the creditor, it provides a safeguard that any outstanding debts or obligations will be fulfilled. In times of financial distress or when seeking to recoup debt, creditors may look to enforce these guarantees.

### The current landscape

Businesses are currently faced with rising inflation and higher interest rates. The move into a difficult economic cycle is likely to place greater pressures on businesses to generate revenues to meet their debt obligations. With businesses experiencing greater difficulty in meeting their obligations, creditors may be more inclined to pursue personal guarantees to satisfy outstanding debts.

However, whether they can pursue personal guarantees is subject to whether the personal guarantee is enforceable.

### Is the guarantee enforceable?

It is important to remember that the enforceability of a personal guarantee is specific to each case. Some factors that may be taken into account to determine whether 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?

A personal guarantee may not necessarily be enforceable where issues are raised on the above factors.

## Recent decisions

### The facts

In the case of *Bendigo and Adelaide Bank Ltd* ('the Bank') v *Pickard* [2019] SASC 123 in South Australia, the Bank sought to recover a loan of \$505,250 to Kenrop (the 'Company') under personal guarantees signed by its directors. The loan was in relation to an investment scheme that ultimately failed as the Company failed to make payments. The loan deed containing the guarantees was signed by an associated entity, GSF, on behalf of the directors.

### The decision

The directors were ultimately successful as the Court found that the guarantees were invalid, and the Bank could not enforce them against the directors.

The arguments raised by the directors, as to why the guarantees were unenforceable, included that:

- the directors signed the loan application in the name of the Company and not personally as guarantors;
- the associated entity was not authorised to enter into the loan deed on the directors' behalf;
- the entity's execution of the guarantees was beyond the scope of their power as attorney; and
- the guarantees in the loan deed were not validly executed by the associated entity as the directors' attorney.

### The findings

Crucially, the guarantees were held to be invalid because the associated entity had invalidly signed the loan deed containing the guarantees. The Court found:

- The entity simply attached the directors' electronic signatures without any means of authentication.
- Usually, when a person physically signs a document, they authenticate the signature is their own.
- The Company's board resolutions to accept the loans did not go so far as authorising the placement of signatures on the loan deeds.
- There was no evidence that either director authenticated their signature, even in the form of minutes authorising their signature on the loans.

### What does this mean for you?

*Pickard* confirms that a purportedly signed guarantee is not necessarily the end of the matter. Other circumstances may still cause the guarantee to be set aside, offering relief to financially distressed guarantors.

Accordingly, guarantors should seek specialist advice as to the circumstances under which they can have a guarantee set aside.

If you would like any further information or would like to discuss your legal obligations, please contact [Chris Kintis](#) or your usual ClarkeKann contact.