



# Recent Decision Bulletin

## Personal Guarantees – “i’s dotted and t’s crossed”?

### **National Australia Bank v Rice & Rose [2015] VSC10**

This is a recent decision from the Supreme Court of Victoria.

The NAB issued proceedings against Mr Rice in relation to personal guarantees that were given by Mr Rice and his business partner Mr Rose.

Rice and Rose were entering into a partnership of sorts to buy and sell luxury properties on the Gold Coast.

They dealt with a Mr D’Angelo from the National Australia Bank. The facts of the matter are complicated. The simplified version is that Mr Rose was required to personally guarantee certain of the debt arrangements that he had with Mr Rice. Separate companies were established for the purposes of buying and selling the properties which required the guarantees.

The evidence was that D’Angelo met with Mr Rose concerning the signing of the guarantees. The evidence given by D’Angelo was somewhat vague as he could not specifically recall what occurred.

The Court was somewhat critical of D’Angelo’s evidence and essentially held that D’Angelo did not explain the nature and effect of the guarantees to Mr Rose. Although an experienced business man, Rose was inexperienced in the terms of guarantees. Rose’s evidence was that if he had known that he was guaranteeing the full extent of debt that might be owed by the companies and/or Mr Rice, he would not have entered into the transactions.

Further, the evidence was that D’Angelo did not explain to Rose that he had the right to seek legal advice, nor advised him to seek legal advice.

The Court said that if the Bank’s documents had been in order or even in a substantially satisfactory state, then the documents may have provided corroborative evidence that D’Angelo gave the warnings and explanations that he said he gave. The Court referred to the “litany of mistakes” made by the Bank about following banking procedures when the documents were signed.

The Court took the view that Rose did not know that by signing some of the guarantees he would potentially become jointly liable for all of the borrowers liabilities.

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Part of the Defence raised by Mr Rice was that liability to the Bank under the guarantees was defeated because of unconscionability. This is where there is a special disadvantage or disability affecting the ability of the relevant person to make a judgment as to his/her best interests. This must also have been known or sufficiently evident to the other person.

There was also a question of whether the Banking Code was applicable and in particular whether the Banking Code formed part of the contract between the Bank and Mr Rose and/or Mr Rice.

The Court said that the Banking Code did not go to the root of the contract so that a breach would give a guarantor an immediate right to terminate. It did however say that in a usual transaction, that terms requiring warnings to be given, would not be considered to be conditions giving a guarantor an automatic right to terminate but may give him a right to damages.

He found that the Banking Code was breached because D’Angelo never told Rose that he should seek independent legal and financial advice before signing any of the guarantees. NAB was required to give Rose a “prominent notice” of such matters. Accordingly, the warranties contained in Section 28.4 of the Banking Code were breached.

The Court found that the loss suffered by Rose in executing each of the guarantees was the amounts claimed by NAB pursuant to each of the guarantees.

The Court however refrained from expressing any definitive view as to whether breaches of the Banking Code give rise to unconscionability. This will have to be left for another day.

The conclusion therefore was that the NAB’s claim against Rice under the personal guarantees was dismissed with NAB ordered to pay costs.

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