SUPREME COURT OF QUEENSLAND

CITATION:	*Crossley v Sea Trek Dive Services Pty Ltd & Anor* [2020] QCA 35
PARTIES:	**DENNIS ALAN CROSSLEY** (appellant) **v** **SEA TREK DIVE SERVICES PTY LTD** ACN 007 847 216 (first respondent) **PEPPI IOVANNELLA** (second respondent)
FILE NO/S:	Appeal No 8846 of 2019 DC No 185 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Cairns – [2019] QDC 126 (Morzone QC DCJ)
DELIVERED ON:	3 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	4 February 2020
JUDGES:	Sofronoff P and Morrison and Mullins JJA
ORDERS:	**1. Appeal dismissed.** **2. The appellant must pay the respondents' costs of the appeal.**
CATCHWORDS:	GUARANTEE AND INDEMNITY – CONTRACT OF GUARANTEE – PARTIES AND CAPACITY – where the respondents made progressive advances to the company of which the appellant was a director – where the appellant was named as a party to the loan agreement which recited that he agreed to guarantee the loan – where appellant disputed signing the loan agreement as the guarantor – where appellant asserted that it was an agreement to give a guarantee in the future – where there was only one place on the loan agreement for the appellant to sign and under his signature was his name and the description "director" – whether there was any error in the primary judge's finding that the appellant liable under the loan agreement as the guarantor of the loan GUARANTEE AND INDEMNITY – CONTRACT OF GUARANTEE – WHAT CONSTITUTES – GENERALLY – where the respondents demanded the repayment of the loan before the due date for repayment under the loan agreement –

where the borrower took no action in response to the premature demand for repayment – whether the guarantor's liability was discharged by the premature demand for repayment – whether the was any error in the primary judge's finding that the premature demand for repayment did not breach the loan agreement

GUARANTEE AND INDEMNITY – CONTRACT OF GUARANTEE – WHAT CONSTITUTES – GENERALLY – where it was a condition of the loan agreement that the natural person who was one of the lenders was to have a major input into the running of the borrower – where that respondent resigned as a director before the due date for repayment under the loan agreement and ceased involvement in the running of the appellant – where appellant claimed the guarantee was discharged due to material variation in the terms of the agreement without his consent – whether it was a term of the loan agreement that that respondent would continue involvement in running the appellant – whether there was any error in the primary judge's conclusion that the condition was for the benefit of that respondent

Andar Transport Pty Ltd v Brambles Ltd (2004) 217 CLR 424; [2004] HCA 28, considered
Ankar Pty Ltd v National Westminster Finance (Australia) Ltd (1987) 162 CLR 549; [1987] HCA 15, considered
Aquawest Pty Ltd v Twynham [2017] NSWSC 652, considered
Bank of Queensland Ltd v Chartis Australia Insurance Ltd [2013] QCA 183, cited
Wharf St Pty Ltd v Amstar Learning Pty Ltd [2004] QCA 256, cited

COUNSEL: M Wolff for the appellant
C J Ryall for the respondents

SOLICITORS: Kelly Legal for the appellant
Devenish Law Pty Ltd for the respondents

[1] **SOFRONOFF P:** I agree with Mullins JA.

[2] **MORRISON JA:** I have read the reasons of Mullins JA and agree with those reasons and the orders her Honour proposes.

[3] **MULLINS JA:** Mr Crossley appeals against the judgment entered against him after trial in favour of Sea Trek Dive Services Pty Ltd and Mr Iovannella for the sum of $450,000 plus interest calculated on that amount from 27 October 2017 until the date of judgment on 23 July 2019 pursuant to s 58 of the *Civil Proceedings Act* 2011 (Qld) and costs. See *Sea Trek Dive Services Pty Ltd v Crossley* [2019] QDC 126 (the reasons).

[4] Mr Crossley was sued on the basis that he had guaranteed the performance of the obligations of Omega Greenpower Limited under a loan agreement with Sea Trek

and Mr Iovannella made on 18 December 2012 (the loan agreement), as varied by two further loan agreements made on 7 April 2013, (the second and third loan agreements). Omega went into liquidation on 13 April 2017. Mr Crossley was a director of Omega at the relevant times. Mr Iovannella was also a director of Omega, when the loan agreements were entered into.

The loan agreement and variations

[5] The learned primary judge set out the loan agreement at [3] of the reasons. For ease of reference, the loan agreement is set out as follows:

LOAN AGREEMENT

This agreement is made between Peppi Iovanella and Sea Trek Dive Services Pty Ltd (ACN 077 847 216), Omega Greenpower Limited (ACN 146 338 516) and Dennis Alan Crossley dated 18th December 2012 whereas:

- *Peppi Iovanella and Sea Trek Dive Services Pty Ltd has agreed to lend the sum of $50,000.00 (Fifty Thousand Dollars) to Omega Greenpower Limited as at this date.*
- *Dennis Crossley has agreed to guarantee the loan.*
- *The loan is for the period up to and including 31st March 2013.*
- *The purpose of the loan is to keep the company solvent up to 31st January 2013.*
- *The funds are to be used to predominantly to purchase stock in order to fulfil existing commitments and to pursue new orders.*

Conditions:

- *As at 2nd January 2013, the general structure of the company is reviewed including but not limited to personnel and operational expenditure.*
- *3 Suns in PNG is vigorously pursued for equity injection.*
- *Ghana is pursued for future business opportunities.*
- *Other PNG opportunities are pursued.*
- *Hybrid light funding options are evaluated.*
- *PI to have a major input into running of the company.*
- *PI has the option to convert the loan to equity at the end of January.*
- *PI has the option for further involvement at any time in the future.*
- *At PI's option, the loan can extend past the 31st March 2013.*

Signed.

_____[signature]_____ _____[signature]_____

Dennis A Crossley *Peppi Iovanella*

Director *Director*

[6] The advance of $50,000 was made on or about 19 December 2012. Further advances were made and on 7 April 2013 the second loan agreement (which was in

similar terms to the loan agreement) was signed by Mr Crossley and Mr Iovannella, except that this loan agreement recited that Mr Iovannella and Sea Trek had agreed to lend the sum of $300,000 to Omega as at 7 April 2013, the purpose of the loan was recited as keeping the company solvent up to 30 June 2013, and the period of the loan expired on 30 June 2013. By 8 April 2013 a total of $300,000 had been advanced which included the initial advance of $50,000. The third loan agreement was also entered into on 7 April 2013 that was again in similar terms to the loan agreement, except that the amount agreed to be lent was increased to $450,000, the purpose of the loan was recited as keeping the company solvent up to 31 December 2013, and the period of the loan expired on 31 December 2013. Between 1 May and 16 September 2013 a further $250,000 was advanced, making a total amount advanced of $550,000. Although there were three successive loan agreements, it is obvious from their terms that the third loan agreement superseded the previous two agreements and became the operative agreement between the parties. There was therefore no challenge to the inference drawn by the primary judge at [19] of the reasons that "each varied agreement was intended to wholly replace and supersede the immediately prior version", such that the loan survived each superseded agreement.

[7] Before the repayment was due under the third loan agreement, Mr Iovannella and Sea Trek on 30 September 2013 requested repayment of the loan by 21 October 2013. The loan was not repaid. Subsequently in October 2016 Sea Trek sent an invoice to Mr Crossley and Omega seeking $550,000 for the loan and a further amount for interest between September 2013 and October 2016. Solicitors acting on behalf of Mr Iovannella and Sea Trek then sent a letter of demand to Mr Crossley and Omega dated 10 November 2016.

The reasons

[8] The appellant's case before the primary judge was that he had not signed the loan agreements as the guarantor and that he did not assume liability to guarantee the loan under the loan agreements, but merely agreed to agree in the future to enter into a guarantee. If the appellant were found to be a guarantor, he defended the claim, in the alternative, on the basis that his guarantee had been discharged due to a material variation to the loan agreements. Two factual matters were relied on by the appellant before the primary judge to assert a material change. The first was that the guarantee was conditional on Mr Iovannella having "a continued major input into the running of Omega and … as a director of … Omega" and that altered with Mr Iovannella's resignation as a director on 30 September 2013, when he also ceased having any input into the running of Omega. The second change that was alleged to be material was that Omega defaulted in repaying the loan under the loan agreement by 31 March 2013 and Mr Iovannella and Sea Trek extended the time for payment without Mr Crossley's consent.

[9] In construing the loan agreements, the primary judge observed at [32] of the reasons "that the parties' lay wording lacks eloquence and precision that might have been expected of a lawyer" and took account of the fact that he was construing an agreement prepared by businessmen, stating:

> "It seems to me that the loan agreement (as varied) ought be construed practically, so as to give effect to its presumed commercial

> purpose, and not so as to defeat the achievement of that purpose by an excessively narrow and artificially restricted construction."

[10] The primary judge found at [45] of the reasons that in the same way that Mr Iovannella signed as joint lender for himself and for his company, the appellant signed the loan agreement for himself as a guarantor and for his company as the principal debtor. To the extent the appellant argued that the reference in the loan agreement to the fact that Mr Crossley "has agreed to guarantee the loan" was prospective and did not amount to a promise in the loan agreement by Mr Crossley to guarantee the loan, the primary judge found otherwise at [51] of the reasons:

> "These arguments must be considered in the circumstances of this case, in the context of the whole agreement, the loan's purpose and express inclusion of the defendant as a party. The wording is expressed in a crude and summary fashion and in that sense lacks legal eloquence and precision associated with the use of recitals. In my opinion, the use of the term "*whereas*" should be afforded it ordinary meaning in the context here as "*it being the case that, or considering that*," in particular, that *"Dennis Crossley has agreed to guarantee the loan."* It seems to me that these immediate and unqualified terms, plainly conveys an obligation immediately assumed by the defendant to answer for Omega's default in meeting its primary liability under the loan agreement. This was restated at the time of each variation." (*footnotes omitted*)

[11] The primary judge then concluded at [53] of the reasons that:

> "Having regard to the temporal language, and purpose of the loan, and the absolute tenor of the [appellant's] promise, I find that the [appellant] assumed immediate and unqualified liability as guarantor in respect of the loan."

[12] In dealing with the allegation the guarantee was void or unenforceable for want of consideration and/or for uncertainty, the primary judge noted at [55] of the reasons that, if a guarantee were given in consideration of further advances being made to the principal obligee, there was no necessity for a specific identification within the instrument of the details of the amount of the advances, or the time at which they were to be made. The primary judge then concluded at [56] of the reasons that:

> "Upon the true construction of the loan agreements (as varied) here, it seem to me that the measure of the liability of the defendant as guarantor is the balance outstanding from the Omega to the plaintiffs by way of loan from time to time. There is a prospective or future element – a promise and expectation of future loan or advance – to the promise made in exchange for the promises made by the surety." (*footnote omitted*)

[13] On that basis, the primary judge concluded at [57] of the reasons that the guarantee was supported by good consideration.

[14] The respondents' claim had been for $550,000, but the primary judge found at [60] of the reasons that the loan agreement (as varied) did not capture any advances in excess of $450,000.

[15] The primary judge rejected Mr Crossley's defence that his liability was discharged, as a result of the respondents' extending time to Omega to pay after default without his consent. The primary judge held at [64] of the reasons that Mr Crossley assumed liability in respect of the loan "which was progressively committed between the parties' variations involving temporal extensions and the balance outstanding". The primary judge noted at [64] of the reasons that each variation (which is a reference to the second and third loan agreements) "recorded the [appellant's] promises as guarantor of the balance of the loan as might be outstanding from time to time".

[16] The primary judge also rejected the defence that the respondents had breached essential terms of the guarantee by demanding earlier repayment and interest. The primary judge found at [67] of the reasons that the request for repayment by 21 October 2013 was an expression of "frustrated emotion" about the state of affairs and did not amount to "an effective demand in breach of the terms of the agreement".

[17] In relation to the defence based on the resignation of Mr Iovannella as a director, the primary judge found at [72] of the reasons that the conditions in the loan agreements that Mr Iovannella was to have a major input into the running of Omega and further involvement at any time in the future were for the benefit of Mr Iovannella and Sea Trek, so that Mr Iovannella's withdrawal from involvement in Omega did not have the effect of discharging Mr Crossley's obligations under the guarantee.

The grounds of appeal

[18] The grounds of appeal, as they relate to the findings made by the primary judge (and as they were argued on the hearing of the appeal), can be summarised as:

(a) whether the primary judge erred in finding that the loan agreement was executed by the appellant as guarantor?

(b) whether the primary judge erred in finding that the loan agreement incorporated the guarantee by Mr Crossley rather than being an agreement by him with Mr Iovannella and Sea Trek to agree in relation to the guarantee?

(c) whether the primary judge erred in finding that the guarantee was not void for uncertainty or want of consideration?

(d) whether the primary judge erred in failing to find the demand for repayment made on 30 September 2013 was a breach of an essential term of the third loan agreement?

(e) whether the primary judge erred in failing to find that Mr Iovannella's resignation as a director and his ceasing to have a major input into the running of Omega from 30 September 2013 amounted to a variation of the third loan agreement?

(f) whether the primary judge erred in failing to find that Mr Crossley's liability as guarantor was discharged, as a result of the respondent's extending time to Omega to pay after default under the loan agreement in repaying the loan on 31 March 2013 without Mr Crossley's consent?

The signature of the appellant on the loan agreement

[19] It is not irrelevant to note that the draft of the loan agreement was prepared and forwarded by Mr Crossley to Mr Iovannella by email dated 17 December 2012 with the comment "Made it as simple as possible. Welcome your input."

[20] Although the third loan agreement was the ultimate operative document on which the respondents sued, it is in the same form as the loan agreement and the circumstances of the preparation and execution of the loan agreement and the second loan agreement remained relevant for determining the issues in respect of the third loan agreement. Apart from dates and the amount to be advanced, the third loan agreement followed the terms of the draft prepared by Mr Crossley.

[21] The form of the third loan agreement, the identification of the parties, the terms of the document and the content of the attestation clause are relevant to the question of whether the third loan agreement was executed by Mr Crossley as guarantor.

[22] The primary judge at [42] of the reasons relied on *Wharf St Pty Ltd v Amstar Learning Pty Ltd* [2004] QCA 256 at [11] for the proposition that an individual might apply his or her signature to an instrument in more than one capacity. The appellant does not dispute the proposition as such, but disputes the application of it in the circumstances to Mr Crossley's signature on the third loan agreement. The appellant says that there is an ambiguity in the attestation clause and seeks to apply the principle set out in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549, 561 that a doubt as to the status of the provision in the guarantee should be resolved in favour of the surety. The appellant also seeks to apply by analogy the decision in *Aquawest Pty Ltd v Twynham* [2017] NSWSC 652.

[23] The issue in *Aquawest* was whether the defendant director of the debtor company who signed the credit contract with the plaintiff on behalf of the debtor had assumed personal liability for the debtor's obligations. The director had signed the credit contract in one place under the words:

> "I agree that if I am a director/shareholder (owing at least 15% of the shares) of the Customer I shall be personally liable for the performance of the Customer's obligations under the contract."

[24] Before the Magistrate there was evidence that the defendant was a director, but it could not be shown that he held at least 15 per cent of the shares in the debtor. Because the Magistrate found the credit application to be ambiguous, the Magistrate was not satisfied the defendant signed the document as a person offering to guarantee the debt owed to the creditor. On an appeal to the Supreme Court on an error of law, the issue was whether the forward slash between director and shareholder was conjunctive or disjunctive. That was held by Lonergan J at [26] to be a question of mixed fact and law and on that basis the appeal failed. If that were wrong, it was held at [27] that the appeal would have failed on the basis the credit contract was ambiguous, as to whether the defendant signed the contract as a personal guarantor.

[25] The decision in *Aquawest* turn on the terms of the clause that preceded the signing of the document by the defendant. It is not analogous to the facts and circumstances of the signing of each loan agreement by Mr Crossley.

[26] As the primary judge recognised, it is compelling that Mr Crossley was named as a party to the loan agreements for which there was no purpose otherwise than to

indicate his role as guarantor of Omega's obligations that was expressly referred to in each loan agreement. It is also compelling that Mr Iovannella had two roles to play in the relation to each loan agreement, being a director of Sea Trek and named as a party in his own right, but there was only provision in the attestation clause for his signature to be placed on the document once. The principle in *Ankar* applies to the construction of a provision of the guarantee where there is an ambiguity. In the circumstances of the identification of Mr Crossley as a party to each loan agreement, where the only personal role disclosed in the loan agreement for Mr Crossley was as guarantor, no recourse to the principle in *Ankar* was required. There is no error in the primary judge's conclusion at [46] of the reasons that by signing each loan agreement Mr Crossley manifested his intention to assume personal liability as the named guarantor, even though his signature was also applied in his stated capacity as a director of Omega.

A present obligation as guarantor

[27] The appellant relies on what is said to be an ambiguity in the third loan agreement, as to whether Mr Crossley was agreeing to enter into a formal guarantee in the future or undertaking a present obligation as guarantor and again seeks to rely on the approach to construction that any ambiguity in the terms of a guarantee should be resolved in favour of the surety: *Ankar* at 561, as approved in *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424 at [17].

[28] The appellant challenges the primary judge's approach expressed at [32] of the reasons that each loan agreement ought to be construed practically, so as to give effect to its presumed commercial purpose as inconsistent with the approach to the construction of a guarantee.

[29] Mr Ryall of counsel who appears for the respondents does not dispute the authority of *Ankar* at 561 that was treated as settled principle in *Andar*. The respondents point out, however, that recourse to the principle of construing an ambiguous provision in a guarantee in favour of the surety only applies, after all other aids to construction have failed to eliminate the ambiguity: *Bank of Queensland Ltd v Chartis Australia Insurance Ltd* [2013] QCA 183 at [38]. That was a decision in respect of the construction of an exclusion clause in a policy of insurance, but it is submitted that it is a principle of construction that is equally applicable to a guarantee.

[30] It is part of the factual matrix which the primary judge was entitled to take into account that the loan agreements were entered into by businessmen who chose the language of their agreements. As the respondents submit, it is only after the usual aids to construction are exhausted and an ambiguity in the terms of a guarantee remains, that the principle in *Ankar* applies. There is no basis for the appellant to assert the third loan agreement was an agreement to agree, when it replaced the second loan agreement which replaced the loan agreement. The parties obviously intended the loan agreements to have legal effect, as they substituted the loan agreements, as further advances were being made by the respondents to Omega. Although the past tense and the word "whereas" was used in setting out that Mr Crossley had agreed to guarantee the loan, the intention of the parties from a consideration of the entire agreement and the fact that further advances were anticipated by the terms of each loan agreement was that the guarantee was

prospective in part, but also applied to the existing advances, as found by the primary judge at [56] of the reasons.

Uncertainty and/or want of consideration

[31] The question of whether there was a want of consideration is determined by the facts. It is apparent that further advances were made after each loan agreement was entered into and each loan agreement specified the maximum amount to be lent by the respondents. There was nothing uncertain about the extent of Mr Crossley's liability as guarantor under the third loan agreement.

The premature demand for repayment

[32] Repayment under the third loan agreement was not due when the demand was made by Mr Iovannella on 30 September 2013. It is therefore arguable that there was no breach of the loan agreement by the respondents' making the premature demand for repayment. If it were a breach of the loan agreement that was of no consequence, as no action was taken by Omega in respect of the premature demand. Omega did not treat the premature demand as a breach that was capable of being accepted, in order to terminate the loan agreement: see *Ankar* at 555. The premature demand therefore did not have any effect on the guarantor's obligation. The time for repayment eventually became due on 31 December 2013 and the loan was not repaid. There was therefore no error by the primary judge in failing to find that the demand for payment before the loan was due to be repaid was a breach of an essential term of the third loan agreement.

[33] Although the primary judge dealt with this argument based on the premature demand for repayment which was advanced at the trial, it was not an issue raised for decision by the appellant's pleading. There was no pleading by the appellant that the premature demand for repayment was in breach of the third loan agreement. The appellant had merely pleaded the premature demand as a fact to support the allegation that Mr Iovannella's resignation as a director amounted to a material variation to the loan agreements by increasing the risk to Mr Crossley as guarantor, because the demand for repayment was made.

The effect of Mr Iovannella's withdrawal from running Omega

[34] The primary judge's construction of the term of the third loan agreement that it permitted and did not oblige Mr Iovannella to have a major input into the running of Omega reflects the term of the loan agreement.

The extension of time for repayment of the loan

[35] The reliance by the appellant on the extension of time for repayment of the debt past 31 March 2013 is inconsistent with the fact the parties substituted the loan agreement with the second loan agreement and then the third loan agreement replaced the second loan agreement. There is therefore no factual basis for the appellant's contention that there was an extension of time for repayment of the loan to which he was not a party.

Orders

[36] None of the grounds of appeal is successful. The orders which should be made are:

1. Appeal dismissed.
2. The appellant must pay the respondents' costs of the appeal.