SUPREME COURT OF QUEENSLAND

CITATION:	*Westpac Banking Corporation v Schwerdtfeger & Anor* [2016] QSC 173
PARTIES:	**WESTPAC BANKING CORPORATION** ABN 33 007 457 141 (plaintiff) **v** **DANIEL CARL SCHWERDTFEGER** (first defendant) **LAURA SCHWERDTFEGER (ALSO KNOWN AS LAURA APRILE OR LAURA CONNOLLY)** (second defendant)
FILE NO:	BS 4240 of 2014
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	4 August 2016
DELIVERED AT:	Brisbane
HEARING DATES:	21, 22 March 2016; 1, 15, 27 April 2016
JUDGE:	Atkinson J
ORDERS:	**1. The defendants are to pay to the plaintiff the sum of $8,580,000, owed as a debt as at 5 March 2014, pursuant to the guarantee and indemnity entered into on 9 July 2008.** **2. Unless the defendants file and serve written submissions on costs within 14 days, with any submissions in response by the plaintiff within seven days of receipt of those submissions, the defendants are to pay the plaintiff's costs on the standard basis.**
CATCHWORDS:	GUARANTEE AND INDEMNITY – THE CONTRACT OF GUARANTEE – CONSTRUCTION AND EFFECT – GENERALLY – where the plaintiff entered into a business finance agreement with the corporate trustee of the defendants' family trust – where the defendants guaranteed the trustee's obligations under the business finance agreement – where the business finance agreement was subsequently varied on two occasions – where the defendants signed their consent to each variation – whether the variations to the business finance agreement discharged the defendants' obligations as guarantors *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549; [1987] HCA 15, considered

Holme v Brunskill (1877) 3 QBD 495, applied
Vivlios v Westpac Banking Corporation [2010] QCA 230, cited

COUNSEL: M J Luchich for the plaintiff
The defendants appeared on their own behalf

SOLICITORS: Minter Ellison for the plaintiff
The defendants appeared on their own behalf

[1] Each of the defendants entered into a contract guaranteeing payment of debts to the Westpac Banking Corporation. The bank claimed against each defendant payment of $8,580,000 as the amount said to be owing under the contract of guarantee as varied after the debtor had defaulted. The defendants alleged that they were not liable as the contract which was the subject of the guarantee was varied and the guarantee was entered into as a result of misrepresentations by the bank. These reasons explain why those defences are not available and the defendants are liable to pay the amounts they guaranteed.

[2] The defendants executed a guarantee and indemnity in favour of the bank on 9 July 2008. The borrower whose debt was guaranteed was Doxa LM Pty Ltd as trustee for the DLJ & G Family Trust ("Doxa"). The DLJ & G Family Trust is the family trust of the defendants who were married to each other and remain business partners. Each of the defendants is an experienced business person. The guaranteed obligations were said to be:

> "all liabilities and obligations of [Doxa] (alone or with others) now or in the future under or in respect of any of the following or any amendment or replacement to them.
>
> Business Finance Agreement dated 27 June 2008 or any other arrangement or obligation you agree is covered by this Guarantee and Indemnity."

[3] The limit on the liability which the defendants agreed to guarantee was $16,460,000 plus amounts like government duties and charges, fees, costs, expenses and interest.

[4] The business finance agreement ("BFA") was a loan offered by Westpac to Doxa on 27 June 2008 and executed by Doxa on 30 June 2008. The securities for the loan were listed and included what was described as a "Limited Guarantee ($16,460,000)" by each of the defendants. The purpose of the BFA was said to be "to provide a total of $16,460,000 of the 'On Completion' values of various projects. Funding will [be] advanced in the following tranches and is specific to the particular projects."

[5] Tranche 1 was "to assist with the renovation/construction cost of property located at 7 Katta Avenue, Currumbin QLD 4223 and 138 Piggabeen Road, Currumbin Valley QLD 4223, and Jagen Pty Ltd ACN 005 137 851 debt repayment." The total amount of Tranche 1 was $8,680,000. Tranche 2 was "to assist with the construction/development costs of property located at 1030 Currumbin Creek [Road], Currumbin Valley QLD 4223 and Jagen Pty Ltd ACN 005 137 851 debt repayment." The property at 1030 Currumbin Creek Road, Currumbin Valley was usually referred to as Double D. The total amount of Tranche 2 was $7,780,000.

[6] There were specific conditions precedent with regard to each tranche. The pre-conditions for Tranche 1 were those found in the property schedule attached to the BFA as well as the following specific conditions precedent:

> "***Tranche 1***
>
> - An updated valuation to be provided to the Lender by LandMark White Residential on 7 Katta Avenue, Currumbin QLD 4223 confirming an 'as if complete' valuation of $2,850,000.00 (GST Exclusive).
> - All agreements for the purchase of the property and repayment of debts are to be to the satisfaction of the Lender.
> - You will provide the Lender a written confirmations [*sic*] that all legal proceedings initiated by Jagen Pty Ltd ACN 005 137 851 or its associated entities in respect to the security properties have been discontinued.
> - You will provide satisfactory evidence to the Lender that environmental issues (lead paint) associated with the property at 1030 Currumbin Creek Road, Currumbin Valley QLD 4223 (Double D) have been adequately remedied.
> - Copies of the following documents are to be provided to the Lender and to be to the Lender's satisfaction:
>
> (a) Building application and approval by local council/authority
>
> (b) Evidence that terms of approval have been fulfilled
>
> (c) Copy of the Building Contract not exceeding $650,000.00
>
> - You will provide the Lender copy of insurance covering building period with the Lender's interest noted.
> - Throughout the term of the loan, appropriate property insurance cover, over all assets offered as security, including those essential to the operation of a going concern business (eg. Chattels, stock, public liability, etc). The policy is to note the bank's interest and:
>
> - provide an adequate 'sum insured' that covers reinstatement or replacement of the building and its services (e.g. lift, air-conditioning), or
>
> - if property is under construction obtain a comprehensive 'all events policy' from the head contractor."

[7] On 25 July 2008, Mr Jones from Westpac confirmed that all of the pre-conditions of Tranche 1 had been met.[1]

[8] The BFA provided that the loan was repayable on demand unless otherwise stated in the finance details. Nothing in the finance details provided to the contrary.[2]

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1 Document Completion Certificate – Exhibit 3.

2 See also B5 of the Memorandum of Common Provisions General Conditions Booklet ("General Conditions").

[9] The finance term was to expire 12 months from the first draw down date. The first draw down of $7,175,951.56 occurred on 25 July 2008 so the term of the loan, which included both tranches, was to expire on 24 July 2009.

[10] Before the moneys to be advanced in Tranche 2 could be drawn down, the borrower, Doxa, was required to meet the following specific conditions precedent:

> "***Tranche 2***
>
> - An updated valuation by Herron Todd White on 1030 Currumbin Creek Road, Currumbin Valley QLD 4223 confirming an 'as if complete' value of $13,000,000.00 (GST Inclusive).
> - Development application approval for 1030 Currumbin Creek Road, Currumbin Valley QLD 4223 for 10 rural residential lots held and in accordance with the Heron Todd White valuation.
> - A maximum price and fixed time construction contract is to be in place between you and the contractor not exceeding $750,000.00.
> - The Lender is to use the services of an independent Quantity Surveyor acceptable to the Lender to:-
>
> (a) Confirm accuracy of costings
>
> (b) Confirm that all necessary statutory approvals are held
>
> (c) Advise any events or material changes to the original design/structure during the course of the project which may impact adversely on the initial costings.
>
> (d) Complete progressive inspections during the construction period and certify prior to drawing on a cost to date and cost to complete basis.
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> (e) As a pre-requisite to each progress payment, confirm that all required contractor/subcontractor payments are up to date in terms of contractual arrangements.
> - You will provide the Lender copy of insurance covering building period with the Lender's interest noted.
> - Throughout the term of the loan, appropriate property insurance cover, over all assets offered as security, including those essential to the operation of a going concern business (eg. Chattels, stock, public liability, etc). The policy is to note the Lender's interest and:
>
> (a) provide an adequate 'sum insured' that covers reinstatement or replacement of the building and its services (e.g. lift, air-conditioning), or
>
> (b) if property is under construction obtain a comprehensive 'all events policy' from the head contractor.
> - An acceptable updated market analysis to be provide to the Lender for the Katta Avenue and Double D projects when the new valuation are held.

- Acceptable feasibility analysis to be provide to the Lender once the new valuations are held."

[11] Those conditions precedent were not met before the term of the loan expired. Accordingly, Tranche 2 was never able to be drawn down.

[12] The parties to this litigation had various discussions and negotiations about extending the term of the loan.

[13] On 20 August 2009, Warren Williams, on behalf of Westpac, offered a variation of the BFA which was accepted by Doxa (BFA Variation 1). Its purpose was said to be:

- "Cancellation of Tranche 2 Facility of $7,780,000.00
- Reduction in existing Tranche 1 Facility and extension of term."

[14] The limit on borrowing was reduced by $8,380,000 to $8,080,000. This was a reduction in Tranche 1 borrowing from $8,680,000 but required a payment by Doxa of $600,000 to reduce the principal borrowed.

[15] The term of the BFA Variation 1 was for one year to expire on 31 July 2010. There was a change to the specific conditions so that they now provided:

"**Condition Precedent**

- You are to provider the Lender with the original valuation for the 7 Katta Avenue Currumbin QLD property by Landmark White Residential dated 30 June 2009.
- You are to deposit $600,000.00 with the Lender to cover interest costs for the next 12 months.

Conditions Subsequent

- You are to provider the Lender with monthly sales update on sales progress on security property held.
- You are to provide the Lender with updated valuation reports on security properties at 7, Katta Avenue Currumbin Hill, Currumbin Valley and 138, Piggabeen Road, Currumbin Valley and 746 Currumbin Creek Road, Currumbin Valley by 30 June 2010, should properties not be sold in extended loan term period."

[16] There was also a variation to the securities so that the guarantee given by the defendants was reduced to $8,080,000. The defendants consented to the variation both to the BFA and to the guarantee by executing the variation on 22 September 2009 (Guarantee Variation 1). The evidence does not suggest that BFA Variation 1 was executed by Doxa before Guarantee Variation 1 was executed.

[17] Doxa was unable to make the deposit of $600,000 as required by one of the conditions precedent. Accordingly, a new offer of variation was made by the bank on 24 November 2009. That offer was accepted by Doxa by execution on 4 February 2010 (BFA Variation 2).

[18] BFA Variation 2 had the same term as BFA Variation 1, that is it was due to expire on 31 July 2010. It involved a staged reduction of $600,000 in the principal owing. The securities were varied so that the limit on the guarantee for each of the defendants was $8,580,000 "plus amounts like government duties and charges, fees, costs expenses and interest" (Guarantee Variation 2). Guarantee Variation 2, which expressly signified the consent of the defendants to the variation to the BFA and to the Guarantee, was also executed by the defendants on 4 February 2010.

[19] Various correspondence and negotiations ensued but no further variation was made to the BFA. On 5 May 2010, a letter of demand was sent by the bank to Doxa as it was in default under the BFA as varied. The balance said to be owing was the principal of $8,680,000 and interest of $235,986.35, a total debt of $8,915,986.35. The letter of demand required payment within seven days. Doxa failed to comply with the demand.

[20] On 16 August 2010, the bank served a notice of demand on each of the defendants for the "sum of the amount of principal, interest and other monies due and payable" as at the date of the demand. The amount owing was said to be $9,153,468.47 (being principal of $8,680,000 plus interest of $473,468.71). The demand said that interest, fees and enforcement expenses would continue to accrue until the secured amount had been paid in full. Neither defendant complied with the demand.

[21] On 19 July 2013, Doxa went into liquidation. On 20 February 2014, a notice of demand was served on Doxa (in liquidation) for the total amount owing of $13,180,324.39. That demand was not met and Doxa remains in default.

[22] On 5 March 2014, Westpac sent a notice of demand to each of the defendants for the payment of $8,580,000 owing under the guarantee as reduced by the second variation.

[23] No payments were made in compliance with those demands and the moneys remain due and owing under the Guarantee Variation 2.

Is there any defence to the claim?

[24] In their closing submissions the defendants, who appeared without legal representation, submitted that the variations to the BFA did not bind them as guarantors. They argued that the variations of the BFA, which were demanded by the bank, included a cancellation of Tranche 2 which was to the detriment of the guarantors. This was because Doxa was unable to complete the purchase of Double D which, as was known to all parties, was fundamental and the only means of repayment by Doxa of its debt to the bank.

[25] The defendants submitted that the impact on Doxa's liability in these circumstances was significant and consequently the variations to the BFA were not binding on them and, as a result, the defendants did not guarantee the terms and obligations of Doxa under BFA Variation 2.

[26] The defendants submitted that, as guarantors, they were not asked to sign any consent at the time the variations were made but rather after the variations were made. This impermissibly altered the obligations of the guarantors.

[27] In the defendants' submissions, they relied on the principle set out in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*.[3] Ankar was the guarantor under a lease agreement between the debtor and National Westminster Finance (then known as Lombard). Lombard had agreed to an assignment of the debt to an assignee and failed to notify the guarantor in breach of its agreement with the guarantor. It also breached its agreement with the guarantor by failing to notify the guarantor that the debtor was in breach before the assignment. The plurality of the High Court held that a creditor cannot alter a surety's rights by a material breach or alteration to the principal contract without consulting the surety as the surety has an interest in the principal contract. In such a case, the breach of condition in the principal contract relieves the surety of its obligations under the contract of surety.

[28] The Court cited with approval the decision of Cotton LJ in *Holme v Brunskill*:[4]

> "The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that **if he has not consented to the alteration**, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that **if he has not so consented** he will be discharged." (emphasis added)

[29] It follows that if the surety has consented to the alteration it is not discharged.[5]

[30] That is what happened in this case. The guarantors executed Guarantee Variation 1, consenting to the variation of the BFA and the guarantee, before BFA Variation 1 was executed by Doxa; and they executed Guarantee Variation 2, consenting to the variation to the BFA and the guarantee, on the same day the BFA Variation 1 was executed by Doxa. The principle set out in *Ankar* does not relieve them of liability.

[31] It follows that, as the defendants as guarantors consented to the variations, the variations do not prevent them from being bound by the terms of the guarantee as amended.

A defence on the pleadings?

[32] Although not pursued in the defendants' oral or written submissions, their pleadings allege that throughout their negotiations with the plaintiff's representatives it was understood by all parties that the development and sale of the Double D property was essential to enable the repayment of all monies loaned under the BFA. The defendants' Further Amended Defence asserted not only that the plaintiff was aware that the release

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3 (1987) 162 CLR 549; [1987] HCA 15.
4 (1877) 3 QBD 495 at 505-506.
5 See also *Vivlios v Westpac Banking Corporation* [2010] QCA 230.

of Tranche 2 funds was fundamental to Doxa repaying all loans but also that the availability of Tranche 2 funds was a condition precedent to the need to repay Tranche 1.

[33] In the Further and Better particulars to their defence, the defendants asserted that oral statements made by the plaintiff's representatives on 27 separate occasions were to the effect that:

> "the total loan package to [Doxa] for which the first and second defendants would provide guarantees, consisted of funding, sufficient and adequate to enable the completion of the proposed Currumbin developments, specifically Double D… that would discharge the guarantor's [*sic*] obligations."

[34] The defendants claimed reliance on those statements in signing the guarantee.

[35] The agents of the plaintiff said by the defendants to have made the pleaded representation were John Ryan, who was a Senior Business Development Manager, Peter Jones, who held the same role, and Warren Williams, who was a Senior Relationship Manager. Each of these Westpac employees were involved, successively, in negotiations with the defendants in relation to arriving at a loan agreement between the plaintiff and Doxa. The negotiations resulted in different loan proposals being put forward at different times, only one of which was ultimately proceeded with and resulted in the formation of the BFA. The earlier loan proposals will be referred to only to the extent necessary to assess the strength of the evidence of the alleged representations.

[36] It is worth noting at the outset, as was submitted by the plaintiff, that nine of the oral statements referred to in the defendants' particulars were alleged to have been made on dates after 9 July 2008 and, accordingly, could not have induced the defendants to sign the guarantee, which was entered into on that date. This includes all of the statements alleged to have been made by Mr Williams, who did not become involved with the defendants' matter until well after that date. The defendants conceded as much in cross-examination.

[37] In relation to the remaining oral statements alleged to have been made by Mr Ryan and Mr Jones, the plaintiff made submissions as to the inherent improbability of the plaintiff's representatives making such statements, which are directly inconsistent with the terms of the BFA. As both defendants accepted in the course of cross-examination, they were aware, as expressly set out in the BFA, that the availability of Tranche 2 funding was subject to several conditions precedent, including the requirement that a development application approval and an updated market analysis for the Double D property be obtained and be acceptable to the plaintiff. At no stage did the defendants query the presence of these conditions precedent which, by their terms, indicated that the drawdown of Tranche 2 funding was not by any means an inevitable consequence of Doxa's entering into the BFA.

[38] In relation specifically to Mr Ryan's alleged representations, the plaintiff drew attention to the fact that the finance structure proposal put forward by him differed in significant respects to the BFA ultimately entered into, including the fact that it made no provision for funding the development or acquisition of the Double D property. Mr Ryan could not be called to give evidence at trial, as he was by then deceased, but his documented

interaction with the defendants gives no indication of representations being made by him in the form alleged nor any basis to conclude that it was at all likely.

[39] In relation to the statements allegedly made by Mr Jones, the plaintiff relied on his oral evidence rejecting any such statements being made by him. It also submitted that no convincing evidence was led by the defendants supporting their claim that Mr Jones made the representations alleged. Indeed in his oral evidence the first defendant conceded as much in the following exchange:[6]

> "Mr Jones didn't say to you words, in substance, in these terms: the total loan package to Doxa for which you and Ms Aprile would provide guarantees consisted of funding sufficient and adequate to enable the completion of the proposed Currumbin developments, specifically DD, that would discharge the obligations of you and Ms Aprile under your guarantees; he didn't say that to you?---No. He didn't say that directly, no."

[40] Mr Jones first worked with the defendants in the development of a three-tranche proposal that did not proceed and then on the BFA and guarantee which was executed. He exchanged emails with the defendants in February, May and June 2008 about various financing arrangements for the defendants to pay out Jagen Pty Ltd, the company of Justin Lieberman, a wealthy businessman who owned or part-owned the properties that the defendants wished to develop, but none of the arrangements discussed in those emails became the agreements that were finally entered into by Doxa and the defendants with the bank. In any event, none of those emails contained the representation which the defendants allege.

[41] The defendants offered no credible evidence to support the claim that the alleged representations were made by the plaintiff's agents. The first defendant repeatedly gave evidence that he, himself, thought that the Double D property was the "jewel in the crown" of the deal, as it would be highly saleable once subdivided, and he attributed precisely the same statement to Mr Ryan and Mr Jones. The second defendant gave evidence that Mr Ryan was "very excited about" the idea that the defendants were planning to develop the Double D property with Mr Lieberman. However, she did not give evidence of any statement by Mr Jones resembling the representations relied on by the defendants in the Further Amended Defence or their Further and Better Particulars.

[42] It is not improbable that the plaintiff's agents would have expressed enthusiasm for the idea of developing the Double D property, but any statements to that effect are far removed from a representation that receipt of development approval for that project was the only condition precedent for Tranche 2 funding being released. Nor do such statements represent that the plaintiff otherwise agreed to make provision of funding for the Double D development in order to enable the defendants to meet their obligations as guarantors. Certainly, the BFA entered into, and guaranteed by the defendants, and the subsequent variations do not reflect any such representations having been made. The concession by the defendants that they were aware of the multiple preconditions in the BFA, and their failure to raise any concerns about these, is particularly telling. Furthermore, the defendants specifically agreed to guarantee the borrowings set out in variations to the BFA which did not include any funding for Tranche 2.

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[6] Transcript of evidence 2-14, lines 1-6.

[43] In the circumstances, I am not satisfied on the evidence that the plaintiff, through its agents, made statements to the effect alleged. Accordingly, if the defendants intended to raise defences based on equitable principles of estoppel or misrepresentation, they could not succeed in light of the fact that the pleaded representations were not made.

Conclusion

[44] The defendants do not dispute the formation of the BFA or its terms; they do not dispute that they entered into the guarantee or contest its terms; they do not dispute that Doxa entered into BFA Variation 1 and BFA Variation 2; they do not dispute that they executed Guarantee Variation 1 and Guarantee Variation 2; nor do they dispute that Doxa failed to pay the amounts owing to the bank or that payment exceeding the limit of the defendants' guarantee is still outstanding. As the defendants have not raised a viable defence, it must follow that judgment be entered for the plaintiff in the sum claimed.

[45] The plaintiff informed the court that it is willing to forgo its pleaded claim for interest beyond the principal sum of the debt.

[46] No submissions on costs have been made beyond the plaintiff stating, in oral and written submissions, that it seeks its costs. There appears no reason on the material before the court to depart from the usual order that costs, assessed on the standard basis, should follow the event. However, the defendants should be given an opportunity to make submissions as to why the usual order as to costs should not be made.

Orders

1. The defendants are to pay to the plaintiff the sum of $8,580,000, owed as a debt as at 5 March 2014, pursuant to the guarantee and indemnity entered into on 9 July 2008.

2. Unless the defendants file and serve written submissions on costs within 14 days, with any submissions in response by the plaintiff within seven days of receipt of those submissions, the defendants are to pay the plaintiff's costs on the standard basis.