

SUPREME COURT OF QUEENSLAND

CITATION: *Bank of Western Australia Limited v Clift* [2010] QSC 366

PARTIES: **BANK OF WESTERN AUSTRALIA LIMITED ACN 050 494 454**
(plaintiff)
and
JOHN LAWRENCE CLIFT
(defendant)

FILE NO/S: BS4604/10

DIVISION: Trial Division

PROCEEDING: Application filed 13 July 2010

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED EX TEMPORE ON: 24 August 2010

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 24 August 2010

JUDGE: Margaret Wilson J

ORDER: **1. That the Defendant pay to the Plaintiff the amount of \$5,478,733.19 (including interest to this day); and**
2. That the Defendant pay the Plaintiff's costs of the proceeding to be assessed on the standard basis.

CATCHWORDS: CORPORATIONS – VOLUNTARY ADMINISTRATION – protection of company property during administration – other matters – where plaintiff loaned money to two companies – where defendant sole director of two companies – where defendant guaranteed loans – where first company went into administration and liquidation – where administration and liquidation caused default event under loans – where plaintiff issued default notices and demanded immediate repayment – where administrator appointment to second company after proceeding commenced – where plaintiff commenced proceedings against defendant – where plaintiff seeks judgment in the proceeding against defendant – whether plaintiff requires leave of court to proceed pursuant to s440J(1) of the *Corporations Act* 2001 (Cth)

Corporations Act 2001 (Cth) s 440J(1)

Fraser v Deputy Commissioner of Taxation (1996) 138 ALR 689, cited

Holt v AEG Electric Co [1918] 1 Ch 320, cited

R v. Bates [1982] 2 NSWLR 894 at 895, cited

Re Behan (1995) 17 ACSR 725, considered
Wallabah Pty Ltd v Navillo Pty Ltd (1997) 23 ACSR 444,
cited

COUNSEL: PA Hastie for applicant
No appearance for respondent

SOLICITORS: Norton Rose Australia for applicant
No appearance for respondent

- [1] **MARGARET WILSON J:** This is an application by the plaintiff against the defendant for summary judgment. The defendant was served with the application but did not appear.
- [2] The plaintiff lent money to two companies, TDC Acquisition Pty Ltd and Medeco Australia Pty Ltd. The defendant was the sole director of each company.
- [3] The defendant guaranteed the TDC loans by executing the following documents: (a) written guarantee and indemnity executed on 27 June 2007; and (b) guarantor's acknowledgement executed on 6 April 2009. He guaranteed the Medeco loans by executing the following: (a) written guarantee and indemnity executed on 17 February 2009; and (b) guarantor's acknowledgement executed on 1 July 2009.
- [4] On 16 February 2010 administrators were appointed to Medeco. That company went into liquidation on 23 March 2010. Those were events of default as defined under both the TDC and the Medeco loans.
- [5] On 17 February 2010 the plaintiff issued default notices to the two companies.
- [6] On 4 March 2010 it issued demands to the defendant for the immediate repayment of the TDC and Medeco loans.
- [7] This proceeding was commenced on 6 May 2010. The plaintiff claimed moneys due and owing under the guarantees, namely, \$5,419,857.68 under the guarantee of the TDC loans, and \$27,761 under the guarantee of the Medeco loans.
- [8] On 24 June 2010 the defendant filed a defence. It denied that demands had been made. I am satisfied from the affidavit of Shane Nicholas O'Reilly filed on 13 July 2010 that the demands were properly made.
- [9] The total amount owing under the two loans as at today is \$5,478,733.19.
- [10] On 9 August 2010 an administrator was appointed to TDC. Section 440J(1) of the Corporations Act provides as follows:

"[Guarantees Unenforceable] During the administration of a company:

(a) a guarantee of a liability of the company cannot be enforced, as against:

(i) a director of the company who is a natural person; or

(ii) a spouse, de facto spouse or relative of such director;

and

(b) without limiting paragraph (a), a proceeding in relation to such a guarantee cannot be begun against such a director, spouse, de facto

spouse or relative; except with the leave of the Court and in accordance with such terms (if any) as the Court imposes."

- [11] Here, the plaintiff wishes to proceed to judgment in a proceeding against the guarantor commenced before the appointment of an administrator to TDC. Is leave required?
- [12] In its ordinary meaning "enforce" means to compel the observance of (see *R v. Bates* [1982] 2 NSWLR 894 at 895). In *Re Behan* (1995) 17 ACSR 725 Hill J considered section 440J. In that case default judgment had been obtained against a guarantor before an administrator was appointed to the debtor company. A bankruptcy notice was then issued against the guarantor. His Honour dealt with an application to set aside the bankruptcy notice, on the ground that leave should have been obtained under section 440J. He held that liability on the guarantee merged in the judgment with the result that the creditor was no longer seeking to enforce the guarantee. In other words, section 440J was not engaged. His Honour observed that "enforcement" would extend to steps anterior to the commencement of a proceeding, for example, serving a demand on a guarantor. He left open the question which arises in this case – whether taking a further step in a proceeding already on foot requires leave.
- [13] According to the explanatory memorandum which accompanied the introduction of legislation containing this section, there was concern that directors of insolvent companies would be discouraged from appointing administrators if guarantees became enforceable as soon as administrators were appointed. But the section has been held to apply not only where the appointment of an administrator would actually trigger liability under a guarantee: see *Wallabah Pty Ltd v Navillo Pty Ltd* (1997) 23 ACSR 444.
- [14] O'Donovan and Phillips in their work on *The Modern Contract of Guarantee* suggest that the true rationale of section 440J is the administrator's need for the continuing cooperation of the directors in carrying on the business of a company under administration.
- [15] As Hill J observed in *Behan*, the wording of section 440J differs from provisions such as sections 440D, 440F and 471B by which proceedings may not be begun or proceeded with without leave. Further, there is the temporal sequence in which paragraphs (a) and (b) of section 440J(1) appear. That may be an indication that the Legislature did not intend the maintenance of a proceeding already on foot to be caught within the prohibition.
- [16] Cases on other legislative provisions have drawn a distinction between establishing a liability or a right on the one hand and enforcing it on the other: see, for example, *Holt v AEG Electric Co* [1918] 1 Ch 320.
- [17] In *Fraser v Deputy Commissioner of Taxation* (1996) 138 ALR 689 the Full Court of the Federal Court considered the meaning of "to enforce any remedy against the person or the property" of a bankrupt in section 58(3) of the Bankruptcy Act. It drew a distinction between the enforcement of remedies, including extra curial remedies, and the institution of legal proceedings and their continuance up to judgment.

- [18] I have already referred to the probable legislative purpose in the enactment of section 440J as being to encourage directors to cooperate with the administrator. It seems to me there is a relevant distinction between the appointment of an administrator triggering a liability under a guarantee on the one hand and the continued maintenance of proceedings already on foot on the other. In the latter case, the potential for discouragement seems less.
- [19] This is not an easy question but, on balance, I have concluded that leave is not required. Accordingly, there should be the judgment sought.
- [20] Order as per draft.