

Dispute Resolution  
Case Law Update  
Rosling King LLP



In the case of *Gaiind v Dunbar Assets Plc*, the High Court recently considered an appeal against a Judgment dismissing an application to set aside a statutory demand in the sum of approximately £1.1 million, on the grounds of misrepresentation.

### The Facts

On 22 August 2006, the Appellant, Mr Deepak Gaiind entered into a personal guarantee (the “Guarantee”) with the Respondent, Dunbar Assets Plc (“Dunbar”) in respect of an advance of £8.7 million that Dunbar had agreed to make to Purple Property Holdings Limited (“Purple”). Mr Gaiind guaranteed Purple’s liabilities up to £1.1 million.

Purple subsequently defaulted on the loan. Dunbar made a demand for the sum of £9.8 million from Purple and a demand for the sum of £1.1 million from Mr Gaiind, as guarantor.

### The Claim

On 20 May 2015, Mr Gaiind filed an application requesting that the statutory demand be set aside. Mr Gaiind alleged he had been falsely induced into entering into the Guarantee as a result of misrepresentations made, both orally and in writing, by Mr Keay, a senior lending manager at Dunbar.

As evidence of this alleged misrepresentation, Mr Gaiind sought to rely upon representations made by Mr Keay who allegedly said that the Guarantee was a “*formality for the purposes of the bank’s credit committee to approve the lending*” and that Dunbar did not have a policy of enforcing such guarantees. Mr Keay also wrote in a letter of 13 April 2005 “*that in reality no bank can make a claim on a guarantor through the court without having first disposing [sic] of its main security and only then when a loss is crystallised/made*”.

Mr Gaiind alleged that he was induced into entering into the Guarantee on the understanding that it would never be enforced. He submitted that the reasonable businessman would have made the same presumption based upon representations made by Dunbar.

Dunbar submitted that Mr Keay’s comment within the letter “*was simply that, a comment... [and] does not state that Dunbar will not make a claim against the guarantor*”. Dunbar failed to see how Mr Gaiind could presume that Dunbar would not enforce the Guarantee, when it was clearly stated to be a required formality without which Dunbar would not have advanced the money.

The Judgments were as follows:

### The Initial Hearing

At the initial hearing, District Judge Bishop (the “District Judge”) found in favour of Dunbar and dismissed Mr Gaiind’s application.

The District Judge held that Mr Keay had clearly stated within the letter that the Guarantee was a formality required prior to lending. It was held that if something was to be stipulated as a requirement then it cannot be presumed to be unenforceable. The District Judge held that

Mr Keay's comments had been taken out of context and in fact, a reasonable businessman considering the letter would not have come to the same conclusion as Mr Gaind.

The District Judge further ruled that there was a difference between Dunbar suggesting that they did not expect to enforce the Guarantee and actually saying the Guarantee could not be enforced. The District Judge held that the Letter had stipulated the former.

The District Judge also highlighted that the wording of the Guarantee itself, and the facility letters, clearly stated that the Guarantee was enforceable against Mr Gaind should the loan fail.

Mr Gaind subsequently appealed this decision.

#### The Appeal Hearing

Mr M H Rosen QC sitting as a High Court Judge (the "Judge") considered the above facts and upheld the District Judge's decision to dismiss Mr Gaind's application.

The Judge observed that the Guarantee was a legal document and thus any reasonable businessman, even an inexperienced one, would expect such a legal document to be enforceable. The Judge found that to assume otherwise would be a "*wholly unrealistic position... to adopt*".

The Judge also held that even if Dunbar had a policy not to enforce guarantees in 2005, Mr Gaind could not reasonably presume that 10 years later, and in light of the dramatic changes in the market, that such a policy remained in existence. Such a policy could not fairly be applied to future decisions.

#### Commentary

The decision is a welcome reminder for Lenders as to the Court's willingness to enforce a written guarantee. It is also useful to note the Court's approach in terms of the applicability of policies which might have been in place pre financial crisis.

However, the case also serves as a reminder as to the difficulties which can arise due to possible representations made by staff members to guarantors.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.