

Dispute Resolution
Case Law Update
Rosling King LLP



The Claim

The Defendant was a successful property developer and a valued customer of the Claimant, which was a company that lent money to people for the purposes of investing in commercial property. The parties shared a “cosy” relationship, as described by the Defendant, and adopted by the Court. This was evidenced by the fact the Defendant would attend auctions, bid for property and become liable to purchase it, confident that his purchase would subsequently be funded by the Claimant.

The claim was issued in respect of eight personal guarantees provided to the Claimant by the Defendant in relation to the indebtedness of a number of companies in which he had interests. The Defendant advanced the same defence in respect of each personal guarantee and asserted that the personal guarantees were executed by him only after he had been orally assured by the Claimant’s credit manager, Mr Nixon, that it would be called in only in the event that there were rent voids. The Defendant alleged that as a result there was a collateral warranty and the Claimant was estopped from asserting the written terms of the guarantees so far as they were inconsistent with the representations made by Mr Nixon (the “**Common Defence**”). Therefore, as there were no rent voids, there was no liability on the various guarantees.

The Claimant highlighted the inherent improbability of it agreeing to limit the enforceability of its security in such a way and drew attention to the unreliability of the Defendant’s own evidence. Mr Nixon did not appear as witness and therefore the Court only heard one side of the disputed conversation.

The Decision

The issue of whether the Common Defence was established was considered by His Honour Judge Worster. He found the Defendant to be “*at times a most unsatisfactory witness*” as his evidence changed several times with regard to the date and place the alleged assurance was made. HHJ Worster explained:

“[The] Defendant seemed to be saying what he thought he needed to say to make good his case. When his evidence was flatly contradicted by the documents, he told me things that I simply did not believe, and which he should have realised were untenable. I can accept that it is hard always to be accurate or consistent when you are giving evidence about things which happened many years before. But ... even without witness evidence from the Claimant, the Defendant’s evidence was repeatedly found to be wrong...the cumulative effect leads me to conclude that I cannot properly rely upon the evidence he gives.”

The Judge further distinguished between circumstances where a guarantee was required because there was a risk of a rent void, and saying that the guarantee would only be called in if there was a rent void.

As a result of the Defendant’s cross examination, the Defence and the Defendant’s credibility

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was left in “*tatters*”. HHJ Worster concluded:

“To establish an estoppel requires a promise or representation which must be clear or unequivocal...for there to be a collateral warranty requires something of similar clarity and certainty. The Defendant has failed to establish anything approaching the necessary standard”.

Accordingly, the Claimant was successful and was able to enforce the personal guarantees.

Commentary

This decision is a helpful reminder of the necessary standard required in establishing estoppel or collateral warranty and further demonstrates the importance of reliable witnesses of fact. It is also another pleasing result for lenders in respect of challenges made to their personal guarantees.

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