



LEGAL BRIEFING

Watersheds Ltd v (1) David D A Costa (2) Paul Gentleman

QBD, Holroyd J

The Facts

A company wanted to raise finance to expand its business operations. Two directors took advice from a corporate finance company. The directors agreed to use the corporate finance organisation's services and the directors guaranteed performance of the company's obligations including payment. One bank loan was obtained, but an investor to provide proper funding could not be found. The directors' company went into administration.

The corporate finance company claimed the sums due from the company directors under the guarantee. The directors refused to pay claiming that they only entered into the agreement on the basis that the corporate finance company orally represented that they would act on a success fee or no deal no fee basis. So, the directors argued that no funding had been found and therefore no fee was payable.

The Issue

If the directors had been induced to enter into the written guarantee in reliance upon the oral representation that the finance company would only charge a fee if funding were found, then no fee would be payable.

The Decision

There was no clear evidence from the directors that the finance company said that they would not charge if funding could not be found. As a result the directors had not been misled about the written clauses relating to the minimum fee. There was also an inconsistency between the two directors evidence, which did not assist them. The finance company may have referred to a success fee during its discussions, but general discussions about a success fee did not misrepresent the proper nature of the agreement, and so the written terms of that agreement prevailed. There was, therefore, no inducement and no misrepresentation.

Comment

More cases are now coming before the Court in relation to claims under guarantees. In the current economic climate people are now calling upon guarantees in order to collect shortfalls in payment. In this case company directors were liable under a guarantee for failure of the company. There will no doubt be more claims of this nature because of the current market conditions.

The directors attempted to avoid payment by arguing that there had been a misrepresentation. In this case stating that they believed from their pre-contract discussions that a fee would not be paid where finance could not be found. However their evidence on this matter was unclear and so the written agreement prevailed. The minimum fees, even for failed funding, had to be paid in accordance with the written agreement.

Claims under guarantees are frequently successful, and care should be taken to make sure the written agreement records the true intention of the parties. If there is to be a success fee (regardless of whether it is in a guarantee or indeed any type of contract) then it must be clearly set out in the document.

Nicholas Gould
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