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Electronic Guarantee Claim by Trade Supplier against Director Unsuccessful

By Jon Broadley, Director

The Court of Appeal in NSW unanimously upheld the decision of the trial judge which dismissed a claim by a trade credit supplier against our client, an alleged guarantor.

Background

It was alleged that the defendant, a company director of a debtor company, had provided a personal guarantee to secure the terms of the Trade Credit Agreement.

Further, it was alleged that a credit application and accompanying all-monies guarantee had been executed electronically by the three company directors in their capacities as guarantors. Each of the signatures had purportedly been witnessed by the debtor's administration manager.

The directors' signatures had been affixed to the documents using an electronic system, by which users can upload their signature and electronically apply it to documents.

The defendant had been provided with a user name and password by one of his co-directors to enable him to access the electronic system. He did not change the password during the relevant period, so that anyone who had these login details would be able to affix the Defendant's electronic signature to documents.

Pursuant to the Trade Credit Agreement, materials were supplied to the debtor company.

After the debtor company went into liquidation, all directors were sued for an amount of approximately $890,000.00. Summary Judgment was obtained against the defendant's two co-directors but the defendant successfully defended the claim against him on the basis that his electronic signature had been placed on the credit application and guarantee by an unknown person without his knowledge or authority.

Although the Defendant did not dispute that he had access to the electronic system on a number of occasions, there was no evidence that the debtor's credit application (and guarantee) appeared in the list of the completed documents.

The debtor appealed, challenging the trial judge's findings on the questions of ostensible (or apparent) authority and ratification and seeking to maintain a claim based on estoppel.

The defendant, whilst defending the appeal, argued that the judgment should be affirmed on the basis that forgery cannot be ratified and that he did not clearly and unequivocally adopt the guarantee.

Decision of NSW Court of Appeal

The Court of Appeal found that the trial judge was correct in declining to find that the defendant was bound by the Guarantee because of ostensible authority.

The defendant's mere use of the electronic signing system did not amount to a representation of authority by the

defendant of his authorisation of some other person to affix his electronic signature to documents. It did not matter whether the trade credit supplier reasonably relied upon the signatures when the relevant representational conduct of the defendant was absent.

The Court of Appeal further found that the defendant did not ratify the guarantee.

Even if one accepted that the defendant would have been able to see on his computer a list of documents previously completed using the electronic signature system, the evidence did not establish that the defendant had shut his eyes to the obvious, such as to suggest that he was fixed with knowledge that a personal guarantee had been given in his name.

The Court observed that upon logging onto the system, the defendant would not have seen any reference to a "guarantee" but simply to a "credit application". More was needed to establish that the defendant was "shutting his eyes to the obvious".

The Court of Appeal also observed that, where the evidence did not establish a representation by the defendant as to the genuineness of his signature on the guarantee or as to his authorisation of anyone else to place his electronic signature there, the mere representation to the trade credit supplier that the defendant's signature was on that guarantee, indicated by the purported witnessing of the defendant's signature by the debtor's administration manager, did not give rise to any estoppel precluding the defendant from denying personal liability on the guarantee.

Things to Learn from the Judgment

This case is instructive for a number of reasons.

Firstly, one needs to take special care when asked to affix a signature electronically. You should still carefully read the contents of the document to which your electronic signature is to be attached as it can be confirmed so quickly with a mere click on the keyboard. There are a number of different software applications available for the affixation of electronic signatures and you should be aware of the manner in which they operate.

Secondly, although in this case it was alleged that a failure to change a password was conduct prejudicial to the interests of the defendant, this did not to ultimately prove to be detrimental to the defendant. However, like any electronic password, it should not be shared with others and you should also consider changing any initial or generic password to one of your own choice.

Some actual representation of ostensible (or apparent) authority is required before a potential guarantor becomes bound under a guarantee signed electronically.

Thirdly, for an allegation of ratification to be made out, there must be some factual basis to prove that allegation, including that the defendant "had shut his eyes to the obvious" so that it could be asserted that he had had knowledge that a personal guarantee had been given in his name.

Read the full judgment here: https://www.caselaw.nsw.gov.au/decision/57e072dee4b058596cb9faa4

Should you wish to discuss any matters arising out of this article, please contact the author:

Jon Broadley, Director
D +61 7 3223 9104
F +61 7 3221 5518
M +61 0413 751 522
E jon.broadley@brhlawyers.com.au

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