'All Debts' Clauses In Commercial Contracts Of Guarantee: Principles Of Construction And Limitations On The Ambit Of Clauses Of This Nature

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INTRODUCTION

'All debts' clauses are common in contracts of both guarantee and mortgage. These clauses, which are also known as 'all accounts', 'all obligations', 'all monies', 'all moneys', and (particularly in the United States) 'dragnet' clauses, are intended to ensure that the party providing the mortgage or guarantee will be liable for all sums owed by the debtor or other nominated party to the creditor. To ensure adequate coverage of all eventualities, clauses of this nature are generally drawn comprehensively.[1] A simple illustration of such a clause is where a guarantor guarantees payment of

> all debts and liabilities, direct or indirect, at any time owing by the debtor to the creditor or remaining unpaid by the debtor to the creditor, heretofore or hereafter incurred or arising and whether incurred by or arising from agreement or dealings between the creditor and the debtor or by or from any agreement or dealings between any third party which the creditor may be or become in any manner whatsoever a creditor of the debtor or however otherwise incurred or arising and whether the debtor be bound alone or with another or others.[2]

Undeniably, the ambit of an 'all debts' clause in a contract of guarantee will in every case be an issue of construction of that particular clause.[3] The purpose of this article, however, is to consider such clauses generally in the context of guarantees, and in particular to identify principles of construction which may assist in determining limitations on the width of application of such clauses. As Brooke J said in *Bank of Scotland* v *Wright*:[4]

> The precise wording of no two guarantees is the same and differences in single words are often all-important in litigation of this type. However (certain cases) evidence in my judgment the modern determination of the higher courts to use all the available aids for the construction of written

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1 As Mahoney JA observed, in *Hall* v *Westpac Banking Corporation* (1987) 4 BPR 97303, 97580, 'A mortgage document is traditionally drawn to cover a multitude of possible events. The difficulty of drafting a document which is directed to such a purpose is, of course, obvious and because the situations with which such a document must cope are complicated, it is not unexpected that the terms of the document will . . . appear complicated. But in the end a mortgage document must be drawn in order to cope with complexities of the kind to which I have referred.'

2 Cf the clause in *Royal Bank of Canada* v *Hale* (1961) 30 DLR (2d) 138.

3 See eg *State Bank of South Australia* v *Macintosh*; *Halwood Corporation Ltd* v *State Bank of South Australia* (unreported, Supreme Court of NSW, Young J, 31 May 1995, Equity Division) 11.

4 [1991] BCLC 244, 259.

> documents to seek out from the words actually used what they believe to have been the true intention of the parties when the guarantee was executed and not to be over-constrained by . . . an interpretation based purely on internal linguistic considerations.

For the purposes of this paper, the writer prefers to confine the discussion to clauses in guarantees only, although clearly issues arising from cases where all debts clauses in mortgages were discussed will be of assistance. The differing nature of the transactions of mortgage and guarantee,[5] the different general rules of interpretation relevant to each transaction, in particular the application of the *contra proferentum* rule,[6] and complex issues which can arise in relation to such provisions in mortgage transactions (for instance, clogs on the equity of redemption[7]) require, in the view of the writer, separate detailed consideration.[8]

[5] The primary distinction of course being the fact that a mortgage is generally a transaction involving two parties, whereas a guarantee involves three. For further discussion of the nature of mortgages and guarantees, see W D Duncan & L Willmott *Mortgages Law in Australia* (2nd ed, Federation Press, 1996) and J O'Donovan & J Phillips *The Modern Contract of Guarantee* (3rd ed, LBC, 1996).

[6] Eg the general approach under Australian law is that the liability of a guarantor should be construed *strictissimi juris*, and ambiguous contractual provisions construed in favour of the guarantor: *Ankar Pty Ltd* v *National Westminster Finance (Aust) Ltd* (1987) 162 CLR 549, 561. This is not the position with respect to mortgagors under a mortgage. The distinction between all debts clauses in guarantors, and all debts clauses in mortgages in this respect was highlighted by Santow J in *Burke* v *State Bank of New South Wales* (1995) 37 NSWLR 53. See also the discussion of this point in O'Donovan & Phillips, op cit, 216 *et seq.*

[7] For a discussion of the issue of clogs on the equity of redemption flowing from all debts clauses in mortgage contracts, see *Richards* v *The Commercial Bank of Australia* [1971] 18 FLR 95, 99; *Re Modular Design Group Pty Ltd (Receiver and Manager Appointed) (In Liquidation)* (1994) 35 NSWLR 96, 108; and *Smith* v *Australia and New Zealand Banking Group Ltd* (unreported, Supreme Court of NSW, Young J, 16 June 1995, Equity Division) 15.

[8] Interestingly however, Young J, in *Estoril Investments Pty Ltd* v *Westpac Banking Corporation* (1993) 6 BPR 13146 in considering an all debts clause in a mortgage, observed that terms of this nature were common place in the United States, where nine principles applicable to 'dragnet clauses' had been identified. Some of these principles may be applicable to all debts clauses in contracts of guarantee under Australian law, as will be discussed in detail during the course of this paper. On the other hand, these rules should not be applied inflexibly, even in relation to all debts clauses in mortgages, as the recent decision of the New South Wales Court of Appeal in *Smith* v *Australia and New Zealand Banking Group Ltd* (1996) NSW ConvR 55–774 shows. The relevant US principles are as follows:

a. The mortgage will only secure advances made or debts incurred in the future if the past debts are identified;

b. Only debts of the same type or character as the original debt are secured by the mortgage;

c. A dragnet clause will often cover future debts only if documents evidencing those debts specifically refer back to the clause;

d. If the future debt is separately secured it may be assumed that parties did not intend

CONSTRUCTION OF 'ALL DEBTS' CLAUSES IN CONTRACTS OF GUARANTEE: GENERAL PRINCIPLES

In ascertaining the liability of a guarantor under an all debts clause, the intentions of the parties in the light of all the surrounding circumstances are determinative.[9] The intentions of the parties may be drawn from various factors, including the context in which the words appear and the commercial purpose which they were intended to serve.[10]

Clearly the courts are prepared to enforce all debts clauses where the moneys claimed by the creditor from the guarantor unequivocally fall within the scope of the guarantee. So, for example, in *State Bank of South Australia* v *MacIntosh; Halwood Corporation Ltd* v *State Bank of South Australia*[11] the guarantor had executed a guarantee and negative pledge guaranteeing to the bank, *inter alia*, the 'due and punctual payment by each of the Companies' (including the debtor, a subsidiary of the guarantor) 'of such of the Guaranteed Moneys as such Company may be or become liable to pay.' 'Guaranteed Moneys' were defined in the contract as meaning

> all moneys which now or in the future may be or become owing (including contingently owing) by any one or more of the Companies (either alone or jointly and/or severally with any other person) to the Creditor ... on any account or for any reason whatsoever (whether such indebtedness or liability be present or future, actual or contingent, fixed or fluctuating, liquidated or unliquidated ...

Young J held that on true construction of the document all future obligations of the debtor were covered, the clearest indications being the clarity and width of the definition of 'Guaranteed Moneys',[12] and the comprehensiveness of the entire document.[13]

that it also be secured by the dragnet mortgage;
e. The clause is inapplicable to debts which were originally owed by the mortgagor to third parties and which were assigned to or purchased by the mortgagee;
f. If there are several joint mortgagors only future debts on which all of the mortgagors are obligated or at least of which all were aware will be covered by the dragnet clause;
g. Once the original debt has been fully discharged, the mortgage is extinguished and cannot secure further loans;
h. If the mortgagor transfers the land to a third party, any debts which the original mortgagor incurs thereafter are not secured by the mortgage; and
i. If the real estate is transferred by the mortgagor advances subsequently made to the transferee are not secured by the mortgage even if the transferee expressly assumed the mortgage.

[9] *State Bank of South Australia* v *MacIntosh; Halwood Corporation Ltd* v *State Bank of South Australia* (unreported, Supreme Court of NSW, Young J, 31 May 1995, Equity Division) 11; *National Bank of New Zealand* v *West* [1978] 2 NZLR 451, 455.

[10] eeson CJ in *Fountain* v *Bank of America National Trust and Savings Association* (1992) 5 BPR 97410, 11819–20; *National Bank of New Zealand* v *West* [1978] 2 NZLR 451, 455; *Kerr* v *Ducey* [1994] 1 NZLR 577, 585–6.

[11] (unreported, Supreme Court of New South Wales, Young J, 31 May 1995, Equity Division).

[12] Id 11.

[13] Id 12; cf the Privy Council in *Coghlan* v *S H Lock (Aust) Ltd* (1987) 8 NSWLR 88, 94.

Debts which have been held by the courts to be within the ambit of particular all debts clauses include:

- the legal costs of the creditor, where the creditor was joined as a co-defendant with the debtor in an action by a third party;[14]
- liabilities of the principal debtor itself as surety for the debts of others,[15] including the liabilities of the debtor under a cross-guarantee;[16]
- bills paid out by the bank on behalf of the debtor;[17]
- obligations incurred by the debtor under a later transaction with the creditor, where both the relevant transaction and the obligations were of a kind within the purview of the ongoing banking arrangements and the subject of the original agreement;[18]
- contingent liabilities;[19] and
- foreign exchange facilities, where the all debts clause clearly included debts incurred in the provision of banking facilities by the creditor.[20]

LIMITATIONS ON 'ALL DEBTS' CLAUSES IN CONTRACTS OF GUARANTEE

Although it is clear that the courts will enforce an all debts clause where appropriate having regard to the actual language used,[21] it is equally apparent that the courts have shown a tendency to read down broad clauses in contracts of guarantee so that the wide words have some operation, but not so as to include situations that would never have been contemplated by the ordinary guarantor by the use of the words.[22]

An examination of cases in this area indicate a number of issues of construction which have been relevant — although not necessarily conclusive — in interpreting all debts clauses in contracts of guarantee. These issues involve:

1. construction of the clause in the event of ambiguity;
2. the need for the debt to fall within the ambit of the guarantee;
3. ascertaining whether the clause will apply only to debts of the same type or character as the original guaranteed debt;
4. the interpretation of terms which customarily appear in clauses of this nature;

[14] *Estoril Investments Pty Ltd* v *Westpac Banking Corporation* (1993) 6 BPR 13146.
[15] *Catley Farms Ltd* v *ANZ Banking Group (NZ) Ltd* [1982] 1 NZLR 430.
[16] *Coghlan* v *S H Lock* (1987) 8 NSWLR 88.
[17] *Westpac Banking Corporation* v *George Comanos* (unreported, Supreme Court of NSW, Cole J, 26 March 1993).
[18] *Fountain* v *Bank of America National Trust and Savings Association* (1992) 5 BPR 97410.
[19] *Re Rudd & Son ; re Fosters and Rudd Ltd* (1986) 2 BCC 98955 and *Bank of Scotland* v *Wright* [1991] BCLC 244.
[20] *Bank of India* v *Trans Continental Commodity Merchants Ltd* [1982] 1 LR 506.
[21] In relation to such clauses in mortgages, see for example Kirby P in *Smith* v *Australia and New Zealand Banking Group Ltd* (1996) NSW ConvR 55-774, 55-937.
[22] Per Young J in *Australia & New Zealand Banking Group Ltd* v *Comer* (1993) 5 BPR 97404, 11758; Santow J in *Burke* v *State Bank of New South Wales* (1995) 37 NSWLR 53.

5. the position of debts owed by the principal debtor to third parties outside the guarantee arrangement, but later assigned to the relevant creditor;
6. establishing whether a guarantee of the obligations of the debtor also covers guarantees given by the principal debtor for the debts of others;
7. establishing whether the clause covers obligations already existing at the time of the guarantee;
8. ascertaining whether the liability of the guarantor ceases when the original indebtedness of the debtor is extinguished;
9. resolving whether the clause contemplates future obligations incurred by the debtor;
10. in the case of multiple debtors — considering whether the guarantee applies to further advances to individual debtors; and
11. the application of equitable doctrines.

Each of these issues will now be considered in turn.

1. Ambiguity

Where there is ambiguity in the operation of a clause in a guarantee, the general approach under Australian law is that the liability of the guarantor should be construed *strictissimi juris*, and ambiguous contractual provisions construed in favour of the guarantor.[23] This may be contrasted with, for example, the liability of a mortgagor under a mortgage.[24]

An illustration of this principle in the context of all debts clauses may be seen in *ALH Australia Ltd t/as Auslec and Lawrence and Hanson* v *McGlinn*.[25] In this case ALH Australia Ltd ('ALH') was a supplier of electrical contractors, trading under two business names ('Auslec' and 'Lawrence and Hanson'). McGlinn and Hudson, directors of Electro-Pneumatic (Australia) Pty Ltd ('Electro-Pneumatic'), a customer company, completed an application for credit to ALH, whereby they personally accepted

> . . . the liability jointly and severally with the debtor company named for all outstanding debts and . . . charge all our property both real and personal with the amount of any indebtedness.

Although the application was addressed to ALH, the document referred only to ALH trading as Lawrence and Hanson — no reference was made in the document to the company trading as Auslec.

Electro-Pneumatic incurred debts to ALH in both trading capacities, however McGlinn and Hudson as 'guarantors' under the application for credit claimed that they were liable only for all debts incurred by Electro-Pneumatic to ALH trading as Lawrence and Hudson.

[23] *Ankar Pty Ltd* v *National Westminster Finance (Aust) Ltd* (1987) 162 CLR 549, 561. See also the discussion of this point in O'Donovan & Phillips, op. cit. 216 *et seq.*

[24] The contrast between the construction of all debts clauses in contracts of guarantee vis-a-vis contracts of mortgage was considered by Santow J in *Burke* v *State Bank of New South Wales* (1995) 37 NSWLR 53.

[25] (Unreported, Santow J, Supreme Court of NSW, 6 February 1996).

Evidence was led to the effect that the guarantors were aware that Electro-Pneumatic was dealing with ALH, whether through an Auslec store or through a Lawrence and Hanson store. Santow J, however, in finding for the guarantors, held

> The ambiguity here is whether "all outstanding debts" comprehends debts for transactions not related to Auslec invoices, when those words appear in the relevant credit application which throughout relates only to Auslec and when an earlier application, in contrast, related only to Lawrence and Hanson. I am satisfied that ambiguity should be resolved in favour of the guarantors, that is, the Defendants, in accordance with the foregoing principle. I also conclude that the course of dealing between the parties was not sufficient to lead to any other construction of the guarantee as embracing Auslec indebtedness.[26]

2. Debt must fall within Ambit of the Guarantee

Given the potentially unlimited liability to which the guarantor commits itself by undertaking an 'all debts' liability for a debtor, it follows that the debt must fall strictly within the ambit of the guarantee before the guarantor will be liable

In *BLM Holdings Pty Ltd v Bank of New Zealand*[27], the bank offered a company a facility by way of revolving commercial bill discount of up to $12.6 million to be utilised with the redevelopment of a warehouse into a hotel. The facility was secured by a joint and several guarantee by two companies in the group and a director. Although all moneys advanced by the bank to the debtor company were guaranteed, clause 28 of the guarantee provided:

> Notwithstanding the provisions of CL 1 of this guarantee it is expressly agreed and declared that the liability of the guarantor hereunder is restricted to and remains in full force and effect only in respect of monies advanced to the principal debtor by the Bank pursuant to and in accordance with the terms of the facility evidenced by letter from Bank of New Zealand to the debtor dated 16 December 1988.

As the moneys in question sought by the creditor were not advanced by the creditor pursuant to the facility, the guarantors were held not liable in respect of those moneys despite the all debts clause in the guarantee.

3. Does the Clause Apply Only to Debts of the Same Type or Character as the Original Guaranteed Debt?

Although as a matter of construction of a particular clause the court may reach the conclusion that the guarantee applies only to debts of the same type as the original guaranteed debt, there does not appear to be a general rule that the

[26] Id 13.
[27] (Unreported, Court of Appeal, NSW, Clarke and Sheller JJA and O'Keefe CJ, 25 March 1994).

guarantee must be so construed.[28] As Young J pointed out in *Estoril Investments Pty Ltd* v *Westpac Banking Corporation*[29]:

> It must always be remembered that a company may very well start off business in a small way in a certain field and then expand its operation. As Dixon J said in another connection in *H A Stephenson & Son Ltd (in liq)* v *Gillanders, Arbuthnot & Co* (1931) 45 CLR 476, 490:
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> > ... the produce merchant may become a farmer, the grain merchant a miller, the farmer a dealer in live stock, the dealer in live stock may slaughter and freeze carcasses, grain merchant, miller and carcass butcher may need freight and charter ships. The scope of the memorandum is to give capacity to allow of an imaginary progress through a gamut of activities.
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> That type of progress could be shown in the history of the companies in the Estoril group ... (Although) Mr Einfeld QC says that the debts which are now being sought to be charged against Estoril are so far removed from what was originally contemplated that the moneys are not within the wide all moneys clause ... I disagree. Even though the parties may well not have contemplated at the time of entering into the mortgages that there would be a million dollars in legal costs which came about because Mr Wimborne, the principal of Estoril, became involved with a Saudi Arabian Prince, nonetheless the parties anticipated that there would be costs and expenses including legal costs which could possibly arise in connection with the banking and which might be added on to the principal sum.[30]

Illustrations of the application of this principle may be seen in *Bank of India* v *Trans Continental Commodity Merchants Ltd*[31] and *Catley Farms Ltd* v *ANZ Banking Group (NZ) Ltd*[32].

In *Bank of India* v *Trans Continental Commodity Merchants Ltd*[33] the bank agreed to open an account to handle documentary credits and to handle Trans Continental's foreign exchange deals. The performance of the contracts was guaranteed by Patel, the second defendant. The guarantee provided inter alia:

> In consideration of the Bank of India (... "the Bank") .. affording banking facilities for as long as the bank may think fit to [the company] ... I the undersigned Jashbai N Patel hereby agree to pay and satisfy to the Bank on demand all and every sum and sums of money which are now or shall at any time be owing to the bank anywhere on any account whatsoever ... of for any moneys which [the company] may be liable as surety ...

The company defaulted on payment in respect of 12 foreign exchange contracts and the bank claimed against both the company and Patel under the guarantee.

[28] *Estoril Investments Pty Ltd* v *Westpac Banking Corporation* (1993) 6 BPR 13146, 13154. This may be contrasted with the second U.S. guideline applicable to dragnet clauses in mortgages, noted in fn 7.
[29] Ibid.
[30] Id 13154 — 13155.
[31] [1982] 1 LR 506.
[32] [1982] 1 NZLR 430.
[33] [1982] 1 LR 506.

Patel denied liability claiming, inter alia, that banking facilities did not include foreign exchange facilities.

Bingham J held that banking facilities should be construed as including foreign exchange facilities, but in any event the width of the clause was such as to comprehend claims against the company not only in debt, but also in damages.[34]

Further, in *Catley Farms Ltd* v *ANZ Banking Group (NZ) Ltd*[35] the bank advanced money to the plaintiff, and the Messrs GH and ES Catley who controlled the plaintiff, on the security of a second mortgage over a farm owned by the plaintiff. The mortgage contained a covenant by the plaintiff in the following terms:

> 1. That the mortgagor will on demand in writing pay to the Bank . . . the amount . . . which shall be owing or unpaid by the . . . customer . . . including all sums in which the . . . customer is or may hereafter become liable immediately or contingently to the Bank upon or in respect of any account . . . in which the customer is now or may hereafter be interested or concerned . . . or in respect of any guarantee . . . which has been given . . . by the customer to the Bank . . . or which may hereafter be given . . . by the customer to the Bank . . .

G H Catley acquired an interest in another company, New Zealand Roadmakers Ltd ('NZRL') which also had an account with the bank, and Mr Catley personally guaranteed the debts of NZRL to the bank. When NZRL was placed in receivership with a short-fall in sums owing to the bank, it was clear that the bank would be looking to the guarantors, including Mr Catley. At this point, the plaintiff sought a declaration that it would not be liable to the bank under the mortgage in respect of the contingent liability of Mr Catley.

Prichard J refused to grant the declaration sought by the plaintiff. The covenant for payment contained in the mortgage included clearly and unequivocally an undertaking by the mortgagor to pay to the bank any amount owing by Mr Catley to the bank under any guarantee given by him, and there was no basis to exclude from that undertaking Mr Catley's guarantee of the NZRL account.

4. The Interpretation of Terms which Customarily Appear in Clauses of this Nature

As an issue of construction it is useful to consider the interpretation accorded to terms regularly arising in cases dealing with all debts clauses. So, for example, judicial attention has focused on

a. 'costs, charges and expenses';
b. 'account'; and
c. 'contingent'.

[34] Id 512.
[35] [1982] 1 NZLR 430.

a. Costs, Charges and Expenses

Provided that the clause is drafted sufficiently broadly, the obligation of a guarantor to guarantee the 'costs' of the creditor in relation to the debt, will extend to include the legal costs of the creditor where the creditor is sued in relation to the debtor's account. This position applies even where the creditor is sued for the commission of its own tort. So, for example, in *Estoril Investments Pty Ltd* v *Westpac Banking Corporation*[36] the mortgagor had covenanted to pay all costs, charges and expenses which the mortgagee 'shall sustain in connection with the mortgage'. The mortgagor was subsequently sued by a third party in relation to moneys deposited in the mortgagor's account with the Bank. Young J held that the legal costs incurred by the Bank in relation to this litigation were within the terms of the clause, irrespective whether the bank was sued in its own capacity as allegedly having perpetuated an equitable fraud in relation to such moneys.[37]

Further, the covenant of the guarantor to pay 'all costs, charges, expenses and payments' which may be incurred by the creditor would necessarily be interpreted as applying only to costs, charges, expenses or payments properly incurred — i.e. reasonably and in good faith. Costs incurred unjustifiably or vexatiously, so as to impose an unwarrantable burden on the debtor or guarantor, would not be recoverable.[38]

b. Account

The expression 'on any account whatsoever' which frequently appears in an all debts clause is ambiguous,[39] although as O'Donovan and Phillips point out,

> There is no classic judicial definition of the phrase, but it has been said not to be limited to an account normally portraying the relation of banker and customer, for example, a current or loan account (*National Bank of New Zealand* v *West* [1978] 2 NZLR 451).[40]

Generally speaking, it is in the interests of creditors to claim that the word 'account' in this context is equivalent to the word 'reason', so as to encompass the broadest possible range of sources of liability,[41] and in the absence of qualification the court may be prepared to interpret the expression to mean 'on any ground' or 'by reason of any circumstances.'[42] Clearly however the meaning of the term in a guarantee will be an issue of construction of that

[36] (1993) 6 BPR 13146.
[37] Id 13155.
[38] McLelland J in *Elders Trustees & Executor Co Ltd* v *Eagle Star Nominees Ltd* (1986) 4 BPR 97256, 9208.
[39] *Skylink International Courier Pty Ltd* v *Grellman* (unreported, Supreme Court of NSW, Needham J, 21 December 1987, Equity Division) 6.
[40] O'Donovan & Phillips, *op cit*, 250.
[41] See, for example, reference to the argument of the creditor in *Skylink International Courier Pty Ltd* v *Grellman* (unreported, Supreme Court of NSW, Needham J, 21 December 1987, Equity Division) 5.
[42] *Re Clark's Refrigerated Transport Pty Ltd* [1982] VR 989, 994; Richardson P in *National Bank of New Zealand* v *West* [1978] 2 NZLR 451, 460; cf *Cambridge Credit Corporation Ltd* v *Lombard Australia Ltd* [1977] 136 CLR 608, 613–14.

particular guarantee. So, for example, the interpretation of the expression may be coloured by:

- the stipulated consideration, as in *National Bank of New Zealand* v *West*[43]
- the types of 'accounts' described in the clause, as in *Re Clark's Refrigerated Transport Pty Ltd*[44], where the court considered that in the context of that particular agreement, the identification of certain accounts limited the operation of the clause;
- the use of such terms as moneys which 'shall become due and payable' and 'howsoever arising', as in *Cambridge Credit Corporation Ltd* v *Lombard Australia Ltd*[45], where the court was of the view that the operation of the clause was sufficiently broad to include contingent liabilities of the debtor; and
- provision in the contract for the payment of interest on moneys 'hereby secured', as in *Skylink International Courier Pty Ltd* v *Grellman*.[46]

'Account': Stipulated Consideration

In *National Bank of New Zealand* v *West*[47] West and the two other respondents were three directors of Allied Wools (Otago) Ltd ('Allied'). They gave personal guarantees to the bank in respect of the company's accounts with the bank. Gray and Hunter were the remaining directors of Allied, and Hunter was also the chairman of the company. In addition, Gray and Hunter were directors of another company, International Trade & Finance (Wool) Co Ltd ('International').

The guarantee provided by West and the other respondents provided:

> In consideration of advances or other banking accommodation whether made or given on or before the signing hereof . . . by THE NATIONAL BANK OF NEW ZEALAND LIMITED . . . to Allied Wools . . . on private joint or partnership account . . . or by any other means whatsoever . . . [the guarantors] hereby jointly and severally covenant and agree with the bank as follows:
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> 1. The guarantors guarantee payment of [i] all moneys which shall at any time be owing or remain unpaid on the general balance of the principal's account with the bank including all such advances as aforesaid, [ii] and all costs charges commissions and other expenses . . . [iii] and all moneys (a) which the bank shall be at liberty to charge or debit to the account of the principal or (b) which may be owing or unpaid to the bank by the principal on any account whatsoever . . . (iv) [interest]

Following discussions with Gray and Hunter, the bank agreed to provide an overdraft accommodation to International, to be secured by an all debts guarantee provided by Allied. Without the knowledge of West and the

[43] [1978] 2 NZLR 451.
[44] [1982] VR 989.
[45] [1977] 136 CLR 608.
[46] (Unreported, Supreme Court of NSW, Needham J, 21 September 1987, Equity Division).
[47] [1978] 2 NZLR 451.

respondents, Gray and Hunter caused the common seal of Allied to be affixed to an unlimited guarantee of the obligations of International.

When International defaulted, the bank looked to Allied to honour the unlimited guarantee executed on its behalf by Gray and Hunter, and on the failure of Allied to meet the demand, subsequently to West and the respondents as directors and guarantors of the obligations of Allied.

As the court concluded that Hunter had validly bound Allied to its guarantee of the obligations of International, the decision in the case turned upon construction of the guarantee provided by West and the respondents. The critical features of the guarantee were

- the meaning of 'account' and
- the consideration for which the guarantee was provided.[48]

The respondents submitted, *inter alia*, that on proper construction of the clause the word 'account' was restricted to a current or loan account or some account of a similar nature in the name of Allied.

Somers J in the New Zealand Court of Appeal observed that by itself the word 'account' has many different meanings.[49] In his Honour's view however

> the words 'on any account whatsoever' are not limited to an account of the type normally portraying the relation of banker and customer, that is to say a current account, a loan account or some other account of a similar nature. I reach that conclusion on a number of considerations. First, the earlier provisions of cl 1 seem to me apt to cover liabilities of Allied on any such account. Secondly, the word 'whatsoever' imports a width of meaning which a restriction of the word 'account' in that way would deny. Thirdly, the reference to contingent liability of Allied suggests that the account referred to relates to something other than a normal customer/banker account.[50]

That did not mean however that there were no restrictions on the source or nature of the liability of the guarantor: Somers J expressed the view that if, for example, Allied's vehicle damaged bank property in circumstances giving rise to delictual liability, it could not be contended that the respondents were answerable for Allied's default in payment of damages.[51] The expression 'on any account whatsoever' had to be construed in the light of the surrounding circumstances, and in particular the consideration given by the bank in return for the guarantee, which was expressed to be advances or other banking accommodation.[52] Accordingly

> In short, the consideration is advances or banking accommodation to be made by the bank with an elaboration of those terms. In the context of this guarantee the undertaking of the respondents, and in particular the width of the words 'on any account whatsoever', is controlled by the nature of that which the bank would proffer as a consideration.

[48] The issue of consideration is considered below.
[49] [1978] 2 NZLR 451, 456.
[50] Id 457.
[51] Ibid.
[52] Ibid.

> Such an approach does no violence to any of the terms of the guarantee and is in accord with well-recognised principles of construction. A document is to be interpreted not simply with reference to the ordinary and grammatical sense of the words used but also in the light of the document as a whole . . . In the present case, unusually, it is the provision as to consideration that affords the principal guide to the parties' intentions. The promise to guarantee is given in return for a forbearance to sue for past advances (of which there were none) and in consideration of the giving of future advances and banking accommodation by the bank to Allied. It is in relation to the type of consideration to be afforded in the future by the bank that the guarantors entered into their undertaking and for which the bank required surety . . .[53]

Types of Accounts

In *Re Clark's Refrigerated Transport Pty Ltd*[54], the creditor took a mortgage over the book debts to secure all obligations of the debtor, in contemplation of advances to the debtor. Advances to the debtor totalled approximately $200,000.

Relevant clauses in the mortgage included:

> (a) all moneys now or hereafter to become owing or payable to the Mortgagee by the Mortgagor either alone or on a joint partnership account or on any account whatsoever; and
>
> . . .
>
> (f) each and all sums of money in which the Mortgagor may now or hereafter be indebted or liable or contingently liable to the Mortgagee on any account whatsoever . . .

The debtor also owed a sum of money to the parent corporation of the creditor.

After the presentation of a petition to wind up the company, the parent assigned to the creditor liabilities of the debtor to the parent amounting to approximately $162,000. The creditor holding the mortgage then claimed in the ensuing liquidation of the debtor to be secured not only in relation to the $200,000 lent by it but also monies in respect of the assigned liabilities.

In considering clause 2 (a) of the mortgage, Brooking J observed:

> In my opinion, while clause 2 (a) may be even more limited in its scope, it is as least limited to moneys owing or payable by reason of some transaction between mortgagor and mortgagee. This is the result of the use of the words 'either alone or on a joint partnership account or on any account whatsoever.' If the words were merely 'on any account whatsoever' it would be arguable that they bore some such meaning as 'on any ground' or 'by reason of any circumstance', but the phrase actually used suggests to my mind at least the limitation that I have mentioned. The expression 'either alone or on joint or partnership account or on any other account whatsoever', or some similar expression, is commonplace in securities like debentures,

[53] Id 458.
[54] [1982] VR 989.

> mortgages of land, guarantees and letters of lien taken by banks to secure their position . . .[55]

In relation to clause 2 (f), which spoke of 'each and all sums of money in which the Mortgagor may now or hereafter be indebted or liable or contingently liable to the Mortgagee on any account whatsoever . . .', his Honour considered that the word 'account' was used in its accounting sense, looking to some transaction between mortgagor and mortgagee.[56] The reasons for this included:

- other clauses in the contract, where there was the common notion of business relations or transactions requiring the keeping of an account, and where the word 'account' was used in the accounting sense rather than in the sense of 'ground' of 'reason'; and
- the nature of an instrument of mortgage, as one brought into being primarily in order to secure advances and accommodation to be granted by one company to another.[57]

Accordingly, the assigned liabilities did not in the judgment of the court fall within the purview of the mortgage.

'Account': Other Relevant Terms

In *Cambridge Credit Corporation Ltd* v *Lombard Australia Ltd*[58] Cambridge Credit Corporation Ltd ('Cambridge') executed a mortgage over land in favour of Lombard Australia Ltd ('Lombard') on 9 May 1974. Some time before the execution of the mortgage, Cambridge had executed guarantees in favour of the mortgagee by which it guaranteed the repayment of certain loans made by Lombard to other companies associated with Cambridge.

In a separate transaction, Cambridge had given a floating charge over all its assets as part of issuing debentures. The debenture trust deed provided that no mortgage or charge might be created to rank into priority to or pari passu with the charge without the trustee's consent.

On 30 September 1974 Cambridge defaulted on the mortgage in favour of Lombard and Lombard went into possession of the land. Cambridge tendered the full amount owing under the mortgage but no amount referable to any guarantees, and the mortgagee refused to release the mortgage until amounts owing in respect of the guarantees were also paid. Lombard claimed that the amounts owing under the guarantees were also secured by the mortgage.

The mortgage provided, *inter alia*,

> That the Mortgagor will on demand in writing . . . pay to the Mortgagee all such further and other sums of money interest costs charges and expenses as are now or hereafter shall become due owing or payable by the Mortgagor to the Mortgagee upon any account whatsoever and whether such sums of money shall be advanced or paid by the Mortgagee to or for the Mortgagor or on the Mortgagor's account or otherwise howsoever including all and

[55] Id 994.
[56] Id 995.
[57] Ibid.
[58] (1977) 136 CLR 608.

> every sum and sums of money to pay which a liability or agreement has been or shall or may be entered into or incurred by the Mortgagee . . .

A key question was whether the mortgage also secured the payment of liabilities, initially contingent in character, on the part of Cambridge to Lombard, arising under guarantees given by Cambridge to Lombard before the execution of the mortgage, in connection with loans made by Lombard to two other companies on the security of lands other than the mortgaged land.

In finding for the creditor that the obligation of Cambridge under the mortgage extended to its obligations as guarantor, the High Court observed that the obligation of the mortgagor to pay upon demand 'all such further and other sums of money . . . as are now or hereafter shall become due and payable . . . upon any account whatsoever'

> are appropriate to pick up not only liabilities which arise subsequently to the giving of the mortgage and while it subsists, but also liabilities which are contingent at the date of execution of the mortgage and cease to be contingent during the subsistence of the mortgage. The amount owing in respect of a liability, initially contingent, which nevertheless ceases to be contingent during the currency of the mortgage is a sum of money which has 'become due owing or payable' within the meaning of the clause. If it be owing upon another account, because it is owing by the mortgagor in its capacity as a guarantor, it is none the less owing upon an account which falls within the words 'upon any account whatsoever.' The subsequent formulation 'and whether such sums of money shall be advanced or paid by the Mortgagee to or for the Mortgagor or on the Mortgagor's account or otherwise howsoever' is an elaboration of what precedes it. . . . Moneys so advanced or paid by the mortgagee are, if not paid 'for the Mortgagor or on the Mortgagor's account', advanced or paid 'otherwise howsoever'.[59]

It is significant to note that had the clause not included the words 'howsoever arising' in relation to liabilities of the debtor, it is unlikely that contingent liabilities of the debtor would have been covered by the guarantee — this point was made by the High Court in *Lombard*,[60] distinguishing the earlier High Court case of *National Bank of Australasia Ltd* v *Mason*.[61]

'Account': Reference to Moneys 'hereby secured'

On similar facts to the case of *Re Clark's Refrigerated Transport Pty Ltd*[62], where debts of the debtor were again assigned to the creditor, and the creditor sought to gain the benefit of an existing security in respect of the assigned debts, the Supreme Court of New South Wales in *Skylink International Courier Pty Ltd* v *Grellman*[63] reached the conclusion that the clause in question did not apply to assigned debts.

[59] Id 613.
[60] (1977) 136 CLR 608, 614.
[61] (1975) 133 CLR 191.
[62] [1982] VR 989.
[63] (Unreported, Supreme Court of NSW, Needham J, 21 September 1987, Equity Division).

The clause in *Grellman's* case was broader than that in *Clark's* case, and provided

> the Mortgagor . . . hereby charges its undertaking and all its assets excluding its book debts whatsoever and wheresoever situate both present and future . . . with the due and punctual payment to the (Mortgagee) of . . .
>
> . . .
>
> . . .
>
> (c) all other moneys now or hereafter to become owing or payable to the Mortgagee by the Mortgagor either alone or jointly with any other person on any account whatsoever including . . . all moneys which the Mortgagee pays or becomes actually or contingently liable to pay to for on behalf of or for the accommodation of the Mortgagor . . .

Needham J considered in some detail the phrase 'on any account whatsoever'[64] and noted the submission that it bore the possible meaning 'all moneys now or hereafter to become owing or payable to the Mortgagee for any reason whatsoever'.[65] However his Honour considered that the expression needed to be construed in the light of other provisions of the deed, to ascertain whether they were consistent with a proposition that moneys which were assigned to the mortgagee would fall within the ambit of the security.[66] In particular, his Honour concluded that the provision in the document for the payment of interest on the 'moneys hereby secured' was determinative of the types of liability within the purview of the security. As Needham J indicated,

> It seems to me that the provision in cl 2 (c) for the payment of interest on 'the moneys hereby secured' tends strongly against any suggestion that moneys owed originally by the mortgagor to a third party, but assigned to the mortgagee, would come within the expression 'the moneys hereby secured.' It would, in my opinion, be extraordinary if the mortgagor owed money to a third party under which interest was not payable but upon assignment by that third party to the mortgagee the sums due originally to the third party but now to the mortgagee attracted the provision for payment of interest. I think that that clause in the deed strongly tends against the construction put forward by the defendants and I do not think that I need to consider any other argument put in the case.[67]

c. Contingent

In relation to the question whether contingent liabilities *per se* are within the purview of the clause, a specific provision in the clause referring to contingent liabilities will generally be conclusive in favour of a the creditor seeking to recover the cost of contingent liabilities from the guarantor. The more difficult questions to resolve are

- whether contingent liabilities will be within the purview of the guarantee if they are not specifically referred to;

[64] Id 4–6.
[65] Id 5.
[66] Id 6.
[67] Ibid.

- whether the debts the creditor is seeking to recover from the guarantor are actually 'contingent liabilities' within the meaning of the clause; and
- whether such liabilities should only be secured once they cease to be contingent.

A contingent creditor is

> a person towards whom, under an existing obligation, the company may or will become subject to a present liability upon the happening of some future event or at some future date.[68]

Accordingly, it appears crucial that there exists a present obligation, out of which the ultimate liability will grow.[69] Whether such a present obligation exists however is not always easy to determine.

Position if the Clause does not specifically refer to 'Contingent Liabilities'

Contingent liabilities will be within the range of an all debts clause provided the clause is sufficiently broadly drafted. In *Bank of Scotland* v *Wright*[70] the guarantor (Wright) had guaranteed to the Bank of Scotland the obligations of Dinewell Holdings Ltd. Dinewell Holdings Ltd in turn had guaranteed the obligations of Dinewell Frozen Foods Ltd. Wright's guarantee secured

> IN CONSIDERATION of your giving time credit and/or Banking facilities and accommodation to Dinewell Holdings Ltd . . . all sums and obligations due and to become due to you by (Dinewell) whether solely or jointly with any other obligant or by any firm of which (Dinewell) may be a partner and/or in any other manner or way whatever . . .

Dinewell Holdings Ltd and Dinewell Frozen Foods Ltd were parties to an inter-available facility, and the bank had insisted that in order for the facility to be freely transferable between the parties, cross guarantees were necessary.[71]

When both companies collapsed, Wright claimed that his personal guarantee made no reference to contingent liabilities, and that on its proper construction the scope of his guarantee was limited to the ultimate debit balance of Dinewell Holdings Ltd to the bank on its bank accounts.

Brooke J however held that as a matter of construction of the clause in the light of the surrounding facts, Wright was liable for Dinewell Holding's contingent liabilities for Dinewell Frozen Food's indebtedness to the bank. Particular factors indicating this liability included

- the surrounding circumstances, including the events leading up to the arrangement of the inter-available facility;
- the very wide words used in the guarantee; and

[68] *Re William Hockley Ltd* [1962] 1 WLR 555, 558; *Community Development Pty Ltd* v *Engwirda Construction Co* (1969) 120 CLR 455, 459.

[69] Barwick CJ in *National Bank of Australasia Ltd* v *Mason* [1975] 133 CLR 191. For a detailed discussion of the phrase in the context of guarantees, see O'Donovan & Phillips, *op cit* 247–250.

[70] [1991] BCLC 244.

[71] Id 253.

- the fact that nothing in the title of the guarantee detracted from the meaning of the words used in the body of the guarantee.

Are the Specific 'Contingent Liabilities' within the Scope of the Clause?

In considering this question it is interesting to compare the cases of *National Bank of Australasia Ltd* v *Mason*,[72] *Greenish* v *Bank of New South Wales*,[73] and *Cambridge Credit Corporation Ltd* v *Lombard Australia Ltd*.[74]

Mason

In *National Bank of Australasia Ltd* v *Mason*,[75] Mr Mason was chairman of directors of Option Underwriters Ltd, and opened a bank account with the National Bank on behalf of the company. Mr and Mrs Mason gave a mortgage over land owned by them as security, and Mr Mason also provided a personal guarantee.

The mortgage contained a promise to pay 'all moneys which are owed or may from time to time hereafter be owing' by the company to the bank.

The guarantee contained a promise to pay 'all moneys which are now owing or which may from time to time hereafter be owing to the bank . . . whether contingently or otherwise.'

Cheques payable to third parties were indorsed by Mason and deposited into the account of the company with the bank. The third parties brought an action against Mason, the company and the bank for, *inter alia*, conversion. When Mr and Mrs Mason sought to have their mortgage to the bank discharged, the bank refused on the basis that if the payees were successful in their litigation the bank would be entitled to debit the company's account, and for that reason there were 'moneys owing' under the mortgage and moneys 'contingently owing' under the guarantee.

In the view of the High Court, the potential liability of Mr Mason to the bank in relation to the alleged conversion did not constitute moneys 'contingently owing' under the guarantee. As stated by Barwick CJ,

> the possibility that the company will have to pay to the appellant the amount paid by it to the payees of the cheques cannot be regarded as moneys 'owing contingently'. Nor, in my opinion, can that amount be properly described as a contingent liability of the company. That description is not satisfied by the fact that money may become owing upon the occurrence of some event. There must be some present obligation to pay out of which the money may become due. The stress is upon the word 'owing', which imports some existing obligation though it may be imperfect until an event within its purview occurs.[76]

[72] (1975) 133 CLR 191.
[73] (Unreported, Supreme Court of ACT, Joske J, 16 December 1977).
[74] [1977] 136 CLR 608.
[75] (1975) 133 CLR 191.
[76] Id 200; cf 205 per Stephen J and 208 per Murphy J.

Greenish

Interestingly however in *Greenish* v *Bank of New South Wales*,[77] despite almost identical facts, Joske J reached the opposite conclusion to that of the court in *Mason*. The relevant clause in the mortgage in *Greenish* was expressed to be for the purpose of securing to the bank 'the payment upon demand to be made by or on behalf of' Mr and Mrs Greenish of, *inter alia*,

> (d) ALSO all moneys which the Debtor and the Mortgagor or either or them whether directly or indirectly or contingently or otherwise or presently or in the future has or may become liable to pay to the Bank on or upon any account . . . or by reason of any other matter or thing whatever . . .

In this case the only possible liability or moneys outstanding under the mortgage were in respect of an action brought against the bank by the firm of which Mr Greenish was the manager, in relation to a cheque for $20,000 drawn on the firm's account which Mr Greenish deposited into his own account in 1971. The firm subsequently claimed that this deposit was unlawful, and had brought an action against both Mr Greenish and the bank claiming, inter alia, conversion, which action had not been resolved at the time of the claim of the plaintiff to have the mortgage discharged.

The mortgagor claimed that the mortgage was a security only for moneys which could be subject to a demand for payment, and that 'payment on demand' in the mortgage meant payment if and when moneys became owing. In this case, no demand for payment could be made by the bank in respect of the litigation concerning the allegedly unlawful deposit, and accordingly the creditor was required to discharge the relevant mortgage.

Joske J held however that this clause entitled the bank to retain its security to meet the possible liability which could result to it owing to the conduct of Mr Greenish, and that the 'demand' in the clause was merely machinery in the sense that a prior demand was required before payment needed to be made.[78]

A similar result to that in *Greenish* was reached by the Court of Appeal in England in *Re Rudd and Son Ltd; Re Fosters and Rudd Ltd*,[79] where the two plaintiffs had provided a mortgage to the Midland bank, and had subsequently entered voluntary liquidation at a time when no amounts were owing in relation to the mortgages. The liquidator called on the bank to vacate the mortgages, however the bank refused because there were certain contingent liabilities still outstanding. Those liabilities were counter-indemnities given by the firms to indemnify the bank in respect of suretyship bonds entered into by the bank with the Lincolnshire and Nottinghamshire County Councils, in connection with roadworks which had to be carried out by the firms. The councils required performance bonds from the bank, and these given by the bank against counter-indemnities from the partners. At the time

[77] (Unreported, Supreme Court of ACT, Joske J, 16 December 1977).
[78] Id 75.
[79] (1986) 2 BCC 98955.

of the liquidator's letter to the bank the liabilities of the firms under the counter-indemnities were still contingent liabilities — no call had been made on the bank by either county council under the performance bonds.

The mortgage provided, *inter alia*, that the bank would reconvey the property to the mortgagors on satisfaction of the following clause:

> PROVIDED ALWAYS and it is hereby agreed and declared that if the Mortgagor or his successors in title shall on demand pay to the Bank all and every the sums of money which shall for the time being be owing to the Bank by the Firm anywhere on the current account of the Firm or any other account . . . including [variety of instruments and transactions including . . . and all moneys for which the Firm or any member thereof may be liable to the Bank as surety or in any way whatsoever with in all the cases aforesaid . . .]

The Court of Appeal held that the bank was justified in refusing to discharge the mortgage until the contingent liabilities had been settled to the bank's satisfaction. So, for example, Dillon LJ said:

> I can see no sensible reason why such liabilities should only be secured from the moment they cease to be contingent and fall to be entered in some account of the firm with the bank.
>
> The same applies to liability to the bank as surety. A surety's liability is a contingent liability until it is called; but in my view it does not make commercial sense that this mortgage should cover contingent liabilities once they are called but not otherwise.[80]

Lombard

The facts and decision in *Lombard* were considered extensively earlier in this paper. As already discussed, the High Court in that case concluded that the obligation to pay upon demand 'all such further and other sums of money . . . as are now or hereafter shall become due and payable . . . upon any account whatsoever' picked up liabilities which were contingent at the date of execution of the mortgage and ceased to be contingent during the subsistence of the mortgage.[81] The court in *Lombard* distinguished the decision in *National Bank of Australasia* v *Mason* on the basis that:

> [In *Mason*] the liability was at all times in prospect or contingent only; at no time during the subsistence of the mortgage was there any sum due or owing. In any event, the mortgage was expressed in language which differs from that found in cl 2 (c). In particular there was in the mortgage in that case no reflection of the expression 'howsoever arising' which appears in cl 2 (c). Consequently, the observation of Barwick CJ [at 198 of *Mason*] that 'the payments by the bank which come within the operation of this clause are payments made by the bank on behalf of the mortgagors of the company', is not apposite in the present case.[82]

[80] Id 98959.
[81] (1977) 136 CLR 608, 613.
[82] Id 614.

Similar Cases, Differing Results

Despite the almost matching facts, the key distinctions between the clauses in *Mason* and *Greenish* appeared to be that

- in *Mason* the stress was upon the word 'owing' which imported an existing obligation, though it may be imperfect until an event within its purview occurs,[83]
- whereas in *Greenish* the words 'contingently owing' were not used, but rather the clause was more broadly expressed to secure to the bank moneys for which the debtor or mortgagor had become contingently or otherwise or presently or in the future liable to pay to the creditor.

Further, an important difference between the clauses in *Mason* and *Lombard* was the use of the broader term 'howsoever arising' in *Lombard*, although arguably more importantly in *Lombard* was the fact that the relevant liability had ceased to be contingent during the subsistence of the mortgage.

In comparing *Mason* and *Rudd* however, the courts reached opposing views on similar clauses, in ascertaining whether contingent liabilities which had not fallen due were within the ambit of the security documentation.

These cases are illustrative of the differing results which can occur depending upon the word used, and the difficulty in predicting a particular result even where facts and clauses are similar.

5. Does an 'All Debts' Clause in a Guarantee include Debts owed by the Principal Debtor to Third Parties and Assigned to the Creditor who enjoys the Benefit of the Guarantee?

As with all aspects of all debts clauses, whether a clause allows creditor C to seek the benefit of an all debts guarantee — provided originally by guarantor G in relation to debts directly incurred between C and debtor D — in relation to debts owed by D to X and later assigned by X to C, will depend upon the construction of the clause itself. This issue has particularly arisen in relation to mortgages, and the courts have indicated generally that in the absence of specific provision in the security documentation, all debts clauses will not cover assigned debts.[84]

The rationale for the caution with which courts permit the expansion of the ambit of an all debts clause to apply to assigned debts was described by Thomas J in *Katsikalis* v *Deutsche Bank (Asia) AG*[85] by way of analogy to a time-bomb[86] — i.e. the fact that the rights conferred by the debtor on the secured creditor (or guarantor) may suddenly be expanded if other debts of

[83] (1975) 133 CLR 191, 200.

[84] See the discussion of this point by O'Donovan & Phillips, *op cit* 252–253, *Re Clark's Refrigerated Transport Pty Ltd* [1982] VR 989, *Skylink International Courier Pty Ltd* v *Grellman* (unreported, Supreme Court of NSW, Needham J, 21 September 1987, Equity Division), *Katsikalis* v *Deutsche Bank (Asia) AG* (1988) 2 Qd R 641, *Kerr* v *Ducey* [1994] 1 NZLR 577.

[85] (1988) 2 Qd R 641.

[86] Id 650.

the debtor with no relationship to the secured transaction are assigned. This analysis was followed by Thorp J in *Kerr v Ducey*[87] where his Honour said

> The 'time-bomb' analogy, indicating that the future significance of such a right would not be foreseeable by a mortgagor at the time of execution of the mortgage, signals a proper matter for concern to a Court expected to endeavour to interpret commercial documents so as to give them commercial efficacy. If the claimed right is created by a standard form all obligations security, that result would add considerably to the problems of many borrowers who have entered into such documents in knowing the extent of the security they have granted, which would be variable without their control or knowledge. In my view, the Court should, as was the single Judge in *Re Clark's Refrigerated Transport* and the majority in *Katsikalis*, be slow to infer such an intention.[88]

Even where the clause does specifically refer to assigned debts, the courts will not readily interpret the assigned debts in a particular case as falling within the ambit of an all debts clause. In *Kerr* v *Ducey*[89] Mrs K and Mr J purchased land as tenants in common and gave an 'all debts' mortgage to Westpac Banking Corporation. Part of the moneys owing were paid when part of the land was sold, however the mortgage remained as security for the business activities of Mr J.

Ducey, one of Mr J's outstanding creditors, obtained judgment against Mr J on 14 March 1991 for $6519.22. Mr J became bankrupt in June 1991.

Ducey then purchased Westpac's mortgage on 20 September 1991 for $36,500, then sued Mrs K and Mr J for the moneys 'due and owing to the mortgagee'. When Mrs K offered to redeem the mortgage within the term specified by Ducey's notice, Ducey revised the amount required to redeem the mortgage, and stated that the amount owing was actually $48,691.55, including the amount of $11,056.93 in respect of principal and interest on Mr J's original debt to Ducey of $6519.22.

The critical provisions of the mortgage originally executed by Mrs K and Mr J in favour of the bank read:

> 1. THAT the Mortgagor will . . . pay . . . the monies hereinafter described, namely:
>
> (a) All moneys already advanced or paid or now or hereafter advanced or paid by the Bank for or after the accommodation of or on behalf of the

[87] [1994] 1 NZLR 577.

[88] Id 585; cf Brooking J in *Re Clark's Refrigerated Transport Pty Ltd* [1982] VR 989, 995–6 where his Honour said: 'I cannot help thinking that when a person gives an 'all obligations' mortgage or debenture he does not ordinarily contemplate that the property the subject of the security will secure not only his present and future obligations to the mortgagee or debenturer holder but also any debt or liability of his which may be assigned by a third person to the secured creditor. It does seem strange that a man may lock up his counting-house and go home for the night, in the comfortable knowledge that his only secured creditor is his banker, to whom he owes a trifling sum secured by the usual boundless bank instrument, and unlock the door in the morning to find that, by virtue of assignments of the large but unsecured debts owed by him to his fellow merchants, and inedeed to the butcher, the baker and the candlestick maker, all his unsecured debts have gone to feed his banker's insatiable security, so that every one of his debts is now secured.'

[89] [1994] 1 NZLR 577.

> Debtor and Mortgagor or either of them either alone or jointly with any other person or otherwise owing or payable now or hereafter by the Debtor ... on any account whatsoever and whether as principal or surety; and without limiting in any way whatsoever the generality of the foregoing;
>
> ...
>
> (f) Also all moneys which the Debtor and the Mortgagor or either of them either alone or jointly with any other person whether directly or indirectly or contingently or otherwise ... hereafter may become liable to pay to the Bank under or on any document or negotiable or other instrument.

Importantly, the word 'bank' was defined in the mortgage as including its successors and assigns under the mortgage.

Thorp J observed that the only manner in which the assigned debts could be brought within the ambit of the mortgage was under the words 'moneys which ... the Mortgagor ... hereafter may become liable to pay to the Bank ...' in clause (f). In his Honour's opinion,

> Clearly that phrase would include moneys which the mortgagor became liable in the future to pay to the original mortgagee, or to an assignee from the original mortgagee. Does it also include moneys which the mortgagor had become liable to pay to an assignee before the latter took an assignment of the mortgage?[90]

After considering cases including *Re Clark's Refrigerated Transport Pty Ltd in liquidation)*[91] and *Katsikalis* v *Deutsche Bank (Asia) AG*[92], Thorp J concluded

> I am satisfied that the mortgage assigned to Mr Ducey, while different in terms from any of those considered in the two Australian decisions, equally does not 'clearly stipulate' that it was intended to cover pre-existing third party indebtedness. For the reasons which convinced the Court in *Re Clark's Refrigerated Transport* and the majority in *Katsikalis*, I believe that such stipulation would be needed to bring pre-existing debts within the ambit of such all obligations mortgages. It follows that Mr Ducey's claim that the terms of the mortgage justify his inclusion of the judgment debt in the redemption price is disallowed.[93]

6. Does an 'All Debts' Clause in a Guarantee Given By G of D's Debts, Include Guarantees Given by D of the Debts of Others?

Again, whether the guarantor will find itself liable for guarantees given of the debts of others by the principal debtor will depend upon the construction of the guarantee itself. This issue frequently arises in relation to cross-guarantees provided in groups of companies.

Provided the clause is drafted sufficiently broadly, guarantees given by the debtor in relation to the debts of third parties will fall within the ambit of an all debts guarantee. Illustrative of this point is *Coghlan* v *S H Lock (Aust)*

[90] Id 583.
[91] [1982] VR 989.
[92] [1988] 2 Qd R 641.
[93] Id 586–7.

Ltd.[94] In that case Coghlan and MacPherson (the appellants) were businessmen with interests in a group of companies known as the Colan group. The leading company in the group was Colan Industries Pty Ltd ('Colan Industries'). Three other companies in the group formed a corporate partnership which traded in machine tools under the business style of Colan Products.

On 15 April 1982 the appellants personally guaranteed the indebtedness of Colan Industries under a 180 day bill drawn on Colan Industries, to S H Lock, which carried on business of a confirming house.

Colan Industries contacted S H Lock requesting a trade finance loan of $60,000 for 'our Colan Products Division', the funds to be made available by a 180 day bill. In the absence of tangible security Lock wanted guarantees from 'the principals' of Colan Industries, Coghlan & MacPherson.

On 15 April 1982 Coghlan and MacPherson signed a guarantee. Further, on 22 April 1982 all companies in the Colan Group executed cross-guarantees in favour of S H Lock, guaranteeing the obligations of each other, however Coghlan and MacPherson were not parties to this agreement. Colan Products then accepted a series of bills of exchange drawn by S H Lock for sums totalling $412,374.38.

The guarantee executed by Coghlan and MacPherson was addressed to all companies in the S H Lock group, and read:

> IN CONSIDERATION of your readiness . . . to entertain and in your discretion to accede to or refuse requests by me or by us or all . . . to enter into transactions from time to time which will or may have the effect of rendering one or more of the Debtors liable for payment of all or some part of the moneys hereby guaranteed (and in the construction hereof the words 'the monies hereby guaranteed' mean the totality of the moneys now, or which may hereafter be owing due and/or payable (but remaining unrepaid) by each and all of the Debtors to each and all of the Lenders in any manner and for any reason or for any account whatsoever . . . and either alone or jointly with some other person or on partnership account . . . whether or not default shall have been made in respect thereof and whether or not any of the Guarantors shall have authorised or been given notice of the transaction giving rise to the same . . .

The only 'Debtor' named in schedule was Colan Industries.

All bills were dishonoured on maturity and by mid-1983 all three companies forming Colan Products were in receivership. S H Lock looked to Colan Industries, and subsequently Coghlan and MacPherson under the terms of their personal guarantee.

Rogers J at first instance, and McHugh JA in the New South Wales Court of Appeal, held that as a matter of construction the guarantee of Coghlan and MacPherson related only to the indebtedness of Colan Industries directly incurred by advances to that company, and not the indirect indebtedness incurred by reason of Colan Industries being party to the cross-guarantees. This was however rejected by the Privy Council on appeal. As their Lordships pointed out:

[94] (1987) 8 NSWLR 88.

> The critical question, however, is whether the moneys which became due from Industries pursuant to its cross-guarantee of the bills accepted by Products are 'monies hereby guaranteed' within the terms of the appellant's guarantee of Industries' liability. Rogers J and McHugh JA were of the view that they were not. Broadly their reasoning was that the only moneys guaranteed were moneys the liability for payment of which arose from 'transactions' requested by Industries, as the only debtor named in the schedule to the guarantee. A transaction requested by a debtor signified on the true construction of the document only a transaction with the debtor itself giving rise to a direct liability. The guarantee was not, therefore, apt to cover a liability of the debtor as guarantor of some other debtor's direct liability. Their Lordships have not felt able to accept this construction. The primary question is the ordinary meaning to be attributed to the defined term 'the monies hereby guaranteed'. It is 'the totality of moneys now or which may hereafter be owing due and/or payable' by the debtor. Thus far there is no reason why, as a matter of construction and even construing the document contra proferentem, there should be imported into this phrase some limitation upon the way in which or the reason why the whole or any part of the 'totality' came to be due and owing . . . (T)he words which follow support the very widest construction, for the moneys referred to are expressed to cover liabilities 'arising in any manner and for any reason or on any account whatsoever in any place' and they are to include moneys due severally or jointly or on partnership account. Now there is no ambiguity about this. On the face of it, it covers any liability in the debtor for payment of money however arising and cannot be said to be restricted to liability arising as a result of direct advance to the debtor.[95]

Accordingly, in the view of the court, on its proper construction, the guarantee executed by Coghlan and MacPherson covered the liability of Colan Industries under the cross guarantee.

Similar results were reached in *Bank of Scotland* v *Wright*,[96] *Catley Farms Ltd* v *ANZ Banking Group (NZ) Ltd*,[97] and *Fountain* v *Bank of America National Trust and Savings Association*.[98]

On the other hand, the manner in which the consideration is drafted in the guarantee may influence the construction of an all debts clause. A case in which the stated consideration resulted in the exclusion of other guarantees from an all debts clause was *National Bank of New Zealand* v *West*[99] discussed earlier in the context of the meaning of 'account.' In *West* the stated consideration for the guarantors was 'advances or other banking accommodation . . . by THE NATIONAL BANK OF NEW ZEALAND LIMITED . . . to Allied Wools'.

As Richardson P observed,

> Although these words of elaboration are wide in their scope it will be seen that the particular types of banking transactions to which they refer are all of a kind which may fairly be described as "advances or other banking accommodation" made or given by the bank *to* Allied Wools (Otago)

[95] Id 93–4.
[96] [1991] BCLC 244.
[97] [1982] 1 NZLR 430.
[98] (1992) 5 BPR 97410.
[99] [1978] 2 NZLR 451.

> Limited . . . An advance made by the bank to a customer other than Allied is not, in ordinary language, an advance or other banking accommodation made or given by the bank to Allied, even though guaranteed by that company . . .
>
> The obligations of the respondents should, as a matter of construction, be related only to such obligations of Allied as flow from advances or other banking accommodation made or given by the bank to Allied.[100]

This case can be contrasted with cases like *Coghlan* on the basis that in *West*, the court as a matter of construction was of the view that the provision as to consideration afforded the principal guide to the parties' intentions, and it was in relation to the type of consideration to be afforded in the future by the bank that the guarantors entered their undertaking.[101]

7. Does the Clause Cover Obligations Existing at the Time of the Guarantee?

Young J in *Smith* v *Australia and New Zealand Banking Group Ltd*[102] suggested as a general rule of construction of 'all debts' mortgages or guarantees, that if there was an existing liability at the time when the mortgage or guarantee was entered into, one would normally expect that this liability be identified and not simply left to be included in the all debts clause.[103] If however the clause specifically adverts to obligations of the debtor whether made or given on or before the signing of the guarantee, then existing obligations should be brought within the scope of the clause provided that this is consistent with the intentions of the parties.

An application of this rule may be seen the reluctance of the courts to interpret all debts clauses as including subsequently assigned obligations of the debtor to the creditor, as illustrated in such cases as *Katsikalis* v *Deutsche Bank (Asia) A.G.* [104]

In spite of the attractiveness of this rule, as pointed out by Kirby P on appeal in *Smith* v *Australia and New Zealand Banking Group Ltd*[105] rules of this nature only take a court so far, and in the end it is necessary to give meaning to the clause 'having regard to the actual language used, as construed in context and for the purposes of the agreement between the parties.'[106]

In *Smith* v *Australia and New Zealand Banking Group Ltd*, Smith was a major shareholder in a joint venture company, YDSI. The company borrowed $3.8 million from the Bank of Tokyo, which required some support from that loan. A letter of guarantee was provided by ANZ Bank, and Smith in turn guaranteed the bank on or about 30 June 1989 in the sum of $1.325 million.

On 28 November 1989, YDSI gave a charge to the ANZ Bank securing all

[100] Id 461; cf 458 per Somers J.
[101] Id 458 per Somers J.
[102] (Unreported, Supreme Court of NSW, Young J, 16 June 1995, Equity Division).
[103] Id 12.
[104] [1988] 2 Qd R 641.
[105] (1996) NSW Conv R 55774, 55937.
[106] Ibid. Cf 55938 per Priestley JA.

moneys including 'all moneys which the ANZ Bank shall pay or become liable to pay to for or on account of the mortgagor either alone or jointly with any other or others . . .'

The charge was executed in return for an overdraft facility provided by the Bank to the company for working capital and lease facilities.

On 23 May 1994 all amounts outstanding from YDSI to the ANZ Bank in relation to working capital and lease facilities were paid out, and on 28 September 1994 YDSI requested the ANZ Bank to remove the charge over the company. The Bank on 30 September agreed to remove the charge, however this was not done.

On or about 6 October 1994 the Bank of Tokyo called on the ANZ Bank under the letter of guarantee, and on 6 October 1994 the ANZ Bank charged Smith's account with the $1.325 million.

Smith claimed that the payment by the ANZ Bank to the Bank of Tokyo was by reason of the ANZ Bank having entered a guarantee with the Bank of Tokyo, and that by reason of the payment, the ANZ Bank acquired a right of indemnity against YDSI which was secured by the charge of 28 November 1989. Smith claimed further that when his account was debited by the ANZ Bank, he was subrogated to the secured claim which the Bank had against YDSI.[107]

On the facts of this case, Young J found that the contingent liability of the ANZ Bank to the Bank of Tokyo was not within the purview of the charge executed by YDSI in favour of ANZ Bank, on the basis that the whole course of action between the ANZ Bank and YDSI was never to treat the liability to the Bank of Tokyo for $2.65 million or more latterly $1.3325 million as being a liability secured under the charge.[108] On appeal however the Court of Appeal overturned this decision, on the basis that the Bank did treat the liability as secured by the mortgage debenture. As pointed out by Priestley JA

> The situation provides a good example why, if post contractual conduct can be used in construction of a contract, it must, in circumstances like the present, be used with great care . . .[109]

8. The Liability of the Guarantor does not necessarily Cease when the Original Indebtedness of the Debtor is Extinguished

Further, in *Smith* v *Australia and New Zealand Banking Group Ltd*[110], Young J stated as an additional guideline in construction of 'all debts' mortgages and guarantees, that in the absence of some indication in the facts and circumstances to the contrary, one normally expects the parties' intention to be that once the original debt for which the mortgage or guarantee was given is paid, the mortgage or guarantee becomes extinguished and is not available as the source of a security for a liability which crystallises after that date.

[107] (Unreported, Supreme Court of NSW, Young J, 16 June 1995, Equity Division) 3.
[108] Id 13.
[109] (1996) NSW Conv R 55774, 55938.
[110] (Unreported, Supreme Court of NSW, Young J, 16 June 1995, Equity Division).

In *Smith*, the court was of the view that the debtor YDSI and the creditor Bank had agreed before 6 October 1994 that the charge was extinguished, and accordingly Mr Smith could not claim a right of subrogation in relation to that charge.[111]

Again, the Court of Appeal on appeal in *Smith* was of the view that the facts did not justify this inference being drawn, and accordingly the 'guideline' did not apply.[112]

Clearly an 'indication in the facts and circumstances to the contrary' would include the situation where an all debts clause is drawn so as to cover contingent liabilities. In this case, the fact that the indebtedness of the principal debtor is reduced to nil will not procure the release of the guarantor from its liability. Cases discussed earlier in this paper including *Greenish* v *Bank of New South Wales*[113] and *Re Rudd and Son Ltd; Re Fosters and Rudd Ltd*[114] are illustrative of this point.

Although the judgment of Young J was overturned on appeal in *Smith* in relation to both guidelines 7 and 8 discussed immediately above, in the view of the writer the relevant principles are nonetheless useful guidelines to employ in construing such clauses in contracts of guarantee. Clearly however, the application of the guideline will be subject to the facts of a particular case in which an all debts clause is considered, and will not be a presumption overruling the clear language of such a clause.

9. Does the Clause cover Future Obligations incurred by the Debtor?

Whether an all debts clause applies to future obligations of the debtor is an issue of construction. This question arose in *State Bank of South Australia* v *MacIntosh; Halwood Corporation* v *State Bank of South Australia*[115] discussed in depth earlier in this paper.

A further illustration of this point is *Fountain* v *Bank of America National Trust and Savings Association.*[116] On 14 October 1976 Mr Fountain had executed an agreement with the bank whereby he agreed on demand to furnish security to the bank in such form and value as the bank might require to secure any of his obligations to the bank. One of these conditions of the agreement was that Mr Fountain would

> (1) . . . repay to you on demand all moneys paid or to be paid or advances whether made by way of overdrafts or in any other form or hereafter to be made by you to me (us) or to any other person at my (our) request . . . (3) That I (we) shall furnish upon demand such security in such form and value as may be required by you from time to time in amounts and values sufficient at all times in your opinion to secure any of my (our) obligations to you whether contingent future or otherwise . . . (4) That this is a continuing agreement and all the rights, powers, and remedies hereunder shall apply to

[111] Id 13–14.
[112] See for example (1996) NSW Conv R 55774, 55938, per Priestley JA.
[113] (Unreported, Supreme Court of ACT, Joske J, 16 December 1977).
[114] (1986) 2 BCC 98955.
[115] (Unreported, Supreme Court of NSW, 31 May 1995, Equity Division).
[116] (1992) 5 BPR 97410.

> all my (our) past, present, future and contingent obligations and liabilities to you, including those arising under successive transactions . . .

In 1981 the bank loaned money to Energy Systems Holdings Ltd, a company of which Mr Fountain was managing director. Mr Fountain and the other directors of the company executed a guarantee for the loan commencing:

> (1) For valuable consideration, the undersigned (hereinafter called guarantors) jointly and severally unconditionally guarantee and promise to pay to Bank of America National Trust and Savings Association (hereinafter called the bank), or order on demand, in lawful money of the United States, any and all indebtedness of Energy Systems Holdings Limited (hereinafter called borrowers) to the bank.

In July 1986 the bank made a demand on Mr Fountain for payment of a substantial sum of money owed by the company to the bank, and simultaneously demanded that Mr Fountain provide security to the bank for the purpose of his obligations.

The key question was whether the obligation of Mr Fountain to the bank which gave rise to the demand made in 1986 was an obligation within the purview of clauses 3 and 4 of the 1976 agreement between Mr Fountain and the bank. In the view of the Court of Appeal of New South Wales, it was. As Gleeson CJ pointed out,

> It is necessary to inquire in particular whether the transaction of 1981, that is to say a borrowing of money by Energy Systems Holdings Ltd from the bank and the associated guarantee given to the bank by Mr Fountain and other officers, was "a successive transaction" within the meaning of cl 4. It has been submitted on behalf of the appellant that the obligations referred to in cl 3 are confined to obligations undertaken in the 1976 agreement itself. In my view such a conclusion cannot be sustained. Clause 4 in terms refers to the creations of new obligations or liabilities at some future time . . .
>
> Accordingly, when one turns to the reference in the concluding words of cl 3 "the obligations whether contingent, future or otherwise", one does so in the light of the provisions of cl 4 and the references in cl 4 to successive transactions creating new obligations. . . . (I)n my view we know enough about (the 1981 transaction) to conclude that it was a transaction of a kind within the purview of the ongoing banking arrangements the subject of the 1976 agreement and that the obligation arising out of that transaction was also an obligation within the purview of the 1976 contract.[117]

10. In the case of Multiple Debtors — Whether the Guarantee Applies to Further Advances to One

Even if the guarantee secures the obligations of multiple principal debtors, it is clear that if the guarantee document specifically covers advances to the debtors jointly or alone or on any account whatsoever, the guarantee will cover further advances to an individual debtor.[118] Failure to specify advances

[117] Id 11820.
[118] *Hall* v *Westpac Banking Corporation* (1987) 4 BPR 97303.

of this nature will exclude the liabilities of one individual debtor from the ambit of the guarantee.[119]

11. Grounds for Setting Aside Clause: Intervention of Equity

Failure of the creditor to explain the clause, or an improper explanation of the clause, to the guarantor may lead to an all debts clause in a guarantee being set aside on equitable grounds, including unconscionability and misrepresentation.

Undoubtedly, the leading authority on the issue of unconscionability in the context of an all debts guarantee is the well-known case of *The Commercial Bank of Australia* v *Amadio.*[120] Detailed consideration of unconscionability in the context of contracts of guarantees generally has been considered elsewhere,[121] and is beyond the scope of this paper. It is interesting to consider however that the intervention of equitable principles may be something of a two-edged sword in relation to all debts clauses in contracts of guarantee. Such principles may lead to a clause being rendered unenforceable against a guarantor, however ironically there is some authority that the application of equitable principles may influence the court in its construction of an all debts clause against a guarantor.

A recent example where the court held that the contract of guarantee was not unconscionable, but the all debts clause was set aside on the basis that that particular clause was unconscionable, is *Varthalis* v *Commonwealth Bank of Australia*[122]. In this case Mr and Mrs Varthalis guaranteed a loan of $80,000 by the bank to their daughter and her husband, which guarantee included an 'all debts' clause. Later, the bank approved an overdraft facility to the same debtors, provided that the facility was again guaranteed by the parents. Eventually, the total amount owing by the debtors exceeded $230,000.

The guarantors claimed that the contract should be set aside as unjust, on grounds including their lack of English, their failure to understand the contract, and the absence of explanation by the creditor.

In the view of Hodgson J, evidence indicated that an explanation as to the nature of the guarantee would have been provided by the bank officer who dealt with the guarantors, the guarantors did have some understanding of business transactions[123] and they did understand that their house was being offered as security and that on failure of the debtors to repay the money owing the house could be sold to satisfy the debt owing to the bank. However his Honour was of the view that the guarantors had no understanding of the 'all debts' clause, and no explanation as to the nature of the all debts clause was offered by the creditor. Accordingly although the guarantee executed by the

[119] *Richards* v *The Commercial Bank of Australia* [1971] 18 FLR 95.
[120] [1983] 151 CLR 447. See also *Burke* v *State Bank of New South Wales* (1995) 37 NSWLR 53, where a guarantee containing an all debts clause was set aside on the ground of unconscionability.
[121] For further discussion of this issue see, for example, O'Donovan & Phillips *op cit* 176–191.
[122] (Unreported, Supreme Court of NSW, Hodgson J, 31 January 1996).
[123] For example, Mrs Varthalis had conducted a business as a hairdresser.

guarantors was held not to be unjust, the all debts clause was set aside as unjust under the *Contracts Review Act* 1980 (NSW).[124] Significantly however the guarantors were not relieved of all liability under the guarantee — they were still liable in relation to the original $80,000 advanced by the bank to the debtors.

A further interesting illustration of an all debts clause in a guarantee being set aside on the ground of misrepresentation is the case of *Royal Bank of Canada* v *Hale*,[125] where on the evidence the court found that the bank had innocently mislead the guarantors as to the nature of debts within the ambit of the guarantee.

On the other hand as was pointed out by Kirby P in *Smith* v *Australia and New Zealand Banking Group Ltd*,[126]

> The availability, now, of legislation which is protective of consumers of commercial credit is reason for avoiding any lingering judicial temptation to adopt a construction of the "all moneys" clause which is unduly strained and narrow. Parliament has provided means of relief for such cases.

CONCLUSION

It is clear from the cases that the primary principle in interpreting an 'all debts' clause in a contract of guarantee, is that its meaning depends upon the construction of a particular clause in a particular contract of guarantee. It is further clear that the construction of an 'all debts' clauses in a contract of guarantee is determined by the intention of the parties. This may be drawn from factors including the contract as a whole, the surrounding circumstances, and prevailing commercial conditions.[127] The courts are prepared to limit a broad all debts clause where it appears that liabilities claimed by the creditor were not within the contemplation of the parties at the time of entry into the transaction. However the limitations on 'all debts' clauses considered in this paper can do no more than provide a guide to the types of issues which are relevant in construing clauses of this nature, and must yield to a clear language expressing a contrary intention.[128] They can be nonetheless useful as methods of approaching construction of an all debts clause in a guarantee in its factual matrix.[129]

In reviewing cases concerning all debts clauses, the current preference of courts in Australia to construe contracts of guarantee strictly in favour of the guarantor, so as to avoid imposing a heavier burden on the guarantor than

[124] (Unreported, Supreme Court of NSW, Hodgson J, 31 January 1996) 14–15.
[125] (1961) 30 DLR (2d) 138.
[126] (1996) NSW Conv R 55774, 55937.
[127] Cf Young J in *State Bank of South Australia* v *Macintosh; Halwood Corporation Ltd* v *State Bank of South Australia* (Unreported, Supreme Court of NSW, Young J, 31 May 1995, Equity Division) 11; Somers J in *National Bank of New Zealand* v *West* [1978] 2 NZLR 451, 455, 458.
[128] Santow J in *Burke* v *State Bank of New South Wales* (1995) 37 NSWLR 53.
[129] Cf Young J with respect to all debts clauses in mortgages in *Smith* v *Australia and New Zealand Banking Group* (Unreported, Supreme Court of NSW, 16 June 1995, Equity Division) 13.

that which was bargained for, must be kept in mind.[130] To this extent, construction of all debts clauses in contracts of guarantee may to some degree be contrasted with similar clauses in contracts of mortgage, where there has been a recent judicial inclination towards applying broad clauses in accordance with the language used, rather than in the light of any inclination towards the mortgagor.[131]

[130] Eg Santow J in *Burke* v *State Bank of New South Wales Ltd* (1995) 37 NSWLR 53.
[131] Eg *Smith* v *Australia and New Zealand Banking Group* (1996) NSW Conv R 55774 and *In the bankrupt estate of Cheryl Ann Murphy; Max Christopher Donnelly* v *Commonwealth Bank of Australia* (Unreported, Federal Court of Australia, Hill J, 26 September 1996).