

Spouse liable under guarantee as accommodation surety despite lack of ILA

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Loan guarantees are often provided by parents, spouses or siblings to other related parties. The person signing the guarantee usually does not receive any direct financial benefit for doing so. While the potential for undue influence is a concern in such cases, an otherwise competent guarantor is responsible for taking reasonable steps to ensure that they understand their personal obligations. Generally, a lender is entitled to rely on the commitment provided by the guarantor without ensuring that they receive independent legal advice (ILA), unless there are specific reasons why such advice is required in the circumstances.

The decision in *Business Development Bank of Canada v. ROC Ice Cream Inc*, 2022 ONSC 1945 (CanLII), demonstrates that a guarantor will generally be bound by the terms of the guarantee that they provide absent *non est factum*, unconscionability, fraud, misrepresentation or undue influence.

In the case, the plaintiff bank loaned \$165,000 to a corporation owned by JC, who was also a director and manager. A guarantee for the loan was signed by JC and his then spouse, KB. The corporation defaulted on the loan and the plaintiff obtained judgment against the corporation and JC.

The bank then moved for summary judgment against KB on the basis of the guarantee that she signed. In response, KB argued that because she was not a shareholder, officer, or director of the corporation, and she had received no direct or indirect consideration as a result of the loan, she was an “accommodation surety”—someone who provides a guarantee to obtain a benefit for another debtor, often a spouse or a child.

KB argued that a guarantee should be set aside for want of consideration when a guarantor is an accommodation guarantor and the loan was procured by misrepresentations by the debtor, or the party receiving the benefit of the loan.

Before turning to the question of whether there were any misrepresentations, the court rejected the argument that special consideration rules apply to “accommodation guarantees”. A guarantee is subject to the same rules of interpretation for all contracts: *Manulife Bank of Canada v. Conlin*, 1996 CanLII 182, [1996] 3 S.C.R. 415, at para. 78. It is well-established that mere inadequacy of consideration is not a ground for disturbing the contract: *Calumsky v. Karaloff*, 1946 CanLII 24 (SCC).

In the court’s view, KB’s position would call into question the validity of any guarantee offered by an accommodation surety since an accommodation surety by definition receives no direct or indirect benefit from a loan advanced to another person and the risk is always financially disproportionate to the benefit.

KB’s second line of argument was that it would be unconscionable to enforce the guarantee in the circumstances where the bank knew, or ought to have known, that her signature was procured by undue influence, fraud, or misrepresentation from JC, or that it was unconscionable that she should sign the guarantee. In the circumstances, she argued, the bank ought to have ensured that she received independent legal advice before signing the guarantee.

The court agreed that a lender seeking a guarantee may have an obligation to ensure that a guarantor receives ILA in circumstances where there is a reasonable possibility of unconscionability, fraud, misrepresentation or undue influence, and the party knew or should have known about that possibility. However, the precise circumstances are key since “the lack of [ILA] does not invalidate a guarantee in the absence of evidence of *non est factum*, unconscionability, fraud, misrepresentation or undue influence”: *RBC v. 164393*, 2019 ONSC 5145, at para. 54, citing *Bank of Montreal v. Featherstone*, 1989 CanLII 4128 (ON CA).

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The issue was accordingly whether, based on the evidence filed for the summary judgment motion, KB established that the bank knew or should have known of the reasonable possibility of unconscionability, fraud, misrepresentation, or undue influence by the corporation or JC.

KB's evidence was that a representative from the bank attended at her home to get the loan documentation signed. KB had not previously seen nor read all of the documents she was being asked to sign, and particularly, the personal guarantee. She asked a question about the high interest rate but signed whatever she was asked to by the bank and JC without asking for clarification or time to consult with a lawyer.

KB did not argue that she could not read or otherwise understand the documents based on the doctrine of *non est factum*. While she was not entirely comfortable with the documents she was being asked to sign, she admitted doing so, claiming that she believed she had no choice.

Conversely, the bank's evidence was that it reviewed the guarantees with JC and KB and asked if they had any questions prior to signing. KB had no questions and expressed no concerns.

No evidence was filed by JC since he was already subject to default judgment in favour of the bank.

The court noted that while the bank's and KB's evidence did not accord with respect to what occurred at the meeting at KB's home, even if the bank's evidence was disregarded entirely, KB's evidence at its highest did not establish that the bank knew, or should have known, that it was reasonably possible that she signed the loan documentation and guarantee as a result of fraud, misrepresentation, undue influence, or that the transaction was unconscionable.

In that regard, KB's evidence indicated that she understood that by signing the guarantee she was risking her personal assets, yet she signed without objection. There was no evidence that KB raised any concerns about taking on this risk in front of the bank's representative at the meeting. KB had experience with mortgage borrowing and the terms of the guarantee document were short and understandable. As far as the bank knew, KB had an interest in the corporation and nothing happened during the meeting which should have caused the bank's representative to question her reasons for agreeing to the guarantee.

Further, KB failed to take any reasonable steps to protect herself from exposure. She did not read the loan documentation she signed. She did not ask questions of the bank's representative. She did not contact the bank after signing the documentation to attempt to clarify her obligations or resile from them. She did not seek legal advice. She did not even ask the bank or her spouse JC whether the funds had been advanced.

Instead, KB waited until after the funds had been advanced and the loan went into default, and then alleged that the bank should have saved her from herself, or from her spouse, or both. In the court's view, "[t]hat is not a creditor's obligation."

The court also rejected KB's argument that she was in a position of unequal bargaining power *vis à vis* the bank or JC. There was no evidence that elevated KB's relationship with the bank to anything other than a normal commercial relationship, and the loan guarantee was no different than thousands of contracts that are entered into daily--"from insurance contracts, to terms of service on websites or social media, to drycleaning transactions"--which are potentially marked by the vulnerability of one party to another.

In the result, the court found that the bank had no obligation to ensure that KB had ILA before signing the guarantee. There was no basis for concluding that the bank knew, or should have known, that it was reasonably possible that KB's signature was procured by misrepresentation, fraud, undue influence, or that the transaction was unconscionable. The guarantee was therefore enforceable against her.

The decision is a cautionary tale about guaranteeing the obligations of a spouse or other family member. What may seem like a good idea at the time may well turn out to be a financial nightmare.

For more information please contact: **James Cook** at **416.865.6628** or jcook@grllp.com

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Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

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Fax: 416.865.6636
contactGR@grllp.com