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Business

'Clear and unambiguous' guarantee survives loan changes

By **Ray Mikkola**

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(December 19, 2017, 8:57 AM EST) -- A common concern for lawyers and clients when dealing with guarantees is the effect on the enforceability of the guarantee of a change in the underlying loan obligations without the consent, or even the knowledge, of the guarantor. Most guarantees contain provisions confirming that the guarantor continues to be liable under the guarantee even if there are changes to the underlying loan terms. A recent British Columbia case sheds some light on the enforceability of such provisions.

In *Royal Bank of Canada v. Zuk*, released Nov. 15, 2017, the Supreme Court of British Columbia confirmed the enforceability of the personal guarantee and the continuing obligation of a guarantor even where the underlying loan agreement was changed, on the basis that the original guarantee specifically contemplated and permitted such changes.

In this case, Carolyn Zuk, an officer of Silverado Drilling Corporation, gave a personal guarantee of Silverado's debt obligations to the Royal Bank of Canada. Zuk's husband, Kevin Zuk, was the sole director of Silverado. Carolyn Zuk's guarantee to the bank was limited to $545,000, plus interest.

Silverado and the bank entered into a number of agreements which had the effect of continuing and amending the numerous credit facilities which were the subject of the original borrowing. These amendments included extending due dates and increasing and establishing a new line of credit (under which fresh advances were made). All of these were executed after Carolyn Zuk had executed the guarantee, and after she advised that she and her husband were separating. At the date of the summary trial application, Silverado and Kevin Zuk were bankrupt.

Ultimately, Silverado defaulted on its payment obligations and the bank issued a demand to Zuk under her guarantee. The bank claimed that it was entitled to $189,000 under the guarantee, including $110,000 in legal and enforcement costs. Zuk believed that she should be released from any obligations under her guarantee, because, among other reasons, the bank had made material changes to the loan arrangements in respect of which she gave the guarantee. She had received no notice and had provided no consent to the material changes. The bank denied that the changes were material.

The court ultimately concluded that Zuk was liable under the guarantee, finding that although the subsequent amendments to Silverado's loan arrangements were properly characterized as "material" as pleaded by Zuk, the alterations were nevertheless contemplated and permitted by the clear and unambiguous language of the guarantee. There was no obligation, accordingly, on the part of the bank to disclose those alterations to Zuk, nor was there a requirement to obtain her consent.

The case is authority for the proposition that alterations to the underlying loan agreement are generally presumed to be material unless they are plainly "insubstantial or necessarily beneficial" to the guarantor. However, where a guarantee specifically contemplates and allows for subsequent material alterations to the underlying loan documents, the mere presence of material alterations imposes no obligation on the part of the party benefitting from the guarantee to disclose those variations to the guarantor or to obtain the guarantor's consent as a condition of the continuing

operation of the guarantee. Zuk was held not to be an "accommodation surety"; that is, the court found that she received, directly or indirectly, a benefit from her guarantee.

The court, *in obiter*, held that had Zuk been found to be an accommodation surety, she would nevertheless not have been released from her guarantee obligations in view of the "clear and unambiguous" provisions of the guarantee. Where a guarantor is an accommodation surety, the court held that any "variations in the terms of the principal contract are subject to greater scrutiny."

A close reading of the case also suggests that an important distinction may apply between guarantees given for a particular obligation, such as a fully advanced conventional mortgage, and one given as a continuing "all accounts" guarantee with respect to amendments to the underlying loan terms. Except in "unusual circumstances," there is no obligation on the bank to provide "continuing and ongoing disclosure" to a guarantor.

Finally the case demonstrates the importance of adequate independent legal advice to a guarantor. The failure of a lawyer giving independent legal advice to adequately explain the guarantor's continuing obligations even where material amendments to the loan documents occur may result in the guarantor alleging that the legal advice was inadequate at the time of execution of the guarantee, for which the lawyer may be held liable.

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