

# Bank guarantees and unfair preferences

## Can a bank guarantee constitute an unfair preference?

There has been much conjecture recently about whether the funds recovered by a landlord via the presentation of a bank guarantee shortly before or after a company has liquidators appointed could be an unfair preference pursuant to the *Corporations Act 2001*.

The consternation has arisen from a Federal Court decision – *Commissioner of Taxation v Kassem and Secatore* [2012] FCAFC 124. This case dealt with payments made by a company (A) to the Commissioner of Taxation to reduce the indebtedness of a second related company (B). Although it has been well-established practice for creditors to recover outstanding debts from a company in a precarious financial position by securing the payment from a third party to avoid the appearance of an unfair preference, the court in this case found that, in fact, A loaned the money to B, with B directing A to pay the funds directly to the Commissioner of Taxation.

In making this determination, the court found that the payments by A, a solvent third party, were actually payments made by B, an insolvent company, and therefore the payments (which were made in the six month period prior to B going into voluntary administration) were unfair preferences.

Some commentators have extrapolated the factual matrix of this case to argue that money received by a landlord from the presentation of a bank guarantee may be an unfair preference. This is despite the fact that bank guarantees have traditionally been exempt from such a claim because the payment pursuant to the bank guarantee will come directly from the debtor's bank and not the debtor itself.

It is my view that this conclusion ignores the basic nature of bank guarantees. They are usually unconditional, irrevocable directions to the debtor's bank which the debtor makes at or about the time that the bank guarantee is signed by the bank. Once that bank guarantee is signed, there is nothing (subject to some exceptions) that the debtor can do to prevent the landlord from drawing down on it and there is nothing that the bank can do to avoid paying the landlord the funds specified in the bank guarantee (again, subject to certain exceptions), when it is presented.

Therefore, I consider that the relevant date for determining the commerciality of a bank guarantee or whether a payment made pursuant to it may be an unfair preference is the date that the bank guarantee is signed and delivered and **not** the date the money is recovered under it.

**However**, this will depend on the terms of the lease pursuant to which the bank guarantee was provided, and the terms of the bank guarantee itself, and when the bank guarantee was provided. It is therefore very important that terms regarding bank guarantees are carefully drafted and that the resultant bank guarantee also meets the requirements of the lease.

(This article is for enlightenment purposes only and is not meant as a substitute for professional legal advice).



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