

## **Loan Groans**

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*If a loan agreement is varied without the consent of the guarantor, it cannot be called a new agreement to avoid the automatic discharge of the guarantee. David Lalic writes in Owner Driver –*

MR SILVERSMITH and Mr Van Veizen were sued for \$240,000 plus interest of \$138,568.75 as guarantors of a loan by Valstar to P & G Pty Ltd under a mortgage executed on March 12, 2003. It is not unusual for a mortgage guarantee to be required when vehicles are purchased.

Clause 6 of the mortgage in the Silversmith and Van Veizen case provided that the mortgage should take effect as if it was entered into by the guarantors and that they would also be responsible to the lender.

It was argued that this clause gave the guarantors the same status as lenders and therefore they did not have the protection that a guarantor would have. This argument failed because the judges in the Court of Appeal held that it was not clear enough.

On April 29, 2004, the company executed a variation of the mortgage. This document was executed by the guarantors.

In September 2004, a second variation of mortgage was executed in the same form as the first variation.

In October 2004, Mr Silversmith and Mr Van Veizen resigned as directors of the company.

On February 9, 2005, the company executed a third variation of mortgage. It was not signed or agreed to by Mr Silversmith or Mr Van Veizen.

On April 19, 2005, a fourth variation was entered into. Mr Silversmith executed this fourth variation as secretary of the company. Mr Van Veizen did not sign this document at all. This variation increased the mortgage to \$390,000.

On January 30, 2006, the company executed a final variation of the mortgage. This variation increased the principal sum to \$500,000 but was not signed by either Mr Silversmith or Mr Van Veizen.

The company defaulted in its obligations under the mortgage. The security property was sold but the proceeds were not sufficient to discharge the debt and Mr Silversmith and Mr Van Veizen were sued as guarantors. In the transport industry, security property can be vehicles or land.

In the proceedings, the company attempted to argue that the variations that Mr Silversmith and Mr Van Veizen did not sign were in fact new agreements and that they should be liable for the original \$240,000 plus interest.

The judges of the Court of Appeal considered that the reasoning of the judge in the District Court that one or more of the third, fourth and fifth variations substituted a fresh agreement for the original, thereby discharging Mr Silversmith and Mr Van Veizen from their obligations, was an incorrect analysis of the law.

The judges of the Court of Appeal pointed out that for a new agreement to be reached, all of the parties to the agreement would have to be joined in the agreement.

However, the barrister who appeared before the Court of Appeal for the guarantor pointed out that a critical matter raised before the judge was that if a variation to a loan contract is made without the consent of a guarantor, and the variation is harmful or prejudicial to the interests of the guarantor, that variation immediately discharges the guarantee.

The obligation of the guarantor from that point is at an end.

The judges of the Court of Appeal agreed and it was held that because the contract between the lender and the borrower had been varied without the consent of the guarantors, the guarantee had been discharged and neither Mr Silversmith nor Mr Van Veizen had any responsibility to make any payments under the guarantee.

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