

RATIONAL DEBT

In a recent court case the Code of Banking Practise was relied on to try to set aside a guarantee. The court found the defendant should have known better, writes David Lalic.

The Case of Middleton Nominees v Westpac Banking Corporation was one where the borrower, Middleton Nominees, had defaulted on its loan. Westpac sued to recover its money. Westpac decided not only to sue the borrower, Middleton Nominees, but each of its guarantors.

One of these guarantors, Mr Volkov, argued that the bank had breached clause 28 of the Code of Banking Practise.

Because each of the clauses of the Code of Banking Practise becomes a term of the contract between the banker and the customer, Mr Volkov argued that because of the breach by Westpac of the Code of Banking Practise, his guarantee to pay the debt of Middleton Nominees should be set aside.

Clause 28.4 of the Code of Banking Practise provides that a bank must do certain things before it takes a guarantee of a loan.

The bank must give a prominent notice to the guarantor telling them:

- That he or she should seek independent financial advice on the effect of the guarantee
- That the guarantor can refuse to enter into the guarantee
- That there are financial risks involved in giving the guarantee
- That the guarantor has the right to limit liability in accordance with the Code and as allowed the law; and
- That they can request information about the transaction or facility to be guaranteed.

The code also provides that the bank must give certain documents to the guarantor.

The court examined the facts in the case of Mr Volkov's guarantee and decided the bank had complied with the Code and had given the documents to him and because Mr Volkov had the independent solicitor all of the advice required to be given to Mr Volkov had been received by him.

In this case the guarantor did not benefit by arguing the Code of Banking Practise but the position might be different in cases in the future where the facts support the claims being made by a guarantor.

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