

# Case in Brief

## Personal guarantees: When you think the amount of your personal guarantee had a payment limit – but it didn't

By Jo O'Dea

In a recent Court of Appeal case, *Cancian v Carters* [2021] NZCA 397, Mr Cancian had given a personal guarantee to Carters for payment of construction supplies to his company, BVH. Mr Cancian claimed that he thought the guarantee amount was limited even though BVH ran up a supply bill far in excess of the guarantee. Not only was Carters able to raise the "limited" guarantee amount, they didn't have to tell Mr Cancian they had done this. He was ordered to pay Carters the entire amount owed by BVH.

### The facts

In October 2016, Bella Vista Homes Ltd (BVH) through its sole director, Mr Cancian, entered into a "credit agreement application and terms of agreement for supply" of construction goods with Carters. The agreement contained Carters' standard terms and conditions with an approved credit limit of \$700,000. At the same time as the credit agreement, BVH also provided a deed of guarantee and indemnity signed by Mr Cancian. In this, he "unconditionally and irrevocably"

agreed to pay Carters any outstanding amounts owed by BVH.

The initial credit limit granted by Carters to BVH was \$50,000. A week later, Carters increased this limit to \$800,000 but did not notify BVH or Mr Cancian of the limit increase. By October 2017, BVH owed Carters \$1,078,668.23. When no payment was made to them by BVH or Mr Cancian, Carters issued proceedings against Mr Cancian to enforce the guarantee.

### The High Court

Mr Cancian attempted to enforce the \$50,000 limit of the personal guarantee by arguing:

- (a) Carters' agents told him that the guarantee would be limited to \$50,000; and
- (b) the increase in the credit limit was a variation of the original agreement, discharging his responsibility to pay.

The High Court dismissed both these arguments. The Judges preferred the Carters version of events that no Carters agent had made any representations about a "capped" guarantee amount. On the variation point, the Judge found that the guarantee agreement had a clause which allowed Carters to increase the limit unilaterally. This clause specifically allowed Carters the right to alter the credit limit amount **without** the obligation to notify Mr Cancian.

### The Court of Appeal

The High Court found in favour of Carters. Mr Cancian appealed this decision to the Court of Appeal, arguing that Carters did not have the right to vary the credit limit unilaterally. The Court of Appeal discussed the relevant law surrounding the right of a creditor to vary contract terms when this variation will discharge the debtors' obligations. In this case, they held that Carters' change of the credit limit was a legitimate use



of the clause and not a variation which would affect Mr Cancian's liability under the guarantee. There was no obligation on Carters to advise Mr Cancian of the revised credit limit. The Court went further and said that even though the amendment to the credit limit was a variation to the credit agreement, Carter's had the right to make this variation because this had also been covered in an "anti-discharge" clause. This separate clause specifically allowed Carters to vary or alter the credit agreement, even if this were to increase Mr Cancian's liability. Overall, "anti-discharge" clauses attempt to ensure that even with variations to an agreement, these variations do not "discharge" a debtor's obligations. It is important to note that the Court also found that as sole director of BVH, Mr Cancian would have known about its credit limits and that an increase in the credit limit was within the general purview of the guarantee. This is an indication that the credit limits were anticipated by BVH/Mr Cancian.

## Key takeaways

It goes without saying that any in any contract, close attention to the terms and conditions is important. This is especially so for parties considering giving personal guarantees. Construction supply companies will always seek to cover all payment eventualities (among others) as part of their standard terms and conditions of supply. This case serves as a reminder that if offering a personal guarantee, close scrutiny of the guarantee terms and conditions is required. This is especially relevant where one party retains the right to alter terms without notifying the other party. Ultimately, a sole director may find it difficult to escape a personal guarantee on technical grounds but notice of alterations to an agreement may prevent disputes about their enforcement.

## ABOUT THE AUTHORS



Jo O'Dea is a member of NZDRC's Knowledge Management team and provides technical support to the Building Disputes Tribunal. She has recently joined us from UNICEF, where she worked as a contracts specialist, assisting the Corporate Partnerships team to enter into international partnerships. Prior to this, Jo worked as a solicitor in New Zealand and the United States.

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