Amendment and restatement — new, replacement or change?

Overview

There can be numerous modifications made to the terms of a commercial finance facility over its life. Sometimes these are contained in a short amendment document, where only the particular changes are recorded. There may be a number of these over time and, in more complex and long-running transactions, it is common at some point for the original facility agreement with its changes to be “amended and restated” – in other words, consolidated and contained in a single document. That is as much for ease of reading as anything.

In the decision of the Court of Appeal of Western Australia in Australia and New Zealand Banking Group Limited v. Manasseh (delivered on 10 March 2016), the legal nature and effect of an amendment and restatement was the central issue. The case involved a claim by the Bank under a guarantee which had been granted when the facility was first provided. The result was a victory for the guarantor who successfully argued that the guarantee given at the outset of the facility did not extend to the modified facility arrangements which were “amended and restated” at a later time.

The Issue

The Bank claimed that a guarantee given for the purposes of the facility as originally documented extended to the “amended and restated” facility agreement, which came into effect following defaults as the global financial crisis hit. Much turned on the interpretation of the facility documents and the guarantee itself, though the case is of interest to financiers, lawyers and guarantors alike given that it was a standard guarantee used by one of the big four banks and the factual situation occurs frequently in practice.

As is common, the guarantee document contemplated future arrangements and modifications to the original credit arrangements which would fall within the description of the obligations guaranteed. Some of these future modifications required the consent of the guarantor and some did not.

In broad terms, the outcome depended on whether the arrangements as documented in the “amendment and restatement” were properly classified as:

- new (unconnected with the existing facility);
- replacements (substituted for the existing facility which was then terminated); or
- changes (a variation to the existing facility which otherwise continued).

If the modified facility arrangement was found to be either a “new” or a “replacement” arrangement then the original guarantee would only extend to it with the guarantor’s consent. If, however, there was a “change”, with the existing facility arrangements otherwise continuing, then the guarantor’s consent was not required in order to extend the liability under the guarantee to the modified arrangements unless:

- there was an increase in the guarantor’s liability; and
- the law or any relevant code of conduct required a consent.

These carve-outs reflect the common law principle (as affirmed by the High Court in Ankar Pty Ltd v. National Westminster Finance (Australia) Ltd) that a guarantor is discharged from a guarantee if the underlying contract giving rise to the guaranteed obligations is varied, in a way that is substantial or which prejudices the guarantor, without that guarantor’s consent.

In this case, the Bank had delivered a series of proposed offers to extend and continue the defaulted facility with covering letters that were not entirely clear as to the intended legal nature of the modified arrangements. This left open the question whether there was a replacement or just a variation (it was clearly not a “new” arrangement).

The Bank had delivered a form of consent to the guarantor for the modified arrangements as a condition to them taking effect, though the guarantor refused to sign and return it. The Court understandably found that the Bank had waived the condition.

In reaching its decision, the Court affirmed the accepted principle that an agreement to “vary” an existing agreement...
can either alter the existing agreement without affecting its existence or it can terminate and replace the existing agreement. That question is determined on the objective intentions of the parties.

In the Manasseh case, two of the three members of the Court found that the “amendment and restatement” had the effect of replacing (and therefore terminating) the earlier facility agreement to which the guarantee related. As the guarantor had not consented to the replacement facility her guarantee did not extend to it.

The other member of the Court found that there had in fact been a variation which did not rescind the earlier agreement, and so did not require the guarantor’s consent on its face. His Honour nonetheless found in favour of the guarantor on the grounds that the “variation” required the guarantor’s consent because the carve-outs based on the Ankar principle applied in this case.

Takeaways

The decision will surprise many financiers and lawyers who would usually regard an “amendment and restatement” as a continuation of the existing facility agreement, rather than a new agreement which terminated the old. The distinction can have drastically different consequences, as was the case here.

The Bank’s cause was not helped by the fact that it had delivered a form of consent to the guarantor which had been refused and so found itself having to argue that the consent which it had required as a condition to the amendment was not in fact necessary.

Clearer language in the correspondence that passed as to the intended effect of the modified arrangements may have helped the Bank’s cause to an extent though the result would have been the same in light of the findings on the carve-outs.

As a matter of sound practice, where there are to be continuing guarantees extended to modified arrangements (however documented), the consent of the guarantors should be obtained to avoid any argument, irrespective as to whether the terms of the guarantee itself require that. If the consent is refused then at least the financier will be aware of the risk of a later challenge.

For further information or discussion, please contact HopgoodGanim Lawyers’ Banking & Finance team.

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