

THE COURT WILL NOT DRAFT YOUR GUARANTEE FOR YOU!!

In order for a guarantee to be valid it *must be in writing and signed by the guarantor or a person authorised by it*. The written *guarantee must state all the material terms* of the guarantee which have been expressly agreed. The reason being, so it can "avoid the need to decide which side was telling the truth about whether or not an oral promise had been made and exactly what had been promised" Lord Hoffman.

In the recent case of *Fairstate Ltd v General Enterprise & Management Ltd and another* the High Court refused to apply principles of construction (*the interpretation of contracts*) and rectification (*correcting of mistakes made in recording agreements*) to remedy defective drafting in a guarantee.

FACTS OF THE CASE

Mr Kaheel is the sole director and shareholder of Fairstate Ltd. Fairstate Limited owns a long lease of 12 flats in a residential block ("Property").

In August 2006, Mr Kaheel approached Mr Sarian to manage the Property through a start up company called General Enterprise & Management Ltd ("Enterprise"). Mr Sarian agreed to pay a monthly fee to Fairstate Limited in return for Enterprise keeping any profits it could make from letting the Property.

On 1 September 2006, the parties signed a management contract ("Contract") and a "guarantee form" ("Guarantee") to give effect to the agreement between the parties to manage the Property. The Contract and Guarantee were both drafted on Mr Kaheel's instructions by his solicitor.

The Contract was expressed to be made between Fairstate Limited and Enterprise as manager. It included a provision for payment of the monthly fee by Enterprise together with a sum to be held on deposit by Fairstate Limited for the term of the Contract.

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It also included a statement on the Contract stating that in respect of Enterprises' management of the Property, Mr Sarian was "willing to provide a personal guarantee against any possible loss or damage" to Fairstate Limited.

The Guarantee *was signed by Mr Sarian* but contained incomplete clauses and numerous drafting errors. The names of the principal debtor, creditor and guarantor were confused such that Mr Sarian was named as the beneficiary of the guarantee as well as the guarantor while Fairstate Limited was named as the principal debtor. The guaranteed liabilities were also mis-described. In addition, the form of the Guarantee was that of a third-party guarantee required by a bank as a guarantee for the indebtedness of a customer.

A dispute arose between the parties. Fairstate Limited claimed amounts due from Enterprise under the Contract and from Mr Sarian under the Guarantee. Enterprise and Mr Sarian denied the effectiveness of the Contract and the Guarantee.

The High Court was asked to decide whether Mr Sarian was liable to Fairstate Limited as a guarantor of Enterprises' obligations.

DECISION

The court held the Guarantee was ineffective as a matter of contract and unenforceable *due to drafting errors* under section 4 of the Statute of Frauds 1677.

The court acknowledged that, in principle, it had open to it the normal remedial tools of construction and rectification. However, while there is no limit to the amount of rearrangement or correction that the court was allowed, where there is a genuine dispute as to the existence of any agreement of guarantee, or as to precisely what has been agreed, the court may need to consider the extrinsic evidence that is presented to it for that purpose with particular care. *The defects in the Guarantee were too fundamental and extensive to be corrected by construction or rectification.* Were the court to do so, it would be creating the parties' contract for them and depriving the guarantor of its legitimate statutory defence.

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LESSON TO BE LEARNED:

This case is a reminder of the need to draft guarantees accurately and in a form that is entirely appropriate for the transaction at hand. Creditors should not expect the court to step in and correct drafting mistakes.