IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2008-404-7572
[2018] NZHC 17

BETWEEN	NEW ZEALAND LIFE CARE LIMITED Applicant
AND	OFFICIAL ASSIGNEE Respondent

Hearing: 21 November 2017 and 19 December 2017

Appearances: A M Swan for the Applicant
G Neil for the Respondent

Judgment: 25 January 2018

JUDGMENT OF ASSOCIATE JUDGE R M BELL

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*This judgment was delivered by me on **25 January 2018** at **4:00pm***
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Richard S Wood, Auckland, for the Applicant
Meredith Connell (G D Neil), Auckland, for the Respondent
Counsel:
Andrew Swan, Auckland, for the Applicant

[1] New Zealand Life Care Ltd applies under s 239 of the Insolvency Act 2006 for an order reversing the decision of the Official Assignee to reject its claim for $4,880,980.25 in the bankruptcy of Edward John Harman. Its case is that Mr Harman guaranteed repayment by his companies, Fairthorne Trading Ltd and Wake Investments Ltd, of its loans to them. Mr Harman, now discharged from bankruptcy, agrees with New Zealand Life Care Ltd that he did give a guarantee. Notwithstanding that, the Official Assignee says:

(a) New Zealand Life Care Ltd has not proved that Mr Harman gave any guarantee to New Zealand Life Care Ltd in 2005, the time of the initial advances;

(b) if Mr Harman did give a guarantee, it was oral and not enforceable under the Contracts Enforcement Act 1956, s.2;

(c) while there were discussions about giving a guarantee in 2008, they did not result in a concluded and enforceable agreement for a guarantee;

(d) affidavits by Mr Harman after his adjudication in bankruptcy cannot be used to prove a guarantee that was not enforceable when he went bankrupt;

(e) New Zealand Life Care Ltd cannot rely on estoppel; and

(f) Even if Mr Harman gave New Zealand Life Care Ltd an enforceable guarantee, the claimed amount is too high.

Procedural matters

[2] New Zealand Life Care Ltd applied by originating application. The Official Assignee objected that the proceeding should have been brought under Part 18 of the High Court Rules with a statement of claim. That was so that deponents could be

cross-examined on their affidavits. That point did not matter, because New Zealand Life Care Ltd made its witnesses available for cross-examination.

[3] The parties agree that on an application by a creditor under s 239 of the Insolvency Act to modify or reverse the decision of the Official Assignee the court decides the matter de novo.[1] The court may consider evidence and information that were not available to the Official Assignee at the time of the original decision.[2] The creditor needs to prove its case to the civil standard. No weight attaches to the Official Assignee's decision. The role of the Official Assignee in the proceeding is like that of a liquidator described by Brennan and Dawson JJ in *Tanning Research Laboratories Inc v O'Brien*:[3]

> In such a proceeding, a liquidator who defends his decision to reject a proof of debt is no longer acting in a quasi-judicial capacity; he is cast in the role of an adversary, defending the assets available for distribution against a liability which, according to the view he formed while acting quasi-judicially, is not legally enforceable. The liquidator may defend those assets against the creditor's claim on any ground on which the company might have defended the claim had it been sued by the creditor.

Background

[4] New Zealand Life Care Ltd was established in 1999. It had four directors. Mr Harman was one. Mr Mark Durling was another. It ran aged care facilities. In November 2005, it sold six of its facilities to Global Infrastructure Fund (II), an entity managed by the Macquarie Group. New Zealand Life Care Ltd received partly-paid units in the Global Infrastructure Fund plus cash. The major portion was cash—almost $6 million. A further $1 million was held in escrow. The cash was earmarked to meet calls for payment of the partly-paid units.

[5] Mr Harman provided a treasury service for New Zealand Life Care Ltd. He held substantial investments and had been successful in foreign exchange trading. He used companies under his control: Paeroa Investments Ltd, Wake Investments Ltd,

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1 *Re Trepca Mines Ltd* [1960] 1 WLR 1273 (CA).

2 *Official Assignee v Kirkham* HC Auckland B701/95, 8 October 2003 at [8]; *Holdgate v Official Assignee* HC Auckland B1545-IM 96, 23 August 2000 at [22]; *S B Properties Ltd (in liq) v Holdgate* [2009] NZCA 327, [2011] 1 NZLR 633 at [53]–[57]; and *H Investment Ltd v Official Assignee* [2017] NZHC 996 at [47].

3 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 341.

Fairthorne Trading Ltd, Fairthorne Investment (NZ) Ltd and Fairthorne Ventures Ltd. He had handled funds on behalf of New Zealand Life Care Ltd in the past, but smaller amounts than in this case. He offered to hold the funds from the sale of the aged care facilities. The funds were put into two of the companies, Fairthorne Trading Ltd and Wake Investments Ltd, by way of loan repayable with interest.

[6] In early 2008, Mr Durling became concerned about the investments in Mr Harman's companies. There were discussions and correspondence, including proposals for Mr Harman to give a written guarantee, but none was signed.

[7] With the global financial crisis, Mr Harman had a financial collapse. His companies, including Fairthorne Trading Ltd and Wake Investments Ltd, went into liquidation in July 2008. New Zealand Life Care Ltd claimed in Fairthorne Trading Ltd's liquidation for $2,965,398 and in Wake Investments Ltd's liquidation for $2,533.447. Mr Harman was adjudicated bankrupt on 26 February 2009. He was discharged on 26 October 2012.

[8] Administration of his bankruptcy is still on foot. Counsel for the Official Assignee advised that $4,022,409.39 is held in his estate. To date, the Official Assignee's costs come to $197,029.05. The Official Assignee has admitted claims of $19,391,417.97 in Mr Harman's bankruptcy. Many of them are for guarantees. In addition to those claims and that made by New Zealand Life Care Ltd, there are claims by the liquidators of Mr Harman's companies for about $22 million for alleged breaches of director's duties. The Official Assignee has not accepted those. There will be a hearing to decide them in March 2018. The decision in this case will be relevant. If New Zealand Life Care Ltd's claim is upheld, the Official Assignee will say that the liquidators' claims should be reduced to the extent that they involve compensation for indebtedness to New Zealand Life Care Ltd.

[9] New Zealand Life Care Ltd made a claim for $5,498,845 in December 2011. It made a reduced claim for $4,880,918.25 in September 2014 after allowing for distributions it had received from the liquidations of Mr Harman's companies. The Official Assignee rejected its claim on 22 June 2017. New Zealand Life Care Ltd claims only as creditor under a guarantee. It does not say that Mr Harman is its debtor

on any other basis. It accepts that it lent money to his companies, not to Mr Harman personally.

Proof of a claim in bankruptcy

[10] For New Zealand Life Care Ltd's claim to be recognised in Mr Harman's bankruptcy, it must be a provable debt. Under s 232(1) of the Insolvency Ac 2006, that is a debt or liability that the bankrupt owes at the time of adjudication, or, after adjudication but before discharge, by reason of an obligation incurred by the bankrupt before adjudication. Claims in bankruptcy are assessed as at the date of adjudication.[4] A debt is not provable if it is not enforceable. Viscount Simonds' dictum in *Government of India v Taylor* as to liquidations applies equally in bankruptcies:[5]

> I conceive that it is the duty of the liquidator to discharge out of the assets in his hands those claims which are legally enforceable, and to hand over any surplus to the contributories. I find no words which vest in him a discretion to meet claims which are not legally enforceable…an additional purpose of a winding up is to secure that creditors who have enforceable claims shall be treated equally, subject only to the priorities for which the statute provides.

On the whole the same principles as to enforceability apply to claims in a bankruptcy and to claims in proceedings against a debtor who is not bankrupt. Debts that are statute-barred, contract obligations not supported by consideration, and claims unenforceable against minors are not provable.[6] Oral guarantees are not enforceable and cannot be claimed in a bankruptcy.[7]

[11] The Official Assignee buttressed his submission on this point with an argument by analogy based on executorship law. While executors are required to pay the lawful debts of the deceased, it is a devastavit to pay a debt which is unenforceable under the Statute of Frauds.[8] An executor may not waive the defence. If that is the case when the assets of a solvent deceased are to distributed after debts are discharged, by analogy

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4 *Ellis & Company's Trustee v Dickson–Johnson* [1924] 1 Ch 342, at 356.
5 *Government of India v Taylor* [1955] AC 491 (HL), at 509.
6 See Contract and Commercial Law Act 2017 Part 2 subpart 6.
7 *Re Bhatt* [2014] NZHC 1559. A case of a proposal under Part 5 subpart 2 of the Insolvency Act 2006, but under s 325, the same test applies.
8 Authorities cited were *Re Rownson, Field v White* (1885) 29 Ch D 358 (CA); *Midgley v Midgley* [1893] 3 Ch 282 (CA); *Anguilla v Estate and Trust Agencies (1927) Ltd* [1938] AC 624 (PC) at 635; and *McConnell v Commissioner of Stamp Duties* [1941] NZLR 599 (SC).

the same should apply in the case of an insolvency procedure such as bankruptcy. That is a round-about argument. The same point is reached directly by applying the Insolvency Act and decisions under it.

Formal requirements for guarantees

[12] Since 1677 the law has required contracts of guarantee to be in writing and signed by the guarantor. Section 4 of the Statute of Frauds 1677 said:

> No action shall be brought … whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person. … unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

It will be necessary to refer to some of the case law under it. It was repealed and replaced by the Contracts Enforcement Act 1956. Section 2 said:

> (1) This section applies to –
>
> …
>
> (d) Any contract by any person to answer to another person for the debt, default, or liability of a third person.
>
> (2) No contract to which this section applies shall be enforceable by action unless the contract or some memorandum, or note thereof, is in writing and is signed by the party being charged therewith or by some other person or fully authorised by him.

Section 3 said:

> (3) No contract whereby any person promises to answer to another person for the debt, or liability to a third person shall, if the contract is some memorandum or note thereof, is in writing and is signed by the party to be charged therewith or some other person lawfully authorised by him (again insufficient to support an action or other proceeding, to charge the person by whom the promise is made, by reason only that the consideration or the promises does not appear in writing or by necessary inference from a written document.

That was in turn repealed by the Property Law Act 2007 with effect from 1 January 2008,[9] and replaced by s 27 of the Property Law Act 2007:

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[9] Property Law Act 2007, ss 2 and 366.

> **27 Contracts guarantee must be in writing:**
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> (1) This section applies to contracts of guarantee coming into operation on or after 1 January 2008.
>
> (2) A contract of guarantee must be -
>
> (a) in writing; and
>
> (b) signed by the guarantor
>
> (3) Subsection (2) does not require the consideration for a contract of guarantee to be in writing or to appear by necessary implication from a writing.
>
> (4) In this section, contractual guarantee means a contract under which a person agrees to answer to another person for a debt, default or liability of a third person.

[13] In *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* Lord Hoffmann stated the policy for the writing and signing requirements:[10]

> It is, however, important to bear in mind that the purpose of the Statute was precisely to 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. Parliament decided that there had been too many cases in which the wrong side had been believed. Hence the title, "An Act for prevention of frauds and perjuries". It is quite true, as Mr McGhee said, that the system of civil procedure in 1677 was not very well adapted to discovering the truth. For one thing, the parties to the action were not competent witnesses. But the question of whether the Act should be preserved in its application to guarantees was considered in 1953 by the Law Reform Committee (First Report, Statute of Frauds and Section 4 of the Sale of Goods Act 1893 (Cmd 8809)) and the recommendation of a very strong committee was to keep it.
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> The terms of the Statute therefore show that Parliament, although obviously conscious that it would allow some people to break their promises, thought that this injustice was outweighed by the need to protect people from being held liable on the basis of oral utterances which were ill-considered, ambiguous or completely fictitious. This means that while normally one would approach the construction of a statute on the basis that Parliament was unlikely to have intended to cause injustice by allowing people to break promises which had been relied upon, no such assumption can be made about the Statute.

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[10] *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] 2 AC 541 (HL) at [19]-[20].

[14] While that policy also applies to the New Zealand legislation, there are differences between the Contracts Enforcement Act and s 27 of the Property Law Act. In *Northcott v Davidson* I said:[11]

> [27] Under the Contracts Enforcement Act 1956, an oral guarantee could be enforced if there was some memorandum or note of it in writing signed by the guarantor. Similarly, under s 24 of the Property Law Act 2007, a contract for the disposition of land may be enforced if there is a written record of the agreement, signed by the party the agreement is to be enforced against. However, under s 27, the guarantee itself must be in writing. An oral contract of guarantee is not enforceable, even if the guarantor has signed a written record of the guarantee.
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> [28] Where a creditor relies on a signature of the guarantor, it is necessary to see whether the signature is on the written contract of guarantee. For that, it is necessary to distinguish between the text of the contract of guarantee and other writing that does not form part of the contract. That includes written material that would be excluded from consideration under the parol evidence rule or under an entire agreement clause.
>
> [29] On the other hand, a contract may consist of a number of documents. So long as all the documents contain some contractual text there may be a contract of guarantee in more than one document. While it would be prudent to have a guarantor sign every document, s 27(2) does not require more than one signature by the guarantor, even though there may be more than one document in the contract of guarantee.
>
> [30] The effects of non-compliance have changed. Under s 2 of the Contracts Enforcement Act 1956 and under s 24 of the Property Law Act 2007, contracts that lack the requisite formalities are not enforceable by action. They might still have some effect. The contract is simply unenforceable, not void. It might be subject to rectification. It might provide a defence in certain cases, as in claims for repayment of a deposit. The matter is otherwise under s 27. The requirement for the contract to be in writing, signed by the guarantor, goes to the validity of the contract. An oral guarantee is not just unenforceable. It is a nullity. The statute has made that clear by the word "must". Section 26 of the Property Law Act 2007 saves the law relating to part performance for contracts for the disposition of land. However, if an oral or unsigned contract of guarantee is a nullity, the law relating to part performance cannot apply to it. Equity does not order specific performance of a void contract.

[15] While New Zealand Life Care Ltd relies on events after 1 January 2008, it does not say that Mr Harman gave it a written guarantee under s 27 of the Property Law Act after that date. It appreciates that it cannot prove a written guarantee signed by Mr Harman. Instead it says that because of affidavits by Mr Harman after 1 January 2008 oral guarantees he gave earlier are enforceable, notwithstanding the Contracts Enforcement Act.

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[11] *Northcott v Davidson* HC Whangarei CIV 2012-488-97, 7 June 2012 at [27]–[30].

[16] Mr Harman does not take the point that any guarantee by him did not comply with the Contracts Enforcement Act. Instead he supports New Zealand Life Care Ltd. The Official Assignee does rely on non-compliance with the requirements as to form. In doing that he is applying the same test for all guarantees and in that regard may be seen as defending the assets of the estate for those creditors whose provable claims have been accepted.

In 2005 did Mr Harman guarantee that his companies would repay New Zealand Life Care Ltd's loans to his companies?

[17] New Zealand Life Care Ltd accepts that Mr Harman did not sign a guarantee or any memorandum or note under s 2(2) of the Contracts Enforcement Act when it was proposed in 2005 that it would lend funds to his companies. It says however that he gave an oral guarantee. It relies on three affidavits by Mr Harman:

(a) An affidavit of 13 April 2012 made at the request of the Official Assignee identifying creditors, which included:

> NZ Life Care
>
> Wake Investments Ltd borrowed $1,682,000 around November 2005 from NZ Lifecare. This was guaranteed by me. The amount accrued on the creditors claim for Wake Investments Ltd at $2,533,447 is correct in my view. Fairthorne Trading Ltd also borrowed various monies from NZ Lifecare during the period 2005 until 2008. The balance of $2,965,398 seems correct to me from what I can recall. This amount was guaranteed by me.

(b) An affidavit of 19 April 2017 stating that in 2005 he gave New Zealand Life Care a verbal personal guarantee in respect of all its funds he would manage.

(c) His affidavit of 25 August 2017 in this proceeding as to giving a guarantee.

[18] In the last affidavit he describes the circumstances in which he gave the guarantee in 2005. He discussed the proposal that New Zealand Life Care Ltd lend funds to his companies with two of its directors, Mr Durling and Mr Eady. They said that they would not agree unless he gave a personal guarantee as to repayment. They

asked for details of his personal financial position. He outlined his assets and liabilities, saying that his assets then would easily cover the funds to be advanced. He gave them an oral guarantee. Mr Durling and Mr Eady confirm that evidence. As part of the context, Mr Eady and Mr Harman were friends. Mr Harman had his office for his business on the same floor of the building occupied by New Zealand Life Care Ltd.

[19] Counsel for the Official Assignee did not cross-examine any of the witnesses directly on the discussions in 2005. Instead the attack on the claim that Mr Harman gave an oral guarantee relied on these matters:

(a) Mr Harman knew that guarantees had to be signed and in writing. He regularly signed guarantees in favour of people who lent money to his companies. He had a template for a guarantee which he used. He did not however sign any guarantee for New Zealand Life Care Ltd.

(b) Financial statements for his companies prepared by his accountants showed some creditors as guaranteed by Mr Harman, but financial statements for Fairthorne Trading Ltd and Wake Investments Ltd did not show New Zealand Life Care Ltd as a guaranteed creditor.

(c) In February and March 2008 there was email correspondence between Mr Durling and Mr Harman about Mr Harman giving guarantee.[12] There was no suggestion that he had already given one.

(d) In May 2008 when it was clear that he was facing severe insolvency difficulties, Mr Harman sought assistance from insolvency practitioners. In a schedule of indebtedness for himself and his companies prepared with their assistance he showed New Zealand Life Care Ltd as a creditor of Wake Investments Ltd, but as not having a personal guarantee. He did not show Fairthorne Trading Ltd as a creditor.

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[12] See [27]–[29] below for the emails.

(e) Mr Harman was examined on oath by the Official Assignee on 12 April 2011. In response to questions about New Zealand Life Care Ltd, he said he did not think that its debt was guaranteed.

(f) In letters of 11 May 2012 and 21 October 2013 to the Official Assignee explaining Mr Harman's guarantee, New Zealand Life Care Ltd relied on email and correspondence and meetings in 2008, but did not refer to any guarantee in 2005.

[20] Some of these matters carry less weight than others. For example, I do not rely on the financial statements in (b). I do not understand that it is necessary to record whether liabilities of a company are guaranteed by directors. Mr Harman guaranteed debts for other creditors which were not recorded in financial statements. The correspondence in (f) can be read as referring generally to Mr Harman having guaranteed his companies' debts to New Zealand Life Care Ltd.

[21] There remain inconsistencies. Mr Harman has said on some occasions that he did not give a personal guarantee and on others that he did. His affairs were complex and difficult to recall, as can be seen from the record of his examination and from his affidavit of 13 April 2012. Insolvents are not always the best at describing their own affairs, as insolvency practitioners are all too well aware. It would be surprising if there were no inconsistencies in his descriptions of his assets and liabilities.

[22] New Zealand Life Care Ltd was unbusiness-like in its dealings with Mr Harman in 2005. It was sloppy in not recording significant transactions. Given the very substantial sums involved in the loans to Mr Harman's companies, the directors of New Zealand Life Care Ltd would be expected to record the decisions in written directors' resolutions. Other than accounting materials it has produced no records as to the transactions. Mr Durling did not seem to appreciate the need for guarantees to be signed and in writing. Neither he nor Mr Harman came across as dishonest.

[23] Notwithstanding the inconsistencies and slackness in documentation, New Zealand Life Care Ltd has persuaded me on the balance of probabilities that

Mr Harman did give an oral guarantee in 2005 before it made any advances to his companies. The circumstances made it natural for him to give a guarantee. It would be unusual for the advances to be made without his vouching for repayment. Mr Durling and Mr Eady clearly trusted Mr Harman. It was consistent with that trust for Mr Harman to guarantee the company debts. A finding that Mr Harman accepted their trust but did not give a guarantee would jar.

[24] Mr Harman's affidavit of 13 April 2012 is significant as having been made long before the dispute in this case arose. Its sole purpose was to give information to the Official Assignee. He addresses 36 creditors and in many cases states whether he gave a personal guarantee. Whereas an insolvent may be unreliable in stating that he or she did not incur an obligation (for example, because of poor recollection or record-keeping), they are less likely to be unreliable in stating that they did incur a debt.

[25] Mr Neil objected that the oral guarantee alleged by Mr Harman suffered from lack of certainty, as the debtors were not identified. Clearly Mr Harman intended to guarantee repayment by whichever company the funds were advanced to.

[26] There are loose ends and inconsistencies. The failure to document the arrangement is slack. When Mr Durling became concerned in 2008, he sought a written guarantee without referring to any arrangements in 2005. Notwithstanding those difficulties in the case for New Zealand Life Care Ltd, it is more likely than not that Mr Harman did give it an oral guarantee in 2005. That left the loose end that there was no note or memorandum signed by Mr Harman. The 2005 guarantee is not enforceable.

Did Mr Harman give an enforceable guarantee in 2008?

[27] I referred above to emails in 2008 that the Official Assignee relied on to attack the 2005 oral guarantee. New Zealand Life Ltd does not rely on anything in the years between. The question here is whether Mr Harman gave an enforceable guarantee in 2008.

[28] On 22 February 2008 Mr Durling emailed Mr Harman, including this:

> Appreciate your asset backing and the fact that we are relying on you personally to back your loans. We don't know the structure behind your assets. I feel therefore you should have no problem with a personal guarantee. Do you want me to have one prepared?

Mr Harman's reply included:

> Ill ring you but yes im happy with personal guarantee, no problems

Mr Harman prepared a guarantee but Mr Durling was not happy with it. He emailed Mr Harman on 12 March 2008:

> Can you send me a soft copy of the agreement and I will mark up changes.
>
> Obvious errors are the loan is made to Fairthorne as well as Wake
>
> The loan amount will vary from time to time.
>
> The amount is repayable on call. (happy to agree to a notice period but not 365 days)

In reply Mr Harman said:

> See attached
>
> I only had Wake as the borrower as the net diff between what I have and wake loan is well under the $2.4m which is the value of my shares. But happy to include Fairthorne to, no worries

[29] On 19 March 2008 Mr Durling emailed the directors of New Zealand Life Care Ltd, including Mr Harman, and recorded that Mr Harman had agreed to provide a guarantee for the funds held by Fairthorne and Wake (other than those distributed to shareholders and investments for them). The terms of the proposed guarantee were not finalised. Mr Harman did not sign a written guarantee. It was apparently overlooked. None has been put in evidence.

[30] While the exchange of emails in February shows Mr Harman's willingness to give a guarantee, they are not a guarantee themselves. Mr Harman and Mr Durling intended that a separate document signed by Mr Harman containing the guarantee would be prepared. Preparing that document would require them to focus on the terms of the guarantee. When they did that, there were differences which they did not finally resolve. Mr Harman's draft provided for only one debtor, whereas there were two. Mr Durling wanted the guarantee to cover changes in the loan amounts. A notice

period had to be agreed. That remained an outstanding issue after Mr Harman's email of 12 March. There was not complete finality on all terms.

[31] Moreover, consideration was required but there was none. The exchange of emails cannot be a deed. They do not meet the requirements for a deed under s 9 of the Property Law Act 2007. Even if it is assumed that Mr Harman's name appearing at the end of his emails meets the requirements for an electronic signature,[13] his signature was not witnessed.[14] The written guarantee does not need to state the consideration for it,[15] but in the absence of a deed consideration is required as in any other contract.[16] Loan schedules New Zealand Life Care Ltd submitted to the Official Assignee show that it did not make any advances to Wake Investments Ltd after 25 July 2006 and to Fairthorne Trading Ltd after 11 April 2008. Interest continued to accrue after those dates, but that did not involve any new transactions. New Zealand Life Care Ltd cannot say that it agreed to enter into new transactions with the debtor companies in return for Mr Harman giving a guarantee. When a creditor has already given credit to a debtor and no further advances are contemplated, it is common to stipulate as the consideration a forbearance to sue for existing indebtedness. It is not enough that the creditor did forbear from suing. It must have done so at the express or implied request of the guarantor.[17] There is no evidence of any express request by Mr Harman. On the evidence I cannot infer an implied request by him. The emails show that he was willing to co-operate. He was not asking for extensions of time for his companies. Mr Durling continued to regard the companies as in default. That comes out in his email of 2 May 2008 after a meeting on 1 May 2008. The email recorded arrangements made with Mr Harman for payment. It included this:

> Due to what is happened in the past I am not calling off my threats of legal action until I am satisfied that the above starts to happen.

Clearly Mr Durling did not consider that New Zealand Life Care Ltd had earlier agreed to withhold proceedings. Any consideration for the guarantee was past. Because of

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13 See Electronic Transactions Act 2002, ss 15 and 22 (now repealed and replaced by the Contract and Commercial Law Act 2017, ss 219 and 226).

14 Property Law Act 2007, s 9(2)(b) and (7); Electronic Transactions Act 2002, s 23 (now Contract and Commercial Law Act 2017, s 227).

15 Property Law Act 2007, s 27(3).

16 *Paulger v Butland Industries Ltd* [1989] 3 NZLR 549 (CA) at 551.

17 *Crears v Hunter* (1887) 19 QBD 341 (CA) at 346.

the lack of certainty and lack of consideration there was no contract and therefore no guarantee under s 27 of the Property Law Act 2007.

[32] A note or memorandum of a guarantee signed by Mr Harman in 2008 before his bankruptcy could satisfy the requirements of s 2(2) of the Contracts Enforcement Act 1956, even though that statute had been repealed by then. But any note or memorandum must recognise the contract.[18] The emails cannot be read as recognising any guarantee given in 2005. That was the point of the Official Assignee's objection in [19](c) above. In *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* Tomlinson LJ said:

> I would only add that Mr Kendrick tended to approach the two limbs of section 4 of the Statute of Frauds as if it ought necessarily to be more difficult to satisfy the first than the second. I can see no warrant for this approach. The two limbs are simply different. I cannot see why it should be assumed that the formalities prescribed by the first limb will be more difficult to achieve than those required by the second. If anything, the authorities demonstrate that the second limb is in fact attended by more formality. The note or memorandum must not pre-date the transaction. If the memorandum or note does not contain all the terms of the guarantee it must contain some reference, express or implied, to some other document or transaction. This is potentially more problematic than examination of a sequence of contractual negotiations which, by definition, are likely of necessity to contain linking references.

It cannot be seriously argued that any of the emails in 2008 set out all the terms of any earlier guarantee or refer to some other document or transaction. In 2008 Mr Harman did not sign a note or memorandum of an earlier guarantee.

Mr Harman's affidavits made after his adjudication

[33] I come back to Mr Harman's three affidavits in [17] above, all made after his adjudication, two of them after his discharge. I have considered these as evidence in deciding that New Zealand Life Care Ltd that Mr Harman did give an oral guarantee in 2005. Statements by a bankrupt as to liabilities he has incurred are of course relevant information which may assist the Official Assignee and the court in determining provable claims, but they are not determinative. New Zealand Life Care Ltd says however that Mr Harman's evidence has greater significance because he is

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[18] *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] EWCA Civ 265, [2012] 1 WLR 3674 at [24].

the person chargeable under the guarantees. Because of his evidence the absence of a note or memorandum cannot be in issue. This argument can apply only to the enforceability of any oral guarantees under the Contracts Enforcement Act. Under s 27 of the Property Law Act the absence of a written contract signed by the guarantor goes to validity, not to enforceability. New Zealand Life Care Ltd relies on old case law that an admission by a guarantor of the guarantee or his indebtedness bars him from relying on non-compliance with s 4 of the Statute of Frauds.[19] In *Lucas v Dixon* Bowen LJ said:[20]

> It was held, no doubt, that if the defendant admitted his liability that was sufficient – not on the ground that his admission was a memorandum of the contract, but that it was an admission that there was such a memorandum. That is shewn by the fact that if, at the same time, he set up the statute his admission did not operate.

New Zealand Life Care Ltd says that as Mr Harman has admitted the guarantee, it could sue him on it if he were not bankrupt and would obtain judgment against him. Its claim is therefore provable in his bankruptcy.

[34] We are dealing with procedural law, not substantive rights (as in s 27 of the Property Law Act). Enforceability under s 2 of the Contracts Enforcement Act deals with what must be proved if the court is to find a guarantee in a proceeding to enforce it. That has in turn generated the requirement to plead the statute expressly.[21] An admission of a contract by a defendant saves the plaintiff having to show a signed note or memorandum. Now for how that applies when the alleged guarantor has been adjudicated bankrupt. Any proceedings against the bankrupt are halted.[22] Any right to sue the debtor is transmuted into a right to share in a distribution of the bankrupt's assets realised by the Official Assignee. For that the creditor must show a provable debt under s 231. Leaving aside the exceptional case where the court gives leave under s 76(2) for a proceeding to be continued, the creditor must satisfy the Official Assignee of its claim. If the Official Assignee rejects the claim, the creditor may apply under s 239 to establish its claim. The procedural rules for proof of a debt will apply, but

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19 E.g. *Middleton v Brewer* (1790) Peake 20.

20 *Lucas v Dixon* (1889) 22 QBD 357 (CA) at 361.

21 *Steadman v Steadman* [1976] AC 536 (HL) at 558; *Boviard v Brown* [1975] 2 NZLR 694 (SC) at 700; *Whiting v Diver Plumbing & Heating Ltd* [1992] 1 NZLR 560 (HC) at 569; and High Court Rules 2016, r 5.19(1).

22 Insolvency Act 2006, s 76.

with this difference. The party opposing the claim is the Official Assignee, not the bankrupt. Binding admissions by the Official Assignee will relieve the creditor to the extent of the admissions from having to prove parts of its claim. Correspondingly if the Official Assignee intends to oppose an application alleging a guarantee made before 2008 because there was no signed note or memorandum, he must plead non-compliance with s 2 of the Contracts Enforcement Act (as he did in this case). While the bankrupt may be a witness, he or she is not a party to the proceeding. Statements by a bankrupt as to debts incurred may be relevant evidence, but they will not be admissions binding on the Official Assignee.

[35] New Zealand Life Care Ltd accepts that it cannot rely on Mr Harman's affidavits as notes or memoranda under s 2 of the Contracts Enforcement Act. In *Lucas v Dixon* the English Court of Appeal held that the Statute of Frauds required any signed note or memorandum of a contract to be in existence before the start of an action.[23] There is the same result when the creditor relies on a note or memorandum signed by the bankrupt after adjudication. While Mr Harman might have been the "party being charged therewith" under s 2 in any proceeding before his adjudication, once he was made bankrupt the "party being charged therewith" in a claim in his bankruptcy is the Official Assignee, in whom his estate has vested.

No estoppel argument

[36] Out of caution the Official Assignee submitted that New Zealand Life Care Ltd did not have a case based on estoppel. He invoked *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA*,[24] *Northcott v Davidson*,[25] *Victoria Quarter No 1 Ltd v FBB Holdings Ltd* [26] and *Becker v Anderson*[27] and distinguished *Tait-Jamieson v Cardrona Ski Resorts Ltd*.[28] In reply New Zealand Life Care Ltd made it clear that it was not relying on estoppel.

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23 *Lucas v Dixon* (1889) 22 QBD 357 (CA) at 359 per Lord Esher MR and at 361–362 per Bowen LJ. That was a decision on a sale of goods under s 17, but the Court of Appeal applied authorities under s 4.

24 *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] 2 AC 541 (HL).

25 *Northcott v Davidson* HC Whangarei CIV 2012-488-97, 7 June 2012.

26 *Victoria Quarter No 1 Ltd v FBB Holdings Ltd* [2015] NZHC 3007.

27 *Becker v Anderson* [2013] NZHC 2798.

28 *Tait-Jamieson v Cardrona Ski Resorts Ltd* [2012] 1 NZLR 105 (HC).

Can the Official Assignee contest the amount of New Zealand Life Care Ltd's claim?

[37] As well as rejecting New Zealand Life Care Ltd's claim on liability, the Official Assignee wants to contest quantum. He says that if the claim were valid, it should be for $3,539,029.83. He does not challenge the amount for Wake Investments Ltd but takes issue with $1 million added to the claim for Fairthorne Trading Ltd.

[38] New Zealand Life Care Ltd had claimed in the liquidations of Wake Investments Ltd and Fairthorne Trading Ltd. In accepting its claims with some adjustments the liquidators had allowed for the $1m add-back for Fairthorne Trading Ltd. In its claim in Mr Harman's bankruptcy New Zealand Life Care Ltd relied on the liquidators' acceptance of its claims and allowed for distributions in the liquidations.

[39] This part of the Official Assignee's case fails on procedural grounds for not putting quantum properly in issue. The Official Assignee's notice of 22 June 2017 rejecting the claim for $4,880,918.25 says that he is not satisfied on the balance of probabilities that Mr Harman is personally liable to New Zealand Life Care Ltd. The four-page letter gives detailed grounds why he rejected the claim on liability but says nothing about quantum. Anyone reading that notice would not understand that the Official Assignee did not accept the amount of the claim, if liability were established. Understandably New Zealand Life Care Ltd did not address quantum in detail in its application or evidence.

[40] In opposing New Zealand Life Care Ltd's application the Official Assignee was not confined to the grounds given in his notice of rejection. Like any litigant the Official Assignee can raise fresh matters which may have occurred only after further consideration following rejection of a claim. But the Official Assignee was still required to give proper notice to New Zealand Life Care Ltd if he intended to run them. As New Zealand Life Care Ltd applied by originating application, the Official Assignee filed a notice of opposition under r 7.24 of the High Court Rules.[29] The notice is required to state the grounds of opposition.[30] The Official Assignee's three-page notice does give grounds for contesting liability, but again says nothing about

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29 High Court Rules 2016, r 19.10(1)(f).
30 High Court Rules, Schedule 1, Form G 33.

quantum. The affidavit by the Deputy Assignee does not say that the amount of the claim is in issue.

[41] The affidavits in reply had to be limited to new matters raised in the notice of opposition or the Deputy Assignee's affidavit.[31] Obviously they did not address quantum.

[42] In the hearing the Official Assignee submitted that the $1m add-back on the claim involved allegations by New Zealand Life Care Ltd that Mr Harman had acted fraudulently, but it had not adduced any evidence to support such a serious allegation. The Official Assignee was also not bound by the decisions of the liquidators. There is a very good reason why New Zealand Life Care Ltd did not offer any evidence on the point. The Official Assignee never put the matter in issue. It would be unjust to New Zealand Life Care Ltd to inquire into quantum when it was never given fair notice that it would have to prove the amount of its claim.

Outcome

[43] While New Zealand Life Care Ltd has shown on the balance of probabilities that in 2005 Mr Harman orally guaranteed that Wake Investments Ltd and Fairthorne Trading Ltd would repay the loans, he did not sign a note or memorandum of it then or later. The guarantee is accordingly not enforceable and cannot be a provable debt in Mr Harman's bankruptcy. Mr Harman did not give any later guarantees. While his affidavits after his bankruptcy are relevant and admissible, they do not bind the Official Assignee. If I had found that Mr Harman did give an enforceable guarantee, I would have accepted the quantum, as it has not been put in issue.

[44] I make these orders:

(a) I dismiss the application to reverse the Official Assignee's decision of 22 June 2017 rejecting the claim by New Zealand Life Care Ltd in Mr Harman's bankruptcy.

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[31] High Court Rules 2016, r 7.26(2).

(b) New Zealand Life Care Ltd is to pay the Official Assignee costs on the application. If counsel cannot agree costs, memoranda may be filed.

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Associate Judge R M Bell