

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

domestic building LIST	vcat reference No. D181/2004
CATCHWORDS	
Guarantee and indemnity – construction of – relevant principles	

APPLICANT	Arrow International Australia Limited (ACN 081 136 352)
FIRST RESPONDENT	Indevelco Pty Ltd (ACN 061 216 635)(in liquidation)
SECOND RESPONDENT	Perpetual Nominees Ltd as custodian of The Colonial First State Income Fund (ACN 000 733 700)
JOINED PARTY	John Zervos
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	22 October 2007
DATE OF ORDER	12 November 2007
CITATION	Arrow International Australia Limited (ACN 081 136 352) v Indevelco Pty Ltd (ACN 061 216 635)(in liquidation) & Anor (Domestic Building) [2007] VCAT 2239

Order

1. By consent of the Applicant and the Second Respondent:
 - (a) order that the sum of \$45,000.00, being part of the sum of \$60,000.00 lodged by the Applicant in the Domestic Builders Fund as security for the costs of the Second Respondent be paid out to the solicitors for the Second Respondent.
 - (b) order that the balance of \$15,000.00 lodged by the Applicant in the Fund be paid out to the Solicitors for the Applicant.
 - (c) the Applicant's claim against the Second Respondent is struck out with no order as to costs.
2. The Second Respondent's claim against the Joined Party is dismissed.

3. Costs reserved.
4. Direct that any claim by the First Respondent with respect to the moneys paid by the Applicant into the Fund as security for its costs be made by 7 December 2007 and a copy of the claim be served upon the solicitors for the Applicant.
5. Any such claim is to be set down for hearing as soon as practicable with half a day allocated . A copy of any affidavit to be relied upon must be filed and served at least five working days before the hearing.
6. If no claim is made by the First Respondent by 7 December 2007 as aforesaid this proceeding is to be referred to me for an order in Chambers that the said sum be repaid to the solicitors for the Applicant.
7. Direct the Registrar to send a copy of this order by prepaid post addressed to the Liquidator of the First Respondent, Mr S.L. Horne, Draper Dillon, Fawkner Centre, Level 4, 499 St Kilda Road, Melbourne, 3004 and also to its solicitors, Messrs Meerkin & Apel, PO Box 233, South Yarra, 3141.

SENIOR MEMBER R. WALKER

APPEARANCES:	
For the Applicant	Mr and Mr B. Miller of Counsel
For the First Respondent	No appearance
For the Second Respondent	Mr N. Frenkel of Counsel
For the Joined Party	Mr R. Craig of Counsel

Reasons

Background

1. At all material times, the First Respondent (“Indevelco”) was the owner of land in Yarraville (“the Land”) upon which it wished to construct 25 apartments. The Applicant (“Arrow”) is a builder that agreed to construct the apartments for Indevelco pursuant to a building contract (“the Building Contract”). The Second Respondent (“Perpetual”) is a lender that agreed to advance the moneys to enable the apartments to be built. It was not a party to the Building Contract.
2. In this proceeding, Arrow sued Indevelco for moneys said to be due to it pursuant to the Building Contract. It also sued Perpetual claiming that, by virtue of a tripartite deed (“the Tripartite Deed”) entered into by the three parties, Perpetual was directly liable to pay it the amount due.
3. Perpetual sought indemnity in regard to Arrow’s claim against both Indevelco and the Joined Party (“Zervos”) pursuant to various documents detailed below.

The hearing

4. On 1 August 2007, Indevelco went into liquidation and Arrow’s proceeding against it became and remains stayed. The other claims came before me for hearing on 22 October 2007 with 10 days allocated. On the morning of the first day Arrow’s claim against Perpetual was settled and consent orders were agreed to which are reflected in the above order. In essence, the effect of these was that its claim was struck out and the sum of \$45,000.00 would be paid to Perpetual towards its costs. That left the claim by Perpetual against Zervos for indemnity with respect to the costs that it has incurred in this proceeding.
5. Because of the limited nature of the proceeding only one witness was called namely, Mr Abercrombie, a senior manager of a company with some connection with Perpetual (the complex connection between these various companies is not relevant to the outcome of the claim). Mr Abercrombie was cross examined by Mr Craig and I then heard submissions from Counsel. I reserved my decision.

Conclusion

6. The claim against Zervos is dependent upon a number of documents linked to a form of Guarantee and Indemnity. On the proper construction of these documents I am not satisfied that the amounts sought by Perpetual against Zervos are recoverable. The claim by Perpetual against Zervos will therefore be dismissed and costs will be reserved for further argument. The reasons for this conclusion follow.

The documents

7. Perpetual and Indevelco executed a written agreement (“the March Agreement”) on 2 March 2001 for Perpetual to lend Indevelco \$4,050,000.00 to pay out the existing mortgage over the Land and finance the construction of the apartments. On the same date the following further three documents were also signed:
 - a A mortgage of the Land between Perpetual and Indevelco (“the Mortgage”);
 - b A fixed charge over certain assets of Indevelco (“the Charge”);
 - c A deed of guarantee and indemnity from Zervos and another entity (“the Guarantee”).
8. Pursuant to the March Agreement the sum of \$700,000.00 was advanced by Perpetual on 2 March 2001 to refinance Indevelco’s existing mortgage with St George Bank which was secured over the Land. Thereafter, certain interest payments on the loan were capitalised and also became secured.
9. It was a term of the March Agreement that construction was to commence on 1 May, failing which Perpetual would not be obliged to fund the construction. On 9 November 2001 construction had not started and so Perpetual “withdrew” its facility for construction funding but said that it would consider “a new application”.
10. A number of proposals were made by Indevelco after May, with Perpetual indicating a favourable response, but no further agreement was reached between them.

The Further Agreements

11. The Building Agreement was entered into between Arrow and Indevelco on 23 July 2002. Arrow was the third builder that had been considered since March 2001 when the original documentation was signed. There are a number of other complicating factors. The form of contract was the subject of considerable negotiation and Perpetual required certain amendments to it throughout August 2002.
12. It was also a requirement of Perpetual that Arrow and Indevelco sign the Tripartite Deed to regulate the relationship between Arrow, Indevelco and Perpetual. The terms of this were also the subject of negotiation and the Solicitors for Arrow required the insertion of an additional clause 2.11 which Perpetual agreed to. This was one of the clauses which formed the basis of Arrow’s later claim against Perpetual in this proceeding.

13. Finally, on 30 August 2002 a further offer of loan was made to Indevelco on behalf of Perpetual. One of the conditions for the loan in the letter of offer was “a supporting and unlimited guarantee from John Zervos”.
14. A fresh deed of loan was prepared and signed and is dated 13 December 2002 (“the December Agreement”). In addition, the Tripartite Deed was executed and bears the same date. The other documentation securing the indebtedness of Indevelco to Perpetual namely, the Mortgage, the Charge and the Guarantee had already been executed the preceding year and no fresh documents were prepared. The December Agreement provided for a total advance of \$5,200,000.00 which included the moneys already owed.

Demands by Arrow

15. Between November 2002 and November 2003 the total advance had been paid to Arrow so that any further amounts due under the Building Contract would have to be paid by Indevelco. Funds had been certified as due to Arrow by the Quantity Surveyor and Arrow demanded these directly from Perpetual.
16. In November and December 2003 interest payments on the loan were not paid and Indevelco then sought alternate finance. At that time Arrow was demanding payment and Perpetual was concerned about its potential liability to Arrow, although Perpetual’s Solicitors believed the claim to be “spurious”.

Perpetual’s demand for indemnity

17. Correspondence then ensued in which Perpetual’s Solicitors required written confirmation that Indevelco and Zervos would remain bound under their personal covenants and would reimburse Perpetual for any costs it may incur in respect of the claim by Arrow. No such confirmation was given. Instead, a letter dated 5 February 2004 from Indevelco’s Solicitors stated:

“With the full reservation of rights, we confirm that our client will not seek from your client a release of the guarantee at settlement”.
18. The “settlement” referred to was the paying out of the debt to Perpetual and the discharge of the security documentation following a refinancing by Indevelco with another lender.
19. The word “client” in this letter is ambiguous but since the only relevant guarantor at the time was Zervos I think it could only have been intended to refer to him. Indevelco had no interest in removing the Guarantee. Mr Abercrombie said that he interpreted this letter as being confirmation that Indevelco and Zervos would remain bound under the security documents for any costs incurred as a result of the claim against Perpetual by Arrow,

but the letter does not say that. All that appears from the text of the letter is that Guarantee will not be released. It says nothing about what the Guarantee secures or the extent of the obligations imposed by it.

The refinancing

20. On 9 February 2004 the moneys owed to Perpetual by Indevelco were paid in full, the Charge and the Mortgage were satisfied and the moneys advanced under both the March and the December Agreements were fully repaid.
21. Appropriate notices recording the satisfaction of the charges over the property of Indevelco were filed with ASIC. It is apparent from the face of these documents that they were signed on behalf of Perpetual some weeks before settlement. Mr Craig invited me to find that that was the date upon which the Charge and the Mortgage were discharged. I do not think that this follows. All the date in each documents shows is that it was executed on that date. There is no evidence at all as to when they were handed over and I think it is most unlikely that they would have been handed over except at settlement when the balance due under the documents was paid. There is no evidence that this is the case but there is no evidence to the contrary either. All I can find on the evidence is the charges have been discharged and I think it more probable or not that they were discharged at the moment the money secured by those documents was repaid.

This proceeding

22. On 17 March 2004, Arrow commenced these proceedings against Indevelco and Perpetual. The question is now is, whether Zervos is responsible under the terms of the guarantee to indemnify Perpetual with respect to its costs incurred in defending this proceeding. The answer to that question is dependant upon the proper construction of a number of documents.

How should the documents be interpreted?

23. Mr Craig referred me to a number of principles concerning the interpretation of documents. In *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 451 the High Court said in a joint judgment, in regard to the construction of a particular guarantee (at p.462):

“Construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific [*the party entitled to the benefit of the guarantee*] would have understood them to mean. That requires consideration, not only of the text of the documents, but all the surrounding circumstances known to Pacific and BNP [*the party providing the indemnity*] and the purpose and object of the transaction”.

24. Mr Craig referred also to various passages in the High Court case of *Andar Transport Pty Ltd v Brambles Limited* (2004) 217 CLR 424 in which the court unanimously applied the principles set out in its earlier decision of *Ankar Pty Ltd v National Westminster Finance (Australia) Limited* (1987) 161 CLR 149. In *Ankar* Mason J, Wilson, Brennan and Dawson JJ said (at p. 571):

“At law, as in equity, the traditional view is that the liability of the security is strictissimi juris and that ambiguous contractual provision should be construed in favour of the surety. The doctrine of strictissimi juris provides a counterpoise to the law’s preference for a construction that reads the provision otherwise than as a condition. A doubt as to the status of the provision in the guarantee should therefore be resolved in favour of the surety”.

25. In *Andar* the court was concerned with an indemnity rather than a guarantee and pointed out the differences, including that the former is not caught by the Statute of Frauds. The joint judgment continues (at p. 437):

“However, notwithstanding the differences in the operations of guarantees and indemnities, both are designed to satisfy a liability owed by someone other than the guarantor or indemnifier to a third person. The principles adopted in *Ankar*, and applied in *Chan*, are therefore relevant to the construction of indemnity clauses”.

26. I agree with Mr Craig that I must construe the guarantee and indemnity as at the date it was signed. Such a document cannot change its meaning because of the occurrence of future events. It might, when properly construed, provide indemnity to the benefited party in regard to events that happen in the future but only if the document is expressed to provide indemnity in such circumstances. The question therefore is, what does the indemnity mean and what liability is covered? When using the label “Guarantee” I do not ignore the fact that the document operates both as a guarantee in some respects and as an indemnity in others.

The relevant documents

27. Perpetual’s claim against Zervos is based upon clauses 3(b), 3(c) and 10.1 of the Guarantee. Clauses 3(b) and (c) are as follows:

“The Guarantor irrevocably and unconditionally indemnifies the lender against all loss, damage, cost and expenses suffered or incurred by the lender, directly or indirectly, as a result of:

.....

(b) Any breach of the covenants or conditions contained in or implied by the Documents;

- (c) the Documents or any person's liability to pay the Debt are or become unenforceable by a Lender in whole or in part; or are varied or discharged other than by performance of them or by express written agreement;

The Guarantor must pay the Lender on demand a sum equal to the loss, damage, cost and expenses incurred by the Lender as a result of the occurrence of any of the above events".

28. Clause 10.1 is as follows:

"Costs and Expenses"

The guarantor upon demand by the Lender must pay all costs (including legal costs on a full indemnity basis) expenses and other amounts incurred or paid by the Lender in respect of this Guarantee and the Documents (including those arising in consequence or on account of the exercise purported or attempted exercise of any of the Lenders rights or powers or for the preservation of or in any manner in reference to this Guarantee and/or the Documents including the reasonable internal administration costs of the Lender and the Lender's officers) and any stamp duty, loan duty or other duty including duties and taxes on receipts or payments and any fines or penalties arising directly or indirectly in respect of this Guarantee and/or the Documents".

29. Dealing first with Clause 3(b), in order to be recoverable, the loss, damage, costs or expenses suffered or incurred by the Lender must be as a result of any breach of the covenants and conditions contained in or implied by the "Documents".
30. The "Documents" are described in the schedule to the Guarantee as:
- the loan deed between Indevelco and Perpetual;
 - the mortgage of the land;
 - "tripartite deed between the Lender, Borrower and the Builder in respect of the building contract relating to the development of 185-197 Francis Street, Yarraville Victoria;"
 - The fixed charge.
31. Of these documents, the tripartite deed was not in existence at the time the Guarantee was executed, the builder then contemplated was not Arrow and the form of tripartite deed contemplated did not include clause 2.11.
32. Mr Craig submitted that the term "the Documents" does not include the tripartite deed because it was not in existence. Further, the loss with respect to which indemnity is sought was suffered when these proceedings against Perpetual were commenced on 17 March 2002. By then, the March Agreement had been replaced by the December

Agreement and the moneys advanced under both agreements were fully repaid at the time of the refinancing. The Mortgage and the Charge had been fully discharged at the time of refinance.

33. Mr Craig submitted that in these circumstances it was not possible for there to be any breach of the covenants and conditions contained in or implied by those documents since they were discharged and the obligations of Indevelco were fully satisfied..
34. I do not think that is an answer to the claim. Whatever the position is with regard to the other documents, there was no discharge of the Guarantee and insofar as the Guarantee operates to require Zervos to indemnify Perpetual with respect to anything which occurred after the date of settlement then Perpetual is entitled to rely upon it.
35. Mr Frenkel submitted that, in any case, by reason of the letter by its solicitors dated 5 February 2004, Zervos represented to Perpetual that the Guarantee would continue in force. He said that Perpetual relied upon this representation and that Zervos is therefore estopped from denying that the Guarantee continued in force.
36. I do not accept this argument. The letter says what it says and does not in my view amount to a representation of anything beyond its clear words. Further, the evidence of reliance is inadequate. Mr Abercrombie's assumption of what the letter meant was not justified by its text and in any event he said he relied upon what his solicitor told him. But it is quite clear in any case that the guarantee was supposed to continue. The question is, does it cover the present case?

What are the "Documents"?

37. As to the meaning of the word "Documents" despite the very general descriptions in the schedule, in order to give any business efficacy to the Guarantee I must find that the terms "loan deed", "mortgage of land" and "fixed charge" must mean the documents meeting those descriptions executed contemporaneously with the Guarantee, that is, the March Agreement, the Mortgage and the Guarantee respectively. The tripartite deed referred to was to be a document matching the very general description set out in the schedule that the parties would eventually execute. The Tripartite Deed matches that description. In this regard I do not accept Mr Craig's submission.
38. Hence, the Tripartite Deed is one of "Documents" but the December Agreement is not. The Guarantee does not extend to obligations arising under the December Agreement. Nevertheless, for completeness and in case I am wrong I will deal with Mr Frenkel's submissions concerning it.

Clause 3(b) of the Guarantee

39. Mr Frenkel submitted that Indevelco failed or refused to pay all secured money other than the loan money on demand as required by Clause 4.4 of the December Agreement and that this breach was caught by Clause 3(b) of the Guarantee. As stated above, the whole of the secured money was repaid at the settlement of the re-financing but Mr Frenkel submitted that the further loan agreement required Indevelco to pay or agree to pay to Perpetual or indemnify Perpetual with respect to Arrow's claim and the costs of defending it.
40. There are two answers to this submission. In the first place, the Guarantee was not a guarantee of Indevelco's obligations under the December Agreement. The loan agreement guaranteed was the March Agreement. The December Agreement was for a greater sum of money and was not one of the documents referred to in the Guarantee.
41. Secondly, the term "secured money" is defined in the December Agreement as including the sum of \$5,200,000 and all other money Indevelco agrees to pay under the letter of offer, the collateral securities and the December Agreement; the collateral securities being the Mortgage, the Charge, the Tripartite deed and the Guarantee. Of these it was suggested that the costs of defending this proceeding fell with clause 12.11(b)(ii) of the December Agreement which is as follows:
- "The borrower must pay and reimburse the lender on demand for:
- (b)(ii) the contemplated or actual enforcement or preservation of any rights under this deed or the collateral securities including, without limitation, any expenses incurred in retaining any independent consultant or other person to evaluate any matter of concern and in the case of the lender its administration costs in connection with those events".
42. Since Arrow was not a party to the December Agreement, the issue and prosecution of this proceeding against Perpetual cannot have been a contemplated or actual enforcement or preservation of any rights under that deed. Arrow's case purported to be the enforcement of rights under one of the collateral securities namely, the Tripartite Deed, but there is nothing to indicate that Arrow actually had the rights it was seeking to enforce. Indeed, the evidence before me, which consists only of Mr Abercrombie's affidavit, would suggest otherwise. As was pointed out by Einstein J in *Precious Metals Australia Ltd v Xtrata (Schweiz) AG* [2005] NSWSC 141:
- "In my view the word "enforcing" (in the context of enforcing the Guarantee and Indemnity) cannot be stretched to mean "unsuccessfully attempting to enforce" or "making an invalid claim to enforce". The natural meaning of the enforcement of a legal right is just that. An attempt to make (and pursue in curial proceedings)

a misconceived claim to that is in due course held not to be a legal right, cannot properly be described as “enforcing a legal right”. To the contrary this will have been shown to have been an attempt to enforce something entirely different.”

I am sensible of the different context of the word “enforce” here but the reasoning is the same.

- 43. The proceeding by Arrow against Perpetual would appear on the evidence to have been quite unjustified by anything in the Tripartite Deed and the very favourable settlement in favour of Perpetual would seem to suggest that both Arrow and Perpetual finally recognised that. I am not satisfied that the costs of Perpetual in defending this proceeding fall within clause 12.11(b)(ii) of the December Agreement, even if that agreement were caught by the Guarantee, and I do not believe that it is.
- 44. The defence by Perpetual of unjustified proceedings against it cannot be said to be an exercise by Perpetual of its powers, rights and privileges contained or implied by any of the Documents. It is simply a defence of legal proceedings.

Clauses 5(b), (d) and (e) of the Charge

- 45. It is asserted that there was a breach of clause 5(b) of the Charge. That clause requires Indevelco to indemnify Perpetual and others:

“ ... against any action, claim, demand, loss, interest, fee, damage, cost and expense of any nature which the mortgagee or the mortgagee’s officers, agents or employees sustain or incur or for which the mortgagee becomes liable at any time (and any amount so sustained or incurred will form part of the Secured Money) in respect of or arising from the following:

.....

- (b) any loss or damage occasioned by liability incurred by [Perpetual] in the exercise, non exercise or purported exercise of its powers, rights and privileges contained in or applied by this Deed whether or not [Perpetual] acted negligently or was guilty of laches or waiver.

.....

- (d) any claim by any person in respect of or arising out of their use of or presence of the Secured Assets.
- (e) Any actual or assumed obligation of [Perpetual] whether solely or jointly with [Indevelco] or any other person to pay any money or do anything relating to the Secured Assets”.

- 47. In regard to 5(b) the expenses incurred by Perpetual in defending this proceeding do not, I think, arise from the exercise, non-exercise or purported exercise of any of Perpetual’s powers rights or privileges contained in or implied by the Charge. The action was not taken by

Perpetual but by Arrow. The right of Perpetual to defend itself against unwarranted legal proceedings does not arise under any provision of the Charge. It is the right of anyone who is sued.

Clause 5(d) of the Charge

48. For the purpose of 5(d), “Secured Assets” is defined in clause 13.1 of the Charge as follows:

“Secured Assets means all the present and future property, assets and rights of the mortgagor in the property including all rights and entitlements of the mortgagor in respect of:

- (a) all income from, and all rights to receive income in respect of, the property (whether by way of lease payments, licence payments, occupation payments or any other right to receive income);
- (b) any contract or other agreement (whether in writing or not) with any person in relation to the Property;
- (c) all leases entered into by the mortgagor in respect of any part or the whole of the property”.

49. For the purpose of this definition, “Property”, means the land or any part of it.

50. When one looks at the wording of clause 5(d) and the definition of the term “Secured Assets” and “Property” it is clear I think that the purpose of 5(d) is to indemnify Perpetual in regard to any claim by any person arising out of the presence of that person on the Land or arising from the use of the Land by such person. I do not believe that the expenses of Perpetual in defending this proceeding answer that description.

Clause 5(e) of the Charge

51. Similarly, Clause 5(e) relates I think to payments made in relation to the Land. It would cover such payments as rates, insurance and expenses incurred by Perpetual concerning the Land. The obligation that Perpetual assumed in regard to the cost of defending these proceedings was assumed by it as a result of the retention of its solicitors. Although the proceeding of concerned building works carried out on the Land the obligation in regard to the costs of its defence do not relate to the Land itself but to obligations alleged to have been assumed contractually by Perpetual to Arrow in regard to building works carried out on it. I do not think this answers the description of Clause 5(e).

Clause 10.1 of the Charge

52. Mr Frenkel suggested this was the clearest ground of Indevelco’s, and consequently, Zervos’ liability. Clause 10.1, reads as follows:

“Costs and expenses”

The mortgagor on demand by the mortgagee must pay all costs (including legal costs as agreed between solicitor and client) expenses and other amounts incurred or paid by the mortgagor or any receiver in respect of this Deed and/or any Collateral Documents (including those arising from any Event of Default or the exercise or attempted exercise of any of the mortgagee's rights or powers including the mortgagee's reasonable internal administration costs), stamp duty, loan or other duty including duties and taxes on receipts or payments, and fines or penalties arising directly or indirectly in respect of this Deed, any Collateral Documents and/or any transaction contemplated by those documents. Anything which the mortgagor is required to do or the mortgagee is required or permitted to do under this Deed will be done at the mortgagor's expense".

53. For this clause to apply the costs and expenses required to be paid must arise either in respect of the Charge or one of the collateral documents or in the exercise or purported attempt of exercise of any of Perpetual's rights or powers. Otherwise, they must fall within one of the subsidiary descriptions towards the end of the clause. The costs incurred by Perpetual in defending this proceeding were not incurred in respect of the Charge or any of the other documents nor were they incurred in the exercise or purported exercise by Perpetual of any rights and powers. The clause therefore does not apply.

Clause 3(c) of the Guarantee

54. Clause 3(c) of the Guarantee relates to loss, damage, costs and expenses suffered or incurred by Perpetual directly or indirectly as a result of the Documents becoming enforceable by Perpetual in whole or in part or being varied or discharged other than by performance. The loss here does not arise from any of the Documents becoming unenforceable nor does it arise because any of the Documents was varied, discharged or became unenforceable. The loss arises because Perpetual has been sued by Arrow.
55. In regard to the construction of clause 3(c) of the Guarantee Mr Frenkel suggested that I should put a colon or semi colon after the first two words. I do not accept that interpretation. The clause has to be read as a whole. To read it in the way Mr Frenkel suggests would lead the rest of the clause not making grammatical sense. Further, if the first two words were intended to stand on their own one would have expected them to be in a sub-clause on their own.

Others

56. Mr Frenkel further submitted that, by going into liquidation on 1 August 2007, Indevelco breached the December Agreement (clause 9.2(h) and also the Charge (clause 7(c)). Each of those clauses provides that such an

occurrence is an “Event of Default”. This has consequences in regard to various provisions of each document but it does not in itself impose an obligation upon either Indevelco or via, the Guarantee, Zervos, to pay any sum of money. I am not persuaded that such an occurrence should be categorised as a “breach” of either document by Indevelco. There was no contractual obligation by Indevelco that it would not become subject to external administration. Indeed, there are circumstances in which directors properly performing their duties are required to ensure that their company does become such. Even if it were a breach I do not see that any damage that resulted from it.

General

57. I make no criticism of any of the documents referred to. I agree with Mr Frenkel that they are very widely drawn but they do not I think contemplate a claim of this nature or a situation where expenses would be incurred by Perpetual otherwise than in the course of the transaction they were designed to regulate. It is hardly surprising that a guarantor is not liable to indemnify another person for actions taken by a third party quite extraneous to the transaction that the guarantee was intended to secure. Zervos guaranteed the due performance by Indevelco, not the future conduct of Arrow. It indemnified Perpetual but only against the matters referred to which are all matters falling within the transaction, not extraneous to it.
58. The claim by Perpetual therefore fails. The claim will be dismissed and costs will be reserved for further argument.

SENIOR MEMBER R. WALKER