diyLAW

From: Jeff Lampert, diyLAW
To: Ministry of Justice
Date: 29th March 2018

MEMORANDUM
Personal guarantees: computerised tribunal concept

A. Purpose

1. The purpose of this Memorandum is to set out an overview of the proposal by diyLAW for a tribunal system for disputes between guarantors and lenders with respect to personal guarantees ("**PGs**"), further to a meeting held between diyLAW and the CJC on the 9th of March 2018.

B. Background

2. The following statement by Dr R Vis MP in Parliament in 1999 sums up the inequity and excesses of the insolvency industry:

> "*The* Government has repeatedly made promises to help small businesses to survive and prosper, and of course, I welcome that. But there are contrasting interpretations of existing legislation. This is particularly the case when it comes to the excesses of the insolvency industry, as practised by the banks and their servants, the insolvency practitioners. Through the greed and questionable practices - of those practitioners - operated with impunity, many small and medium-sized companies are needlessly closed; their directors — who frequently have put all their personal assets on the line—thrown out of work; and their families thrown on to the streets to become an extra burden on the taxpayers*.*"

3. Since then the situation has worsened, and one aspect of this inequity that has been in the spotlight are PGs given in the past to support corporate borrowing and inter-company debt[1]. For example, the moment RBS admitted to mis-selling Enterprise Finance Guarantee ("**EFG**") loans it started conducting an internal review of each of its EFG loans to judge whether or not the guarantee element was sufficiently explained to customers.[2] We expect other banks to follow similar internal scrutiny in light of recent developments set out under Section (C) below.

4. It has been seen that when signing a PG, often the guarantor does not comprehend:

   (a) what it is they are signing i.e. the equivalent of a blank cheque;[3]

   (b) that the secured lender can, and frequently does, go straight to the guarantor for recovery;[4]

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[1] https://www.youtube.com/watch?v=lD-sxnjNdjs&feature=youtu.be

[2] https://www.ft.com/content/f34c481c-9cab-11e4-a730-00144feabdc0

[3] https://thelawdictionary.org/personal-guarantee/

[4] https://static1.squarespace.com/static/59a6784dcd0f685560d9cdae/t/5aafce2270a6ade1296508cc/1521471011661/Kennedy+and+Mummery+Judgment.pdf

(c) that in an insolvency situation the insolvency practitioners have virtually no duty or communication with the guarantor;

(d) the guarantee can be sold on, without any reference to the guarantor;[5]

(e) the bank often repackages and sells the underlying debt thereby reducing its exposure, whereas the guarantor remains liable on the PG;

(f) that possession of the PG can be used as a form of blackmail. This is particularly onerous as frequently the guarantee is underpinned by a charge over the family home.

5. In these challenging economic times more and more PGs are being used by lenders to recover unpaid debts. For reasons listed above, it is often only at the point of acceleration that the guarantee is being subject to much more scrutiny than when it was given, with the guarantor (often a company owner/director of an SME) looking to avoid or reduce any liability and the lender conversely wanting to ensure that it maximises its recovery under the guarantee.

C. Summary of issues identified by diyLAW

6. The case of Lampert vs Lloyds[6] which was allegedly based on perjury, the HBOS Reading judgement[7] and the recently published RBS s166 report[8] all support guarantors with new evidence for the defences available to them. Examples of defences include the guarantee being set aside having been induced by a mis-representation (such as amongst other things to the ultimate extent of the borrower's liability) and the possibility of the guarantor being able to benefit from Defences available to the original borrower.

7. In light of this, diyLAW make the following assertions:

(a) **volume of cases**: diyLAW estimates that there are up to 250,000 personal guarantees taken out by SME owners which have subsequently been called on. These are potential actions.

(b) **access to justice**: It is rationale to conclude that many former SME owners will become litigants in person (**"LiPs"**) because they cannot afford the cost of litigation and so have no other access to justice. It is accepted that our legal system is over-burdened, particularly with LiPs. Further, it is unlikely that the current Financial Ombudsman Services ("**FOS**") process will cope.[9]

(c) **wider political and economic considerations:** The damage being done to SMEs and UK economy should not be underestimated. SME owners are not borrowing funds to finance research and development (**"R&D"**) and have not done so for some considerable time.[10] One major factor influencing this is the banking industry's insistence on PGs which put homes at risk and, therefore, distorts the risk/reward equation in SME owners' minds. Therefore, there has been a lack of finance for R&D which is now feeding through for a loss of productivity in the UK when compared with our European competitors.

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[5] http://www.bbc.co.uk/news/uk-northern-ireland-26880492

[6] ref. EWCA Civ 1840 [25 November 1998]

[7] https://www.judiciary.gov.uk/wp-content/uploads/2017/02/mills-sentencing-remarks.pdf

[8] https://www.fca.org.uk/publication/corporate/final-summary-independent-review-rbs-grg.pdf

[9] http://www.parliament.uk/documents/commons-committees/treasury/Correspondence/2017-19/chair-fos-130318.pdf

[10] Using the data on https://www.bba.org.uk/news/statistics/sme-statistics/bank-support-for-smes-1st-quarter-2017/#.WZ7tHCiGPD4we can see that bank lending to SMEs over the last five years has been a net negative, falling by ~10bn since 2011.

(d) **equity:** It is recognised that banks need to have some form of PG and not all SME owners come with clean hands, however banks and accountants have taken control of the litigation process around PGs and often manipulated the legal process in their favour, whilst the press and claimants blame the Judiciary. The FCA won against the British Bankers Association regarding the PPI scandal; this is not dissimilar. The FCA should, and most likely will, see PGs as the next PPI.[11]

D. Tribunal: high level process

8. diyLAW is suggesting that a tribunal system similar to the FOIA set up for PGs would go some way to redress the affront to equity set out in Section B above and help deal with the predicted volumes of litigation set out in Section C above, with costs coming from the FCA pot.

9. As overview of the process we are researching is set out as follows:

(a) There are probably no more than 50 or so dispute situations in how a PG came to be signed and subsequently called on.

(b) The guarantor should present his case and based on a diyLAW simple process this can be conducted without emotion.

(c) The initial decision would be arrived at by the same dispute resolution process eBay and Amazon uses. The idea was presented to the attendees of the Fifth National Forum on Access to Justice for those without means by Professor Richard Susskind OBE in 2016. [12]

(d) Any appeal, by either side should be referred to a new tribunal, where at least one member is an insolvency expert and/or a Chartered Banker who is has knowledge of the “Bond of trust” and can advise as to how, in equity, the terms of the PG should be applied.

(e) diyLaw suggests a top limit on the cases going before the tribunal. This may be appealing to both the banks and the FCA as it has the potential to limit their total exposure as in PPI. We suggest the top limit of around £15m noting that the FOS has set a precedent of a cap of £150,000 on cases which fall within their remit.

(f) The new disclosure rules will apply to any appeal to the tribunal.

E. Tribunal: advantages

10. As a result of the process set out under Section D above, there could be a speedy, just and low-cost throughput of the estimated 250,000 outstanding cases.

11. The Claimants could be made to feel less intimidated by the legal system and more empowered by the simplicity of process, which will be a substantial incentive for these cases to settle without further litigation and improve access to justice.

F. Case study: Summary of Jeff Lampert’s personal experience

12. It is very easy for me to blame the courts for the outcome of case, as I went to them for justice. My 3 current cases, Upper Tribunal, Court of Appeal, and Private Criminal Prosecution, involve the Freedom of Information Act, I am now aware of the existence of equity.[13] I am also aware

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[11] https://www.theguardian.com/money/2011/apr/20/fsa-wins-ppi-battle-banks

[12] https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf

[13] https://www.diylaw.co/articles/2018/2/22/about-equity

that the other side can mislead the Judiciary.[14] Currently, the FCA are refusing to allow the Information Commissioner`s Office to release documents to me, allegedly concealing perjury.[15]

13. In my first case as a litigant in person, Chief Master Winegarten had to find for the other side, although both he and I knew they were abusing the process.[16]

14. My first case as a LiP in 2000 highlights the problems faced by many LiPs[17]. However, in summary, by telling an untruth and manipulating inter-company debt figures, accountancy firm Grant Thornton directed to evidence so that the Court found against me on causation. I did not know the legal meaning of the word 'causation' at the time. I was a fairly typical SME owner, and those are the people who need a tribunal system. My last tribunal comprehended and explains my story in detail.[18]

15. The issues surrounding accounting, inter-company debt and personal guarantees are complex. It is unfair and an affront to justice to expect a LiP to fully comprehend the issues. It is also unfair to expect the judiciary to become experts in such a niche and complex area. However, a tribunal with an expert sitting in judgment can do this.

G. Additional Words

(a) Statement of Brad Meyer

16. As co-founder of Help4Lips CIC with Jeff Lampert, I have had occasion to experience Jeff's own litigation and the challenges he has faced. In part, these have been related to an inequitable balance of arms when deciding on how to explain things in court.

17. At one point, he invested an immense amount of time creating a diagram to carefully illustrate some of the financial matters in his case[19]. In court, this was immediately set aside with the simple explanation that the Judge disliked diagrams. He was left bereft of another way to efficiently communicate the issues at-hand.

18. As co-author of "The Forensics of Legal Fraud", I am also aware of a growing discontent amongst LiPs who cannot understand how their presentation of a case – understandable to others in their everyday transactions – can be so ineffectual in an English court of law.

19. A tribunal which provides less linguistic formality on the one hand and greater subject matter expertise on the other can go a long way to re-balancing the problem.

(b) Statement of Jeff Lampert

[14] https://static1.squarespace.com/static/59a6784dcd0f685560d9cdae/t/5aafcc43562fa7c6b9e8bec3/1521470536311/13A.+Post+Judgment+Discussion+26+June+2012.pdf

[15] See point 30: https://static1.squarespace.com/static/59a6784dcd0f685560d9cdae/t/5a2fd5bb71c10bb71793482a/1513084348648/ICO+decision+20+September+2016.pdf

[16] see potentially dangerous" on page 1. https://static1.squarespace.com/static/59a6784dcd0f685560d9cdae/t/5aafcd738a922d25804cb4cb/1521470838066/Attachment+no.10+-+Letter+from+ICAEW+to+GT+-+15+March+2004.pdf

[17] see point E on page 18: https://static1.squarespace.com/static/59a6784dcd0f685560d9cdae/t/5ab1119288251bfd94a9437c/1521553838054/CMW+Judgment.pdf

[18] https://static1.squarespace.com/static/59a6784dcd0f685560d9cdae/t/5a2fd5bb71c10bb71793482a/1513084348648/ICO+decision+20+September+2016.pdf

[19] https://static1.squarespace.com/static/59a6784dcd0f685560d9cdae/t/5ab8f3a48a922dbfc6cd1496/1522070443410/Letter_Before_Action_to_Antonio_Osario.pdf

20. We recognise this suggestion is innovative to the point of being disruptive, but the concept of diyLAW itself is innovative.

21. I have always been innovative: my company Heritage focused on stock turn rather than profit, cut delivery costs per item by delivering a wide range of products to the same customer, which also increased the customers stock turn. It was a “one stop shop” concept. In just 9 years it supplied every supermarket with housewares including 58% of Sainsbury’s offer. Heritage floated on the USM (sponsored by Lloyds Bank), made a couple of acquisitions and was nominated as share of the year.

22. One of the acquisitions made mattress protectors, a bulky item. We squashed the air out of them and packed 12 into carton instead of just 4. This saved £2 (carriage and storage costs) off the retail price. Why pay to ship air? There is plenty at the end of the journey. The concept was to run through Heritage’s range where appropriate. Toilet rolls would have the hole in middle squashed. How many billions of cubic metres of air have been needlessly shipped this century because Heritage was closed.

23. No SME owner should sign a PG for a R&D loan. That is now impacting on the UK Productivity figures, as the secured lender is allowed to get away with abuse of the Law. Innovation is necessary for progress.

24. Following the 1999 debate Lloyds offered me £2m. When I pointed out this was not enough to restore the Company, Lloyds bankrupted me. They directed their legal actions towards my wife, evicted us from our home. My wife has suffered breast cancer followed by open heart surgery. She has also written six books and runs a successful recruitment agency.

25. I have used the Law to understand why Lloyds closed Heritage. I have had maybe 30 or so Hearings. I still do not have the whole truth: as stated above, the FCA are not allowing the ICO to provide me with documents to which I am entitled.

26. There is no way our legal system could cope with another 250,000 or so SME owners like me who have signed PGs. I therefore recommend that the process be computerised with Appeals to Tribunals.

H. Next steps

27. As set out in Section A (Purpose) above, this Memorandum is presented as a high-level overview of the issues and the suggested tribunal process. We welcome comments and questions from the MoJ on areas where it would like diyLAW to expand upon, provide additional information or conduct a deep-dive analysis. We look forward to hearing from you.