

## CONTRACTS

### *Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265

#### Introduction

Electronic signature technologies are increasingly used to execute documents used in commercial transactions. In this case, the New South Wales Court of Appeal held that a genuine electronic signature affixed to a personal guarantee by an unauthorised (and unknown) individual was ineffective to bind the apparent signatory.

The implications of this case may appear concerning because it could be difficult for clients to determine whether a genuine electronic signature was affixed properly (binding) or improperly (non-binding). However, it should be noted that the case concerned a *personal* guarantee, not a document executed by an individual in their capacity as an officer of a company.

Nevertheless, the case stands as a salient reminder to ensure that clients are aware of the nature of the parties with whom they are dealing. More specifically, to ensure that personal guarantees are properly executed by, or with the full knowledge of, the putative signatory.

#### Facts

##### *Background*

This matter arose out of the liquidation of IDH Pty Ltd (**IDH**) and the attempt of a creditor, Williams Group Australia Pty Ltd (**Williams**), a supplier of building materials, to enforce a guarantee against a director of IDH, Mr Crocker.

Between July 2012 and May 2013, Williams had supplied IDH with building materials on credit pursuant to a trade credit agreement between the two companies. The trade credit agreement was purportedly secured by personal guarantees executed by each of the three directors of IDH.

##### *Electronic Signature Management*

The trade credit agreement and guarantees were purportedly executed by means of the electronic signature management software, HelloFax. In short, the software allows for a user to store electronic signatures, tied to a specific username and password, and affix them to documents for purposes of execution.

At the time the trade credit agreement and guarantees were executed in July 2012, the managing director of IDH, Mr Brooks, had instituted the use of the HelloFax system in the company. Relevantly, Mr Brooks had assigned each director of IDH, including Mr Crocker, a HelloFax account for purposes of storing and using their personal signatures for the electronic execution of documents.

Perhaps unwisely, Mr Crocker had failed to change his default password on his HelloFax account, meaning that any person with knowledge of his password could use the electronic signatures he had stored. Mr Crocker alleged, and the Court accepted, that he had not accessed and signed the trade credit agreement and the personal guarantee bearing his signature. Indeed, Mr Crocker said that he had not been made aware of the trade credit application or guarantee, and that the documents only came to his attention as a result of the enforcement proceedings.

##### *IDH in Liquidation*

By May 2013, IDH owed Williams \$889,534.35 under the trade credit agreement. Williams ceased providing materials to IDH and sued to enforce the debt. It also sued to enforce the directors' guarantees. IDH went into

liquidation shortly after proceedings were issued, meaning that the proceedings against IDH were stayed but continued against the directors.

At this point, Mr Crocker became aware of the guarantee and attempted to resist the enforcement action on the basis that he had not executed the contract.

Mr Crocker was successful at first instance, leading Williams to appeal against the decision.

## Issues

The primary issue on appeal, as it was on trial, was whether Mr Crocker was bound by the personal guarantee. Williams accepted that Mr Crocker had not personally affixed his signature to the guarantee and advanced two arguments that the document was binding. First, Williams argued that the document was validly executed by the unknown individual as Mr Crocker's agent under the principles of 'ostensible authority'. In the alternative Williams argued that Mr Crocker had become aware of the existence of the guarantee and thus had ratified its unauthorised execution.

### *Ostensible Authority*

It is uncontroversial that an agent may enter into agreements on behalf of another person. An agent may do so provided they hold some actual or ostensible authority. In the present matter, it was clear that Mr Crocker had not expressly authorised the unknown person to affix his signature to the guarantee, so no question of actual authority arose.

Instead, Williams argued that the signature had been affixed by an agent with Mr Crocker's ostensible authority. This species of authority exists where the principal represents that the agent has the authority to do an act, even where there is no specific and express authority to do so, and the other party relies on that representation to enter into a transaction.

Importantly, the agent will only have ostensible authority if there is a representation from a person with actual authority to enter into the disputed transaction. A significant implication of this rule is that an agent may not represent their own authority; that is, a person cannot simply assert they are authorised and thereby bind the alleged principal.

However, equally importantly, in a leading authority on ostensible authority (*Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451), the High Court of Australia held that a representation may be engendered by the creation of 'organisational structure[s], and lines of communication with third parties... [without] appropriate internal procedures designed to protect' against unauthorised conduct. Thus, in the present case Ward JA said:

A kind of representation that often arises in business dealings is one which flows from equipping an officer of a company with a certain title, status and facilities. In *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd*, for example, the court spoke of the representation that might flow from supplying a particular person with 'a blank order form, thus arming him with a document which, when he signed it, would bear the hallmark of authenticity'... The reference to corporate administrative procedures under which an officer is armed with a document to which he or she can, by signature, impart an appearance of authenticity is a reminder of the wider principle of estoppel which may be relevant to a question of ostensible authority... The holding out might result from permitting a person to act in a certain manner without taking proper safeguards against misrepresentation. [citations omitted]

Accordingly, Williams argued that Mr Crocker had made a representation by failing to change his password, thereby arming any person with that code to affix his signature to any document. In other words, Williams argued that Mr Crocker had represented authority by failing to take 'proper safeguards against misrepresentation'.

Mr Crocker disputed Williams' argument. First, he argued that the failure to change his password was careless, but did not constitute a relevant representation for the purposes of ostensible authority. Alternatively, he submitted that this failure did not represent a general permission for third parties with his password to sign any document on

his behalf. In light of those propositions, he continued, he had not represented any authority; Williams had merely assumed that the signature was valid.

Ward JA, giving the judgment of the Court, preferred Mr Crocker's arguments. In particular, Her Honour emphasised the need to identify a representation alleged to give rise to the ostensible authority in dispute, saying for the argument to succeed:

it would be necessary for...Mr Crocker... in some fashion to have held out to Williams that whoever placed his electronic signature on the relevant documents (and forwarded them to Williams) was authorised by him to do so. The representation need not have been communicated by Mr Crocker to Williams directly... It could, in an appropriate case, arise out of some omission on his part. However, there needs to have been a representation of authority by Mr Crocker (not the agent who applied the electronic signature), on which Williams relied when supplying goods to IDH on credit, for Mr Crocker to be bound by the guarantee.

While recognising that the HelloFax system was an 'institutional system' that could found a claim based on ostensible authority, Her Honour noted that this system was IDH's system, not Mr Crocker's. In other words, Mr Crocker was merely a participant in the system implemented by IDH's managing director. Because he played no part in establishing it, it was difficult to assert that he had made any relevant representation capable of founding Williams' case.

Ward JA's reasoning on this point was underpinned by the fact that Williams sued upon a guarantee executed in Mr Crocker's *personal* capacity. Once that fact was appreciated, Williams' argument experienced difficulty because it was difficult to attribute 'a relevant representation to Williams that use of the HelloFax system amounted to his authorisation of some other person to affix his electronic signature to documents forwarded by the company *so as to bind him personally* to the obligations imposed by those documents' (our emphasis).

Further, Ward JA reasoned that Mr Crocker had not armed any person with his signature 'in any positive sense', (though she did observe that the failure to change his password meant that others had access to his signature in a practical sense). However Ward JA did not consider this practical access to be equivalent to the kinds of positive representations made in other cases, such as where a person is given (or given access to) blank order forms.

Finally, Ward JA found that 'it [was] not suggested that Williams had any knowledge that the documents... had been signed by use of the HelloFax system', but rather assumed that the affixed signature was valid. This finding meant that Williams could not be viewed as having relied upon Mr Crocker's failure to change his password.

As such, Ward JA upheld the decision of McCallum J.

### *Ratification*

Williams' alternative argument was that Mr Crocker had ratified the acts of the unauthorised agent. Ratification is a principle that allows a principal to assent to, and become bound by, an unauthorised act that was carried out in their name. A party seeking to establish ratification must prove the alleged principal's 'full knowledge of all the material circumstances' and show clear and unequivocal acts indicating that the principal adopts the (unauthorised) acts of their agent.

Williams submitted that Mr Crocker was aware of the guarantee and assented to its effect by placing trade orders on IDH's trade credit account with Williams. Williams asserted that Mr Crocker's knowledge was cobbled together from a variety of sources, including the functionalities of the HelloFax system that sent emails concerning unsigned documents and retained a history of all signed documents would have alerted him to the existence of the credit application and associated guarantee and common practice in the industry.

In reply, Mr Crocker denied that he had ever received emails relating to the credit application, had not accessed the HelloFax history of signed documents and, in any event, that the acts of alleged ratification were 'neither

adoptive nor... unequivocal' because they were consistent with the existence of a credit agreement (an issue not in dispute) and said nothing about how that agreement may have been secured.

Ward JA accepted Mr Crocker's arguments on ratification. Her Honour did not accept that the emails, even if they were sent, and HelloFax history functions could not establish that Mr Crocker's knowledge, because they would have recorded a 'credit application', not a personal guarantee. Further, Ward JA noted that it was not universal practice for all trade suppliers to take out personal guarantees. Finally, and alternatively, Ward JA accepted Mr Crocker's arguments that the allegedly ratifying acts were not unequivocally consistent with the existence of a guarantee.

## Compliance Impact

This case demonstrates that a contract entered into by an agent outside their scope of authority will, absent any ratifying conduct, be unenforceable. This is particularly troubling for creditors dealing with those who use electronic signature software and find themselves confronted by an unenforceable contract signed with the actual signature of the other party.

However, the case also stands as a reminder to organisations of the importance to pay attention to the nature of the parties with whom they deal. The decision in *Williams v Crocker* was significantly influenced by the fact that Mr Crocker was sued in his personal capacity. Whether IDH could have run an identical argument to resist a debt is a question that was not considered by the Court. Accordingly, the case reinforces the importance of ensuring that clients deal with potential guarantors in their personal capacities, possibly by direct personal contact, to provide certainty of their knowledge of the arrangements.

Finally, the case is relevant to organisations who use electronic signature management software. To these organisations, the present case demonstrates the importance of data security and proper access controls. Despite Mr Crocker's success at trial and on appeal, it is entirely possible that the matter could have been avoided had the unauthorised third party been unable to access his electronic signature.

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