

FILED

- 6 JUL 2023



NOTICE OF APPEAL

COURT DETAILS

Court Supreme Court of New South Wales, Court of Appeal
Registry Sydney
Case number 2023/00133934

TITLE OF PROCEEDINGS

Appellant Jeffery Tse Hung Lee
Respondent ATL (Australia) Pty Ltd ACN 153 685 075

PROCEEDINGS IN THE COURT BELOW

Title below ATL (Australia) Pty Ltd ACN 153 685 075 v. Cui & Ors
Court below Supreme Court of New South Wales
Case number below 2018/00393537
Dates of hearing 16-24 February 2023
Material date 6 April 2023
Decision of Fagan J

FILING DETAILS

Filed for Jeffery Tse Hung Lee (appellant)
Filed in relation to Decision below in relation to the Appellant
Legal representative Annette Leung
XR Consulting Pty Ltd t/a XR Legal

Legal representative reference [REDACTED]

Contact name and telephone [REDACTED]

Contact email [REDACTED]

HEARING DETAILS

This notice of appeal is listed for directions at

9am on 02/08/2023

TYPE OF APPEAL

Money claim – common law

DETAILS OF APPEAL

- 1 This appeal is brought under s 101(1)(a) of the *Supreme Court Act* 1970 (NSW).
- 2 This notice of appeal is not filed pursuant to leave to appeal.
- 3 The Appellant has filed and served a notice of intention to appeal, which was served on the prospective respondent on 27 April 2023.
- 4 The Appellant appeals from orders made by the court below on 6 April 2023.

APPEAL GROUNDS

- 1 The court below misconstrued or failed to apply the correct law by proceeding on the basis that an additional or side agreement between a borrower and a lender that had no impact on a surety's obligation did not engage the principle in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549: Judgment at [68].
- 2 The court below ought to have asked itself:
 - a. Whether the agreement arising from the email exchange between Gordon HLHS Epping Pty Ltd (**Borrower**) and the Respondent lender on 14 March 2017 (**Side Letters**) was independent of the obligations of the Borrower under the primary loan agreement (**Commercial Loan Agreement**), and concluded in the negative; and
 - b. Whether the changes to the Commercial Loan Agreement effected by the Side Letters were shown by the Respondent lender to be insubstantial or could not be other than beneficial to the Appellant, and concluded in the negative.

Instead, it asked itself whether the Side Letters had any impact upon the Appellant's obligations as a guarantor: Judgment at [68], which was not the right question.
- 3 The court below misconstrued or failed to apply the correct law when it held that an additional or side agreement between a borrower and a lender that effected a change to the primary loan agreement in respect of which surety had been given did not engage the principle in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 unless it was entered into after the primary agreement: Judgment at [69].
- 4 The court below erred in finding that:
 - a. The Appellant entered into a contract of guarantee with the Lender;
 - b. The agreement arising from exchange of the Side Letters did not give rise to any liability of the Appellant for any amount that may be payable by the

Borrower under the Side Letters or under any other agreement and “had and has no impact whatever upon Mr Lee’s obligations as a guarantor”: Judgment at [68];

- c. The agreement arising from exchange of the Side Letters did not engage the principle in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549: Judgment at [68]-[69];
- d. The Side Letters gave rise to an agreement made prior to the guarantee being executed (Judgment 6.4.23 at [69]); and/or
- e. The agreement arising from the exchange of the Side Letters was entered into prior to entry into the primary loan agreement.

5 The court below ought to have found that:

- a. On 14 March 2017, the Appellant (amongst others) delivered a signed copy of the Commercial Loan Agreement to the Respondent lender and, in so doing, the Appellant made an offer to the Respondent lender to guarantee a loan given on the terms set out in the Commercial Loan Agreement (**Offer**);
- b. After the Offer, the Borrower and the Respondent lender exchanged the Side Letters in which they agreed that the interest to be charged would accrue from a date preceding entry into the Commercial Loan Agreement. This amounted to the Respondent lender and the Borrower amending the terms on which funds would be advanced from those terms on which the Appellant had offered to guarantee;
- c. Accordingly, when the Respondent lender advanced monies on 15 March 2017 on the basis of the Offer as amended by the exchange of the Side Letters, and not on the terms offered by the Appellant (being the unamended Offer), the Respondent lender was:
 - i. Accepting the amended Offer from the Borrower;
 - ii. Not accepting the unamended Offer made by the Appellant; and
 - iii. Accordingly, no contract of guarantee arose between the Lender and the Appellant;
- d. In the alternative to (c), the changes effected to the Offer by the exchange of the Side Letters were not independent of the Offer or proven by the Lender to be insubstantial or could not be other than beneficial to the Appellant; and

- e. Accordingly, when the Lender advanced monies on 15 March 2017 on the basis of the Offer as amended by the exchange of the Side Letters, the Appellant was released or discharged from his personal obligations in the Commercial Loan Agreement.

6 Further and in the alternative, the court below ought to have found that:

- a. The Appellant executed the Commercial Loan Agreement as a deed, which he delivered to the Respondent on 14 March 2017, thereby binding himself to its terms from the time of delivery;
- b. Accordingly, the changes to the Commercial Loan Agreement effected by the subsequent exchange of the Side Letters on 14 March 2017 occurred after the Appellant was bound to the terms of the Commercial Loan Agreement and, accordingly:
 - i. By advancing funds to the Borrower pursuant to the terms of the Commercial Loan Agreement as amended by the Side Letters, the Lender advanced funds to the Borrower pursuant to terms different from those which the Guarantor bound himself to; or
 - ii. Alternatively, the principle in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 was engaged because the changes effected by the Side Letters occurred after the executed deed was delivered and the Appellant had bound itself to its terms.

ORDERS SOUGHT

- 1 Leave be granted to the Appellant to raise ground 6 above.
- 2 Appeal allowed.
- 3 Orders 1 and 2 of the court below made on 6 April 2023 be set aside.
- 4 In lieu thereof, the following orders be made:
 - a. The Plaintiff's claim against the Second Defendant be dismissed; and
 - b. The Plaintiff to pay the Second Defendant's costs of and incidental to the proceedings.
- 5 The Respondent pay the Appellant's costs of and incidental to this appeal.
- 6 Such further or other orders as the Court considers fit.

UCPR 51.22 CERTIFICATE

I certify under UCPR 51.22(2) that the amount in issue in this appeal exceeds the specified amount under s 101(2)(r) of the *Supreme Court Act 1970* (NSW).

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the appellant that court fees will be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

solicitor on record

Date of signature

5 July 2023

NOTICE TO RESPONDENT

If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the orders sought in the notice of appeal and for the appellant's costs of bringing these proceedings.

Before you can appear before the court, you must file at the court an appearance in the approved form.

HOW TO RESPOND

Please read this notice of appeal very carefully. If you have any trouble understanding it or require assistance on how to respond to the notice of appeal you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the notice of appeal from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

Court forms are available on the UCPR website at www.ucprforms.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Supreme Court of New South Wales, Court of Appeal Law Courts Building Queen's Square Level 5, 184 Phillip Street Sydney NSW 2000
Postal address	GPO Box 3 Sydney NSW 2001
Telephone	1300 679 272

PARTY DETAILS

A list of parties must be filed and served with this notice of appeal.

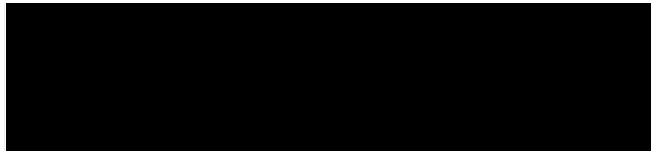
FURTHER DETAILS ABOUT APPELLANT

[Do not include this section if you have previously given this information to the court in these appeal proceedings, eg in a summons for leave to appeal.]

Appellant

Name Jeffery Tse Hung Lee

Address

**Legal representative for Appellant**

Name Annette Leung

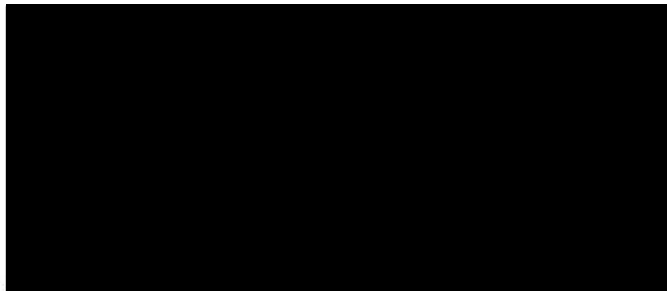
Practising certificate number



Firm

XR Consulting Pty Ltd t/a XR Legal

Address



Telephone

Email

Electronic service address

DETAILS ABOUT RESPONDENT**Respondent**

Name ATL (Australia) Pty Ltd ACN 153 685 075

Address

