CHECKLIST FOR SOLICITORS PROVIDING INDEPENDENT LEGAL ADVICE TO GUARANTORS

A. NOTES

1. This checklist is not exhaustive and should be adapted to suit the particular transaction and documents in question.

2. The law on all accounts transactions, unlimited guarantees and the right to receive notices of default is now affected by the Consumer Credit Code and Lender Codes of Practice and it needs to be ascertained whether these are applicable to the transaction.

3. It is crucial that the explanation to the client be in plain language not legal jargon.

B. FOR CONSIDERATION IN ALL CASES

1. Is the document a guarantee, an indemnity or a hybrid?

2. Explain the difference between a guarantee and an indemnity.

3. Is it an "all accounts" guarantee or is it limited to a specific transaction e.g. a housing loan? Explain that an "all accounts" guarantee covers past and future, actual and contingent indebtedness of the borrower in his or her own right and as a guarantor.

4. Is the guarantee limited in duration? Is it feasible to suggest that it be limited to a certain period? Explain the procedure for revoking a continuing guarantee and the effect of revocation.

5. Is the liability of the guarantor limited to a certain amount of the whole debt guaranteed? Ensure that the limitation does not jeopardise the guarantor's right of contribution.

6. Do the parties expect several guarantors to sign the guarantee? Is there any clause in the guarantee preserving the liability for the signatories even if some of the proposed guarantors refuse to sign?

7. Advise the guarantor that he or she is not generally entitled to notice of the borrower's default.

8. Advise the guarantor that generally he or she has no right to insist that the lender proceeds first against the borrower or enforces his or her securities before enforcing the guarantee.

9. Advise the guarantor that he or she should check with the borrower to ascertain the level of indebtedness and continue to do so.

10. Advise the guarantor to ask the lender questions about the transactions guaranteed.

11. Check that the client understands the capacity in which he or she is signing guarantee. If he or she is a director is he or she providing a personal guarantee or a guarantee by or on behalf of the company? If the client is a trustee, is the guarantee to be limited to the trust assets? Does the guarantee reflect this intention?

12. Ask whether the client has been subjected to any duress, undue influences or commercial
pressure. Is there any inequality of bargaining power?

C. FOR CONSIDERATION IN APPROPRIATE CASES

1. Explain the effect of clauses excluding the technical defences. In particular advise the guarantor whether his or her right of subrogation has been excluded.

2. Explain the effect of the provision dealing with suspense accounts and undue preferences.

3. Explain the guarantor's rights of proof in bankruptcy or liquidation of the borrower or a co-guarantor.

4. Explain the effect of a conclusive evidence clause or a prima facie evidence clause.
PRACTICE NOTE ON SOLICITORS' CERTIFICATION PROCEDURES

1. In view of the risks involved it would be prudent to confine the provision of certificates to existing clients.

2. Fees: In order to do the job adequately, it is estimated that in respect of a general matter, between one and two hours professional time would required in order to provide comprehensive and adequate advice and it is appropriate to charge accordingly. In more complex matters, charges should be made according to the time required to give adequate advice.

3. Open a separate file and keep a comprehensive file note of advice provided (do not rely only on keeping a copy of the certificate on file).

4. If there is any doubt about the guarantor's ability to understand English get an interpreter (never rely on the borrower or any other guarantor to interpret).

5. Where there is more than one guarantor, each guarantor should usually be advised separately and in any event the rules as to contribution should be explained. There may be some circumstances where separate advice may not be required, for example:
   - where there is plainly no conflict of interest between the guarantors;
   - where the debtor is a company - where all guarantors have substantial shareholdings in and are actively involved in the management of the company; or
   - where all guarantors are experienced in the giving of guarantees and mortgages.

Nevertheless each case should be considered in light of its own particular circumstances.

6. The borrower should not be present when the guarantor is receiving independent legal advice.

7. The guarantor should be advised that it is not necessary for him or her to sign the guarantee at all.

8. Consider who is paying your fees and how the guarantor was referred to you. You must ensure that you are truly "independent".

9. You should insist that the guarantor read the document fully before attending your office.

10. It is not sufficient for you to read out the document or to confirm that the guarantor has read through the document.

11. If there are circumstances placing the guarantor on enquiry, this enquiry must be undertaken to ascertain the true position.

12. Give the explanation referred to in Part B of the certificate.

13. Inform the guarantor in the terms set out in Part C of the certificate.

14. Satisfy yourself that the guarantor freely makes the statement referred to in Part D of the certificate and appears to have the understanding referred to. If it appears to you that the guarantor does not have that understanding you must not sign the certificate.

15. You should actually witness the execution of the documents.

16. You should require proof that the person signing the guarantee is, in fact, the guarantor named in the document.
17. Ensure the guarantor signs the form of acknowledgment.