

ARE GUARANTEES ENFORCEABLE IF NOT PROPERLY EXECUTED?

- Is a guarantee enforceable if the execution is not witnessed?
- Useful analysis of a general point of principle as to execution of deeds

WHAT IS IT ABOUT?

In the recent case of ***Signature Living Hotel Ltd v Sulyok*** the question arose as to whether two deeds of guarantee were enforceable despite having been invalidly executed as a deeds.

The applicant sought finance for its developments by way of investment loans from individuals for which corporate guarantees were given as security. The respondent received guarantees but, as the loans were not repaid, they issued statutory demands for payment.

The applicant argued that the guarantees were not enforceable as they had not been witnessed as per Section 44(2)(b) of the Companies Act 2006 (CA 2006). The respondent accepted that the lack of witness prevented the guarantees from being deeds but argued that under contract law they were still enforceable as Section 43(1)(b) of CA 2006 states all that is required for validity of a contract by a company was for it to be made by a person acting under the company's authority (explicitly or implied). As the director had executed on behalf of the company he was authorised, plus there was consideration so the guarantees should stand as simple contracts and be enforceable.

Judgement was granted in favour of the respondent with the Court finding that the guarantees were enforceable as contracts. The Court also considered that a view previously expressed by the Law Commission, that there is no reason in principle why a deed that is defective for want of compliance with the relevant formalities could not survive as a simple contract so long as it was supported by sufficient consideration, remains correct.

WHY DOES IT MATTER?

It is vital that the correct execution provisions are included in documents and then fully complied with, otherwise there is potential for the deed to be invalid.

The case emphasises the need to take care to ensure the basic requirements for compliance are met under Part 4 of the CA 2006 and to be familiar with the necessary formalities. Although the above case related to guarantees, there is no reason why the applied reasoning could not be applied to other types of transaction effected by deed but, as always, it should be noted that each case will turn on its own facts. For example, unlike in this case, there may be situations where parties cannot fall back on the 'safety net' of simple contract where a deed execution is materially defective in some way.

WHAT NOW?

It is always worth ensuring that your document includes all the relevant requirements to be legally valid as a deed, that the relevant execution 'blocks' are included as per the CA 2006 and that, prior to completion, the execution provisions/requirements of each party are checked so that any issues are identified and resolved prior to formal execution and reliance on the agreement.

This is of particular relevance given the situation with Covid-19 and the current lockdown difficulties as execution by electronic means is becoming more common. If such an approach is proposed it may be advisable to seek legal advice to ensure this is a viable option and that the correct steps/formalities are adhered to.

For more information see our article on the practicalities and pitfalls of remote execution [here](#).

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